



Commission for
Communications Regulation

Market Review

Broadcasting Transmission Services in Ireland

Response to Consultation and Decision Notice

Reference: ComReg 13/71

Decision: D11/13

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Redacted Information

Please note that this is a non-confidential version of the Response to Consultation and Decision. Certain information within the Response to Consultation and Decision has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol ✂.

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1 Introduction

Overview

- 1.1 Wholesale broadcasting transmission and distribution services ('**BTS**') essentially enable television ('**TV**') programme service¹ providers such as RTÉ, TV3 and TG4 ('**Downstream TV Broadcasters**') and radio programme service providers such as RTÉ, Today FM and Newstalk ('**Downstream Radio Broadcasters**'), (together referred to as '**Downstream Broadcasters**')², to broadcast their content to end-users.
- 1.2 Consistent with the Commission for Communication's ('**ComReg**') regulatory role to review certain electronic communications markets, in 2012, ComReg undertook a market review (the '**BTS Review**') of the wholesale markets for the provision of BTS (the '**Relevant BTS Markets**') in Ireland in order to establish whether these Relevant BTS Markets warranted *ex ante* regulation, and if so, what form *ex ante* regulation should take.
- 1.3 As part of the BTS Review, ComReg carried out a consultation entitled "Consultation Paper and Draft Decision, Market Review: Broadcasting Transmission Services in Ireland", ComReg Document No. 12/77, dated 13 July 2012³ (the '**BTS Consultation**'). This Response to Consultation and Decision⁴ (the '**Decision**') presents ComReg's final views on the Relevant BTS Markets.
- 1.4 In reaching its final position, ComReg has considered the six submissions⁵ it received (individually referred to as a '**Submission**' and collectively as the '**Submissions**') in response to the BTS Consultation. Submissions were received from the following respondents (together referred to as '**Respondents**'):
- The Broadcasting Authority of Ireland (the '**BAI**');

¹ For the purposes of this Decision, hereafter programme services means TV and / or radio content material distributed to end-users (i.e. a TV and / or radio channel).

² For the purposes of this Decision, hereafter '**Downstream Broadcaster**' means a TV and radio programme service provider and this terminology is used interchangeably with programme service provider throughout this Decision.

³ The consultation ran from 13 July 2012 to an extended period of 14 September 2012. Consultation Paper and Draft Decision "Market Review – Broadcasting Transmission Services in Ireland", ComReg Document No. 12/86, dated 01 August 2013. See <http://www.comreg.ie/fileupload/publications/ComReg1286.pdf>.

⁴ Market Review, Broadcasting Transmission Services in Ireland, Response to Consultation and Decision, ComReg Document 13/71, Decision Number D11/13, July 2013.

⁵ A non-confidential version of Respondents' Submissions has been published on ComReg's website. "Market Review: Broadcasting Transmission Services in Ireland – Non-confidential responses received to ComReg consultation document 12/77", ComReg Document No. 12/121, dated 06 November 2012. See <http://www.comreg.ie/fileupload/publications/ComReg12121.pdf>.

- Eircom Ltd. (**'Eircom'**);
- Ken Murray (the **'Individual Respondent'**⁶);
- Raidió Teilifís Éireann (**'RTÉ'**⁷) / RTÉ Transmission Network Limited (**'RTÉNL'**⁸) (together referred to as **'RTÉ'**);
- Teilifís na Gaeilge (**'TG4'**⁹); and,
- TV3 Television Network Limited (**'TV3'**¹⁰).

1.5 In the BTS Consultation, ComReg expressed the preliminary view that there are two separate Relevant BTS Markets which warrant the imposition of *ex ante* regulation.

1.6 Firstly, ComReg proposed to define a Market for Wholesale Access to National Terrestrial Broadcast Transmission Services (**'Market A'**). This is a 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:

- The broadcast of national analogue terrestrial radio signals to end-users; and
- The broadcast by a **'Multiplex Operator'**¹¹ of its digital terrestrial broadcasting signals to end-users. Such Multiplex Operators operate downstream from this Market A (see discussion below).

1.7 Secondly, ComReg proposed to define a Market for Wholesale Access to Digital Terrestrial Television (**'DTT'**) Multiplexing Services (**'Market B'**). This is a wholesale market which operates

⁶ The Individual Respondent was a private citizen.

⁷ As detailed in section 2 of the Broadcasting Act 2009, RTÉ means the authority originally established under section 3 of the Broadcasting Authority Act 1960. It is a national public service broadcaster in Ireland. The principal objects and associated powers of RTÉ are described in section 114 of the Broadcasting Act 2009. RTÉ is a vertically integrated entity and self supplies terrestrial network services via its wholly owned subsidiary RTÉNL. RTÉ launched its DTT platform marketed as "Saorview" in May 2011. The spectrum used by RTÉ is licensed to it by ComReg.

⁸ RTÉ Transmission Network Limited, formerly trading as **'RTÉNL'** but as of Q2 2013 trading as **'2RN'**. For consistency with the BTS Consultation, the trading name, RTÉNL, is used in this Decision.

⁹ As detailed in section 2 of the Broadcasting Act 2009, Teilifís na Gaeilge means the body, originally established by section 44 of the Broadcasting Act 2001. The objects of TG4 are discussed in section 118 of the Broadcasting Act 2009.

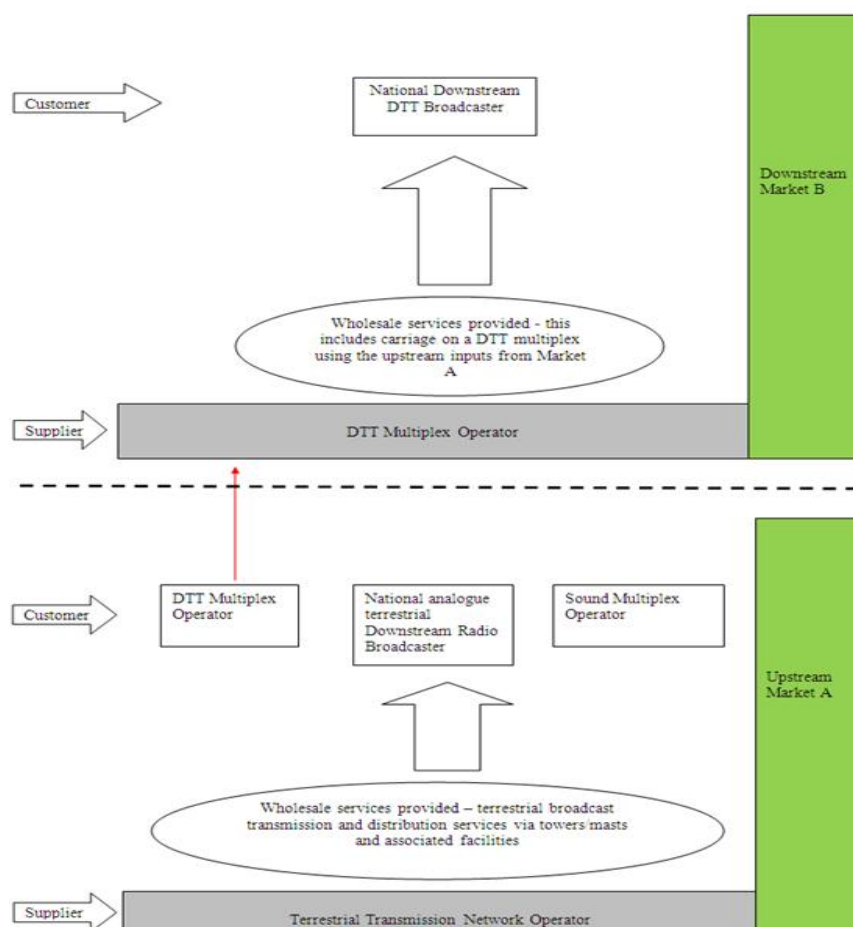
¹⁰ TV3 Television Network Limited trades as TV3 and is the TV programme service contractor as identified in section 70 of the Broadcasting Act 2009. The BAI has entered into a TV programme service contract with TV3 which gives TV3 the right and duty to establish and maintain the TV3 programme service under Section 70 of the Broadcasting Act 2009. 3e is also provided under this TV programme contract. For the purpose of this Decision ComReg refers to TV3 as also comprising the programme services of TV3 and the programme service of 3e, both of which are privately owned by Doughty Hanson and Co. (being a European private equity firm).

¹¹ This is an operator of a multiplexing service. A multiplexing service is defined in footnote 12 below.

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 service¹² to terrestrial Downstream TV Broadcasters enabling the transmission of their DTT broadcasting signals to end-users.

- 1.8 The relationship between Market A and Market B, together referred to as the Relevant BTS Markets, and their relationship with other market participants in the broadcasting value chain, is described in Figure 1 below.

Figure 1: Structure and Relationship between Market A and Market B



- 1.9 This Decision, which should be read in conjunction with the analysis and discussion in the BTS Consultation, now sets out ComReg’s findings on the following matters having considered Respondents’ Submissions:

¹² Digital terrestrial broadcast services are transmitted on multiplexes. Multiplex is defined in section 129 of the Broadcasting Act 2009 as meaning “an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public”. DTT multiplexing services means the above service provided via a DTT multiplex(es).

- The definition of two separate Relevant BTS Markets from both a product and geographic perspective;
- An assessment as to whether the ‘**Three Criteria Test**’¹³ is satisfied in the Relevant BTS Markets (also having regard to non SMP regulation / legislation which may be in place such as the Broadcasting Act 2009¹⁴ (the ‘**2009 Act**’)) and, as a consequence whether they are susceptible to *ex ante* regulation by ComReg;
- On the basis of an assessment of competition within the Relevant BTS Market, whether these markets are effectively competitive and if not, a determination as to which undertaking is designated as having significant market power (‘**SMP**’); and,
- The specification and imposition of appropriate wholesale access, pricing and other related remedies on the SMP undertaking in order to address competition problems that have arisen or could arise in the above Relevant BTS Markets, absent regulation.

Previous Review of the Relevant BTS Markets

1.10 BTS were formerly included in the European Commission’s **2003 Recommendation**¹⁵ as a market which may warrant *ex ante* regulation. ComReg was, therefore, required to carry out an analysis of that market(s) in Ireland. In this respect, following ComReg’s BTS market analysis in 2003 / 2004 (‘**2004 Broadcasting Analysis**’)¹⁶, ComReg identified RTÉNL as having SMP in:

¹³ As noted in the European Commission’s Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation (‘**2007 Recommendation**’); “*For markets not listed in this Recommendation national regulatory authorities should apply the three-criteria test to the market concerned...national regulatory authorities should have the power to apply the three-criteria test in order to assess whether, on the basis of national circumstances, a market is still susceptible to ex ante regulation*”. A market may have the characteristics which warrant *ex ante* regulation if the Three Criteria Test is satisfied. The three criteria are (1) the presence of high and non-transitory barriers to entry (2) a market structure does not tend towards effective competition over the relevant time horizon and (3) *ex post* competition law is insufficient to address the market failure(s) concerned (the ‘**Three Criteria Test**’).

¹⁴ Broadcasting Act 2009. Number 18 of 2009 (the ‘**2009 Act**’). See <http://www.irishstatutebook.ie/2009/en/act/pub/0018/>.

¹⁵ European Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:114:0045:0045:EN:PDF>.

¹⁶ Response to Consultation “Market Analysis - Wholesale Broadcasting Transmission Services”, ComReg Document No. 04/06, dated 3 February 2004. See <http://www.comreg.ie/fileupload/publications/ComReg0406.pdf> (the ‘**2004 Broadcasting Analysis**’).

- (a) The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks, and,
 - (b) The wholesale market for TV broadcasting services on analogue terrestrial networks.
- 1.11 ComReg subsequently imposed regulatory remedies on RTÉNL in these markets, with such remedies being set out in the **2004 Remedies Decision**¹⁷.

Legal basis and regulatory framework

- 1.12 The legal and regulatory framework underpinning the review of the Relevant BTS Markets was set out in section 3 of the BTS Consultation¹⁸.
- 1.13 In summary, this BTS Review is being undertaken by ComReg in accordance with the obligation under the **Framework Directive**¹⁹ (which is transposed by the Framework Regulations) that national regulatory authorities ('NRAs') should analyse and define markets taking the utmost account of the **2007 Recommendation**²⁰ (including the **Explanatory Note to the 2007 Recommendation**²¹) and the **SMP Guidelines**²².
- 1.14 In preparing this Decision, ComReg has taken full account of its statutory functions and objectives under the **Communications Regulation Acts 2002 to 2011**²³ together with its duties under the **Framework Regulations**²⁴, the **Access Regulations**²⁵ and its

¹⁷ Wholesale Broadcasting Transmission Services Markets – SMP Obligations, ComReg Document Number 04/122, Decision Notice D16/04, December 2004. See <http://www.comreg.ie/fileupload/publications/ComReg04122.pdf> (the '**2004 Remedies Decision**').

¹⁸ See paragraphs 3.17 to 3.21 of the BTS Consultation.

¹⁹ Articles 15 and 16 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC (the '**Framework Directive**').

²⁰ European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services OJ L 344 (the '**2007 Recommendation**').

²¹ European Commission Staff Working Document, Explanatory Note accompanying the 2007 Recommendation (the '**Explanatory Note to the 2007 Recommendation**'), (C(2007) 5406).

²² European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3 (the '**SMP Guidelines**').

²³ Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act of 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (no. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) (the '**Communications Regulation Acts 2002 to 2011**').

²⁴ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the '**Framework Regulations**'). The Framework Regulations transpose the Framework Directive.

relevant functions under the 2009 Act²⁶ (where sections 132 and 133 of the 2009 Act set out ComReg's main duties in respect of the licensing of DTT and sound broadcasting multiplexes). ComReg has taken the utmost account of the 2007 Recommendation and the Explanatory Note to the 2007 Recommendation, the SMP Guidelines and the **2005 Accounting Separation and Cost Accounting Recommendation**²⁷. Further, ComReg has taken account of the European Commission's **Notice on Market Definition**²⁸ and any relevant common positions adopted by **BEREC**²⁹.

- 1.15 Regulation 26 of the Framework Regulations requires ComReg to define relevant markets appropriate to national circumstances, in accordance with the market definition procedure set out in the Framework Regulations, and to take utmost account of the 2007 Recommendation and SMP Guidelines.
- 1.16 In 2007, the European Commission revised its 2003 Recommendation which led to the issuing of the 2007 Recommendation. In doing so, the European Commission concluded that, on an EU wide basis, BTS were no longer considered to have characteristics that warrant *ex ante* regulation. However, subject to certain conditions being fulfilled, NRAs have the power to apply regulation in any electronic communications market no longer identified in the 2007 Recommendation, on the basis of national circumstances.
- 1.17 Where ComReg determines as a result of its market review that a given market is not effectively competitive, ComReg is then required, under Regulation 27(4) of the Framework Regulations, to designate one or more undertakings in that market as having SMP and to impose on such undertaking(s) such specific obligations as ComReg considers appropriate which include any (or all) of the wholesale access obligations set out in Regulations 9 to 13 of the Access Regulations.
- 1.18 *Ex ante* regulation under the Electronic Communications Framework may not be necessary if other forms of effective regulation are available. Therefore, in undertaking this BTS Review,

²⁵ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the '**Access Regulations**').

²⁶ See paragraph 3.23 of the BTS Consultation.

²⁷ European Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC) (the '**2005 Accounting Separation and Cost Accounting Recommendation**').

²⁸ Commission notice on the definition of relevant market for the purposes of Community competition law, (the '**Relevant Market Definition Notice**'), Official Journal C 372, 09/12/1997 P. 0005 – 0013.

²⁹ Body of European Regulators for Electronic Communications ('**BEREC**') as established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

ComReg has also considered whether other legislation that may apply to the Relevant BTS Markets in Ireland might impact upon the need for *ex ante* regulation, in particular, relevant aspects of the 2009 Act.

- 1.19 ComReg has also had regard to relevant European Commission comments made, pursuant to Article 7 of the Framework Directive, with respect to other NRAs' market reviews.

Consultation with the Competition Authority and the European Commission

- 1.20 Pursuant to Regulation 27(1) of the Framework Regulations, ComReg must also carry out an analysis of the Relevant Markets in accordance, where appropriate, with an agreement with the Competition Authority (the '**CA**') under section 34 or 47G of the Competition Act 2002 (as amended)³⁰. ComReg has consulted with the CA concerning its proposed draft measures arising from its analysis of the Relevant BTS markets. The CA issued its opinion (the '**CA Opinion**') to ComReg on 11 April 2013 in which it set out its agreement with ComReg's proposed draft measures. The CA Opinion is set out in Appendix A.

- 1.21 ComReg is also obliged to make draft measures accessible to the European Commission, BEREC and the NRAs in other Member States pursuant to Regulation 13(3) of the Framework Regulations. Pursuant to Regulation 13(6) of the Framework Regulations ComReg is then obliged to take utmost account of comments received. In this regard, ComReg notified the European Commission of its draft measures on 12 April 2013³¹ with the European Commission providing comment on 08 May 2013. A copy of the European Commission's comments is set out in Appendix B of this Decision (the '**European Commission Comments**').

- 1.22 Insofar as the draft measures which are the subject of this Decision are concerned (definition of the Relevant BTS Markets, SMP assessments and designations and the imposition of remedies), the European Commission stated:

"The market for broadcasting transmission services is no longer recommended by the Commission for ex ante regulation, as greater platform competition and fewer capacity constraints, mainly due to the transition from analogue to digital transmission platforms, should render it effectively competitive."

³⁰ Competition, Act, 2002.

See <http://www.irishstatutebook.ie/2002/en/act/pub/0014/index.html>.

³¹ Note that the draft measures were notified on 12 April 2013 but were registered as being received by the European Commission on the 17 April 2013.

The Commission notes, however, that the terrestrial broadcasting markets in Ireland present strong features of lack of competitive conditions, with only one vertically integrated supplier so far, and therefore appear to warrant ex ante regulation.

However, the Commission notes also that — following successful completion of a contract award process that would be conducted by the Broadcasting Authority of Ireland — entry of a number of commercial DTT multiplex operators on Market B may occur within the timeframe of the review and could therefore impact the competitive dynamics on the market.

The Commission therefore invites ComReg to closely monitor the development of competition in the two markets (and in particular Market B) in terms of infrastructure and services competition at both the retail and wholesale level and re-assess the need for and appropriateness of the remedies imposed if necessary.”³²

- 1.23 ComReg has taken utmost account of the European Commission Comments insofar as they related to matters which are the subject of this Decision.
- 1.24 Further, having considered Respondents’ Submissions, ComReg has made a number of structural and textual changes in the final Decisions. These have been made with a view to improving the clarity of the Decision Instruments and do not affect the substance of the Decision Instruments as published in draft form in the BTS Consultation.

Approach to finalising its review of the Relevant BTS Markets

- 1.25 ComReg, in reaching the conclusions set out in this Decision, has carefully considered the views expressed in Respondents’ Submissions. In the sections that follow, ComReg generally presents its analysis in the following manner:
- **Position set out in the BTS Consultation:** Firstly, ComReg summarises the key issues highlighted by ComReg in its analysis as set out in the BTS Consultation;
 - **Respondents’ Views:** Secondly, ComReg highlights the key issues raised in Respondents’ Submissions;
 - **ComReg’s Assessment of Respondents’ Views:** Building on the analysis set out in the BTS Consultation, ComReg considers and presents its views on Respondents’ comments, where appropriate updating the presentation of information and data to reflect to most up-to-date position; and,

³² European Commission case reference IE/2013/1445.

- **ComReg’s Position:** Having regard to the considerations above, ComReg presents its final position on issues where appropriate.
- 1.26 The analysis and final views set out in this Decision should also be read in conjunction with the analysis set out in the BTS Consultation. In this regard, rather than repeating the detailed analysis in the BTS Consultation, throughout this Decision, ComReg makes reference to it as appropriate.
- 1.27 It should be noted that some of the data now reported in this Decision is an update of the data then reported in the BTS Consultation. ComReg has also reviewed, in detail, the experience of regulating the Relevant BTS markets in other European jurisdictions and has carefully analysed guidance available from the European Commission, BEREC and other relevant commentators before arriving at its final views in this Decision.
- 1.28 As part of its deliberations, in reaching the conclusions set out in this Decision, ComReg has obtained qualitative and quantitative information from industry participants through formal and informal information requests as well as meetings.

Structure of the Decision

- 1.29 The remainder of this Decision is structured as follows:
- Section 2:** This section contains the executive summary of the key issues and ComReg’s ultimate approach for the regulation of the Relevant BTS Markets.
- Section 3:** This section provides an assessment of the structural and behavioural characteristics in the retail broadcasting markets with a view to informing the subsequent wholesale market definition and SMP analysis.
- Section 4:** This section defines the applicable Relevant BTS Markets from both a product and a geographic perspective.
- Section 5:** This section analyses whether the Three Criteria Test³³ is satisfied in Market A.
- Section 6:** This section assesses competition within Market A and identifies undertaking(s) operating in Market A that hold a position of SMP.
- Section 7:** This section sets out the main competition problems that could, absent regulation, occur within Market A, along with the likely consequential impacts on competition and consumers.

³³ See footnote 13 of this Decision.

- Section 8:** This section sets out regulatory remedies to address competition problems in Market A, namely, in the form of obligations that are now imposed on undertaking(s) having SMP.
- Section 9:** This section sets out ComReg’s consideration of the Regulatory Impact Assessment (‘**RIA**’) of the approaches to regulation in Market A.
- Section 10:** This section sets out ComReg’s consideration of the Decision Instrument in Market A.
- Section 11:** This section analyses whether the Three Criteria Test in Market B is satisfied.
- Section 12:** This section assesses competition within Market B, and identifies undertaking(s) operating in Market B that holds a position of SMP.
- Section 13:** This section sets out the main competition problems that could, absent regulation, occur within Market B, along with the likely consequential impacts on competition and consumers.
- Section 14:** This section sets out regulatory remedies to address competition problems in Market B, namely, in the form of obligations that are now imposed on undertaking(s) having SMP.
- Section 15:** This section sets out ComReg’s consideration of the RIA of the approaches to regulation in Market B.
- Section 16:** This section sets out ComReg’s consideration of the Decision Instrument in Market B.
- Section 17:** This section sets out the next steps that will follow the publication of this Decision.
- Appendix A:** This Appendix contains a copy of a letter from the CA setting out its Opinion that it is in agreement with ComReg’s draft findings with respect to the definition of, and assessment of, competition within the Relevant BTS Markets.
- Appendix B:** This Appendix sets out a copy of the European Commission’s comments concerning ComReg’s notified draft measures with respect to ComReg’s analysis of the Relevant BTS Markets.
- Appendix C:** This Appendix updates the retail trends (where applicable) set out in section 4 of the BTS Consultation which are also discussed in section 3 of this Decision.
- Appendix D:** This Appendix sets out the final Decision Instrument for Market A which specifies, in legal terms, the nature of the regulatory remedies to be imposed,

having regard to ComReg's market definition and competition assessment.

Appendix E: This Appendix sets out the final Decision Instrument for Market B which specifies, in legal terms, the nature of the regulatory remedies to be imposed, having regard to ComReg's market definition and competition assessment.

Appendix F: This Appendix sets out the final RIA for Market A and Market B respectively.

Appendix G: This Appendix contains a glossary of the most frequently used terms in this Decision.

1.30 This is a non-confidential version of the Decision. Certain information within the Decision has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol ✂. Should a Respondent wish to review its own redacted information (where applicable); it should make a request for such in writing to ComReg (to jason.cleary@comreg.ie) and indicate the specific paragraph numbers within which the redacted information being requested is contained. ComReg will consider requests for redacted information and will, subject to the protection of commercially sensitive and confidential information, respond accordingly.

2 Executive Summary

Overview

- 2.1 ComReg previously reviewed the Relevant BTS Markets in Ireland in its 2004 Broadcasting Analysis, at that time taking utmost account of the European Commission's 2003 Recommendation.
- 2.2 In that analysis, ComReg ultimately designated RTÉNL as having SMP in two Relevant BTS markets³⁴, namely:
- The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks; and,
 - The wholesale market for TV broadcasting transmission services on analogue terrestrial networks.
- 2.3 By way of ComReg's 2004 Remedies Decision, ComReg imposed transparency and non-discrimination obligations on RTÉNL.
- 2.4 Having regard to the European Commission's revised 2007 Recommendation and the recent move to DTT broadcasting in Ireland³⁵, ComReg has undertaken a further BTS Review of the Relevant BTS Markets in Ireland in order to establish whether *ex ante* regulation remains appropriate, and if so, what form such regulation should take. The BTS Consultation was part of this BTS Review.
- 2.5 This Decision presents ComReg's analysis of the Relevant BTS Markets, having regard to Respondents' Submissions as well as comments from the European Commission and sets out ComReg's final position in this regard.

Definition of the Relevant Markets and Competition Assessment

- 2.6 Prior to assessing whether a BTS operator has SMP, ComReg must first define the applicable Relevant BTS Markets.
- 2.7 Following an assessment of retail and wholesale broadcast markets ComReg has reached the view that there are the following two separate Relevant BTS Markets.
- 2.8 **Market A** is a 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

³⁴ Decision Notice "Market Analysis – Wholesale Broadcasting Transmission Services". Decision No. D6/04, ComReg Document No. 04/47, dated 24 April 2004.

See <http://www.comreg.ie/fileupload/publications/ComReg0447.pdf>.

³⁵ Following analogue switch-off ('ASO') i.e. the switch off of analogue terrestrial TV services on 24 October 2012.

equipment, buildings etc.) in order to enable (i) the broadcast of national analogue terrestrial radio signals to end-users; and (ii) the broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end-users.

- 2.9 **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 service³⁶.
- 2.10 Having considered Respondents' views, ComReg has assessed whether each of the national BTS and DTT Multiplex Operators within the above Relevant Markets has SMP, that is, the ability and incentive to act, to an appreciable extent, independently of its competitors, customers and consumers. It is ComReg's view that there are neither retail nor wholesale constraints which are likely to effectively constrain each of the national BTS and DTT Multiplex Operator(s) in Market A and Market B.
- 2.11 Further, having considered existing competition, the potential for competition to emerge over the medium term, along with other factors (such as countervailing buying power for example), it is ComReg's position that neither Market A nor Market B are effectively competitive.
- 2.12 Consequently, ComReg has designated RTÉNL as having SMP in Market A and, RTÉ as having SMP in Market B.

Imposition of Regulatory Obligations

- 2.13 ComReg has identified potential competition problems that could arise from the exercise of market power by SMP undertaking(s) in the Relevant BTS Markets. Further, notwithstanding the provision of other sectoral legislation, more particularly the 2009 Act, and, taking into consideration Respondents' views, ComReg is of the position that the range of remedies which were identified as necessary in the BTS Consultation, to address the potential competition problems identified, are valid for imposition in Market A and Market B.
- 2.14 As such, ComReg has deemed it necessary to impose a range of, in ComReg's view, proportionate *ex ante* regulatory remedies, ultimately designed to ensure the development of effective competition, to the benefit of end-users.
- 2.15 The obligations that ComReg has imposed in Market A include:

³⁶ Digital terrestrial broadcast services are transmitted on multiplexes. Multiplex is defined in section 129 of the 2009 Act as meaning "an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public". DTT multiplexing services means the above service provided via a DTT multiplex(es).

- Access Obligations: requirements to meet all reasonable requests from **Broadcast Operators**³⁷ for the provision of access; grant Broadcast Operators access to a fully managed broadcast transmission service (including distribution) including associated facilities; and meet all reasonable requests from Broadcast Operators for access on an unbundled / unmanaged basis;
- Non-Discrimination Obligations: requirements to apply equivalent conditions in equivalent circumstances to Broadcast Operators;
- Transparency Obligations: requirements to publish a reference offer and service level agreements ('**SLAs**');
- Accounting Separation Obligations: requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication; and,
- Price Control and Cost Accounting Obligations: requirements of a cost oriented price control based on a Historical Cost Accounting ('**HCA**'), Top Down ('**TD**'), and Fully Distributed Cost ('**FDC**') methodology³⁸.

2.16 The obligations that ComReg has imposed in Market B include:

- Access Obligations: requirements to meet all reasonable requests from **Broadcasters**³⁹ for the provision of access;
- Non-Discrimination Obligations: requirements to apply equivalent conditions in equivalent circumstances to Broadcasters;
- Transparency Obligations: requirements to publish a reference offer and SLAs;
- Accounting separation Obligations: requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication; and,
- Price Control and Cost Accounting Obligations: requirements of a cost oriented price control based on a HCA, TD, and FDC methodology.

2.17 ComReg would note that as of July 2010 the Minister has initiated work to consider whether he should exercise his discretion under

³⁷ For the purposes of the Market A Decision Instrument **Broadcast Operator** means a multiplex contractor, a national sound broadcasting contractor and RTÉ.

³⁸ For detail on this methodology see paragraphs 9.201 to 9.235 of the BTS Consultation and section 8 of this Decision.

³⁹ For the purposes of the Market B Decision Instrument '**Broadcaster**' shall have the same meaning as under section 2 of the 2009 Act and for the purposes of the Market B Decision Instrument, the Broadcaster shall have the necessary statutory basis or Ministerial consent pursuant to section 130 of the 2009 Act, having regard to section 3.3 of the Decision Instrument.

section 130 of the 2009 Act to direct that payments be made to RTÉ and, in doing so, has been in consultation with ComReg⁴⁰. As part of this consultation, ComReg has, at the request of the Minister, been engaged in carrying out a detailed review of RTÉNL's costs associated with provision of DTT broadcasting services and RTÉ's DTT tariffs with a view to assessing whether or not they are fair and reasonable. This as a consequence, may not necessarily be akin to what might be an SMP related cost oriented price under an appropriate cost recovery mechanism which serves to promote efficiency and sustainable competition and maximises consumer benefits having regard to Regulation 13 of the Access Regulations. As part of this work, ComReg has also engaged the assistance of Deloitte and Touche.

- 2.18 While ComReg's work to assist the Minister's section 130 review has many synergies with the establishment of an *ex ante* SMP cost oriented price control, it has, for example, not considered an appropriate WACC⁴¹ for RTÉNL's / RTÉ's operations in Market A and Market B respectively.
- 2.19 Noting the above, ComReg has already initiated work to examine appropriate WACC(s) for RTÉ / RTÉNL's regulated businesses and expects to consult on these, and may consult on related matters, at a later date once this Decision becomes effective. Nevertheless, ComReg considers that RTÉNL's DTT network cost model and RTÉ's tariff model broadly represent an appropriate starting point from which charges for the regulated services can be appropriately derived. However, ComReg would also note that, in accordance with Regulation 13(4) of the Access Regulations, the burden of proof for demonstrating that charges are cost oriented rests at all times with RTÉ / RTÉNL. In this respect, having regard to the above mentioned work being carried out by ComReg (or indeed any other work), ComReg reserves its right to require that adjustments be made to RTÉNL / RTÉ charges in light of its SMP price control obligations in Market A and Market B.
- 2.20 For clarity, ComReg has not, to date, undertaken a review of RTÉNL / RTÉ's tariffs in the context of *ex ante* regulation (given that RTÉNL / RTÉ have not been subject to price control obligations). However, following the effective date of this Decision, RTÉNL / RTÉ will be subject to price control obligations of cost orientation. In this regard, ComReg would note that, if RTÉNL / RTÉ were to notify ComReg of its intention to adjust its regulated tariffs following the effective date of this Decision, having regard to such cost

⁴⁰ As provided for under section 130 of the 2009 Act ComReg has been requested to consult with the Minister on the payments of the DTT broadcasting services provided under section 130 (2), (4), (6), (8), and (11). A detailed review in relation to this is currently ongoing.

⁴¹ Having regard to Regulation 13(2) of the Access Regulations, ComReg's approach to imposing *ex ante* regulation is based on principles that, among others, allow a reasonable rate of return to be earned on adequate capital employed, taking into account any risks involved.

orientation obligations, any adjustment of tariffs would need to be notified to ComReg (and market participants) and be subject to ComReg's review, including public consultation if appropriate. Noting ComReg's intention to undertake a review of the WACC (and potentially other related matters), such tariff adjustments by RTÉNL / RTÉ would therefore likely apply on an interim basis and, following the completion of ComReg's aforementioned review of the WACC and other related matters, may be adjusted (either upwards or downwards) as appropriate.

- 2.21 Appendix D and Appendix E contain the Final Decision Instruments which set out, in legal terms, the various decisions now made in this Decision, including the regulatory obligations that RTÉNL and RTÉ will have to comply with, once the Decision Instruments come into effect.

3 Assessment of the Retail Market

3.1 In sections 4 and 5 of the BTS Consultation⁴², ComReg described the trends in retail broadcasting market(s), set out its preliminary views on the retail market assessment and invited Respondents' views on these matters. Below, ComReg considers the issues raised and sets out its final position on the assessment of the retail market(s).

Position set out in the BTS Consultation

3.2 In the BTS Consultation, ComReg discussed the retail market(s) under the following headings.

- Broadcasting Trends;
- Salient Features of Retail Broadcasting Market(s);
- Retail TV Broadcasting Assessment; and,
- Retail Radio Broadcasting Assessment.

3.3 These are discussed below, before discussing Respondents' views on these issues.

Broadcasting Trends

3.4 In sections 4 and 5 of the BTS Consultation, ComReg described the trends in the provision of and demand for retail TV and radio broadcasting services and set out its preliminary views on its assessment of the retail market(s)⁴³ to the extent that it informs the subsequent analysis of the Relevant BTS Markets.

3.5 As regulation was applied to national analogue BTS markets arising from ComReg's 2004 Broadcasting Analysis and 2004 Remedies Decision (together referred to as the '**2004 Broadcasting Review**'), in seeking to determine whether regulation remains appropriate, ComReg's starting focal point in the BTS Consultation was the provision of terrestrial BTS services.

3.6 In section 4 of the BTS Consultation⁴⁴, ComReg noted the vertically integrated nature of RTÉ's broadcasting activities in Ireland, whereby RTÉ operates at a number of levels in the broadcasting value chain, as it is a content creator, content organiser (i.e. provides TV and radio programme services), and supplier of BTS services (given it is both a Multiplex Operator⁴⁵ and, via its wholly

⁴² See paragraphs 4.1 to 4.54 and 5.5 to 5.49 of the BTS Consultation.

⁴³ Note that some of the data published in the BTS Consultation has been updated in Appendix C of this Decision.

⁴⁴ See paragraphs 4.4 and 4.5 of the BTS Consultation.

⁴⁵ It is noted that RTÉ holds a 'multiplex licence' under section 132 of the 2009 Act while other (potential) Multiplex Operators would hold a 'multiplex contract' under section 131 of the 2009 Act.

owned network subsidiary, RTÉNL, a terrestrial BTS network operator⁴⁶).

- 3.7 ComReg observed that retail TV and radio programme services are available primarily via terrestrial, cable, satellite and Internet Protocol ('IP') platforms.
- 3.8 The two-sided nature of retail broadcasting markets was also noted whereby the reach, coverage and viewership of a Downstream TV Broadcaster's programme services also impacts the level of advertising revenue that a Downstream TV Broadcaster can receive⁴⁷. As a consequence, Downstream TV Broadcasters typically use several BTS platforms to distribute their programme services to end-users.
- 3.9 In the case of radio broadcasting, although available on multiple BTS platforms, it was also noted that it is mainly consumed by end-users via terrestrial broadcasting means.

TV Transmission / Viewership⁴⁸

- 3.10 In the BTS Consultation it was noted that as of May 2012 there were 1,577,000 TV homes in the Republic of Ireland, representing a 96% TV penetration rate given approximately 1,635,000 homes in Ireland⁴⁹.
- 3.11 Data on TV ownership in the home also indicated that since ComReg's 2004 Broadcasting Review there had been a decline in the number of homes utilising terrestrial TV as their sole mode of viewership ('**Terrestrial TV Only Homes**'), but nevertheless there still remained a small but significant number of homes that utilise terrestrial TV as a means of viewership (also employed with other TV platforms).
- 3.12 According to data from the Nielsen TAM Establishment Survey⁵⁰, the BTS Consultation showed that, based on '**Reception Type**'⁵¹ data,

⁴⁶ RTÉNL is a wholly owned subsidiary of RTÉ and operates a network of transmission sites from which terrestrial radio and TV services are broadcast.

⁴⁷ For example, the Competition Authority, in its review of RTÉ's conduct in the market for TV advertising notes that TV advertising is sold as commercial impacts where one commercial impact is defined as one person watching one advertisement once. TV audiences comprise of different demographic groups and impacts are sold against these audience groups. Enforcement Decision Series (E/12/001), Competition Act 2002, Decision of Competition Authority (Case COM /10/02), 17 January 2012.

See <http://www.tca.ie/images/uploaded/documents/E-12-001%20RTE%20Enforcement%20Decision.pdf>

⁴⁸ See paragraphs 4.9 to 4.44 of the BTS Consultation.

⁴⁹ Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd. The Establishment Survey is a survey produced by Nielsen TV Audience Measurement (fieldwork is carried out by Behaviours and Attitudes) on behalf of Television Audience Measurement Ireland Ltd (a TV ratings body). The Establishment Survey covers areas such as ownership of TV related equipment, method of TV reception and demographics of TV household individuals such as age etc.

⁵⁰ Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.

as of May 2012, approximately 19% of TV homes were solely dependent on free to air (**'FTA'**) terrestrial TV programme services, down from approximately 39% in 2003. In total, 31% of TV homes had a FTA TV service i.e. 19% FTA terrestrial TV and 12% FTA satellite TV (**'FTA TV'**).

- 3.13 The remaining 69% of TV homes were shown to have had a cable, Sky or IPTV service (**'pay TV'**), up from approximately 61% in 2003.
- 3.14 Furthermore, based on **'Reception Method'**⁵² data, although 19% of TV homes were FTA Terrestrial TV Only Homes, 38%⁵³ of TV homes had aerial TV reception for FTA terrestrial services. This suggested that a number of TV homes were using both FTA terrestrial and other BTS platforms for their TV viewing.
- 3.15 For example, in the TV home, TV programme services could be viewed on one TV set using both FTA terrestrial and another reception method or using two TV sets with each TV set using a different reception method.
- 3.16 ComReg noted that although pay TV services have gained popularity over time (increasing by 6 percentage points between 2003 and 2012) the overall proportion of existing FTA TV homes had remained somewhat stable over the latter portion of that time period (ranging from 29% to 33% between 2008 and 2012). This implies that existing FTA TV homes have shown an unwillingness to take up pay TV services.
- 3.17 ComReg also highlighted the nature of existing Irish public service terrestrial Downstream TV Broadcaster's (**'PSB'**)⁵⁴ (being RTÉ and TG4) and Irish commercial terrestrial Downstream TV Broadcasters⁵⁵ (TV3⁵⁶) statutory / licence requirements⁵⁷. Such

⁵¹ This **'Reception Type'** measurement is determined by the programme services the TV home receives. This is hierarchically defined and mutually exclusive. A home is classified once within a reception type and this is based upon the highest form of reception (being the reception method which allows for the most programme services to be received) available within the home. For example, Irish free to air terrestrial TV homes are those homes who received the most programme services via this platform.

⁵² This **'Reception Method'** data is measured differently to that of Reception Type employed in paragraphs 3.12 to 3.13 above. Each TV home can have more than one method of reception e.g. DTT and Cable, or Sky and Cable, etc. Each home is asked what is the reception method for their main TV set and up to a further 8 TV sets (9 in total). For this reason, the total for the Reception Methods adds up to more than 100% (as a home could use several Reception Methods for the same or different TV sets).

⁵³ This compares to approximately 56% in 2003.

⁵⁴ RTÉ and TG4 are subject to certain public service broadcasting objects. Section 2 of the 2009 Act defines this term as meaning *"an activity undertaken by a corporation in pursuance of paragraphs (a) to (i) of section 114(1) or paragraphs (a) to (h) of section 118(1)"*. These include, among others, that RTÉ and TG4 establish, maintain and operate a national TV broadcasting service which shall have the character of a public service, be a FTA service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.

⁵⁵ For the purposes of this Decision, a commercial Downstream Broadcaster means a non-PSB Downstream Broadcaster.

- terrestrial Downstream TV Broadcasters effectively have statutory / licence obligations to operate national FTA TV programme services.
- 3.18 ComReg also highlighted the importance of these terrestrial Downstream TV Broadcasters' programme services for Irish viewers where, despite the increased range of TV programme services available over time across cable and satellite platforms, these Irish FTA programme services have continued to maintain a large share of TV viewership relative to other commercial programme services across all TV platforms.
- 3.19 In this respect, consolidated⁵⁸ national audience market shares for these broadcasters showed that, across all platforms⁵⁹, for the week of 09 April 2012 to 15 April 2012 RTÉ (being the programme services of RTÉ One, RTÉ One +1 and RTÉ Two) had a market share of 27.2%, TV3 had 12.1% and TG4 had 2.5%. TV programme services market shares are, therefore, fairly concentrated amongst a few programme service providers, with market shares for the remaining programme services being substantially smaller and spread across many providers (i.e. a few TV programme services (as above) dominate viewership and the majority of the remainder of the TV programme services are much more disbursed in viewership).
- 3.20 ComReg then discussed the various BTS platforms through which TV and radio programme services are distributed in Ireland.
- 3.21 It was noted that end-users can receive satellite services on a FTA or pay basis. As of May 2012 approximately 12% of TV homes had a FTA satellite service with 44% having a pay satellite service, with both such services being national in scope⁶⁰.
- 3.22 26% of TV homes were also identified as having a cable TV service; with approximately 54% of all homes passed for cable TV services (i.e. cable TV is available to these homes).

⁵⁶ TV3 Television Network Limited trades as TV3. The BAI has entered into a TV programme service contract with TV3 which gives TV3 the right and duty to establish and maintain the TV3 programme service under Section 70 of the 2009 Act. 3e is also provided under this TV programme contract. For the purpose of this Decision we refer to TV3 as also comprising the programme services of TV3 and the programme service of 3e, both of which are privately owned by Doughty Hanson and Co. (being a European private equity firm).

⁵⁷ Spectrum licences are issued either directly from ComReg (as in the case of RTÉ) or indirectly through the BAI who enter into contract with Downstream Broadcasters as for example in the case of TV3.

⁵⁸ Consolidated data means Live + Timeshift data. The measurement and reporting of Time-Shifted Viewing (TSV) was introduced in September 2010. Since then Nielsen have been reporting on Live viewing, and time-shifted viewing, being any viewing that occurs post live broadcast. The sum of Live and TSV is the basis on which industry trades for advertising and, is the reference for all viewing, referred to as 'Consolidated'. Consolidated data is issued after 7 days of viewing on day 8.

⁵⁹ TAM Ireland Ltd. Viewed April 2012. See www.tamireland.ie/box-clever/tv-basics/share-and-reach

⁶⁰ These percentages refer to Reception Type, the definition of which is described in footnote 51 of paragraph 3.12 of this Decision.

- 3.23 ComReg stated that IPTV (as managed⁶¹ TV BTS) can be regarded as another BTS platform for TV broadcasting. ComReg noted that it was limited to urban areas and had a low take-up at less than 2% of TV homes⁶².
- 3.24 ComReg also noted that, based on a 2011 ComReg Survey⁶³, in an average week, approximately 22% of those with an internet subscription at home streamed movies or TV shows, 15% downloaded movies and 25% watched online videos. Eurostat data also showed that, in 2010, 18% of individuals in Ireland listened to web radio or watched web TV⁶⁴.

Radio Transmission / Listenership⁶⁵

- 3.25 Insofar as radio transmission is concerned, ComReg stated that radio content is primarily distributed over terrestrial BTS networks and is transmitted to end-users who listen on in-home radio sets or in-car radio sets. Although a number of years old, it was noted that a ComReg consumer survey⁶⁶ indicated that accessing radio content over a radio set was the most popular means of access (81%) followed by listening to the radio on a car radio (48%). A 2009 BAI report⁶⁷ also highlighted that listenership via devices other than fixed radio (88%) and in-car radio (87%) was low.
- 3.26 ComReg also noted that there are two categories of national terrestrial radio services in Ireland. These are RTÉ PSB radio services and national independent commercial radio services provided by Today FM and Newstalk. Non-national radio services are also provided by other independent terrestrial Downstream Radio Broadcasters.
- 3.27 Listenership figures from April 2011 to March 2012⁶⁸ then indicated that, 85% of the adult population listened to a daily mix of national, regional, multi-city and local radio. 47.2% of listeners listened to a

⁶¹ Although broadcasting content can be viewed via the internet in a non-linear form this is not likely comparable to linear TV services. It is a non-managed service which can suffer from degradation due to internet quality issues.

⁶² Informa Telecoms and Media, Global IPTV forecasts 2005 – 2015.

⁶³“Consumer ICT Survey”, ComReg document No. 11/96a, dated November 2011. See [www.comreg.ie/ fileupload/publications/ComReg1196a.pdf](http://www.comreg.ie/fileupload/publications/ComReg1196a.pdf).

⁶⁴Information and Society Statistics, Internet Activities, 2012. See http://epp.eurostat.ec.europa.eu/portal/page/portal/information_society/data/database.

⁶⁵ See paragraphs 4.45 to 4.54 of the BTS Consultation.

⁶⁶“Consumer ICT Survey”, ComReg Document No. 09/07, dated February 2009. See [http://www.comreg.ie/ fileupload/publications/ComReg0907.pdf](http://www.comreg.ie/fileupload/publications/ComReg0907.pdf).

⁶⁷ “Digital Radio for Ireland: Competing Options Public Expectations”, BAI, dated September 2009. See http://www.bci.ie/documents/digital_radio_final_report_2509.pdf.

⁶⁸Ipsos MRBI / JNLR Press Release, dated May 2012. See <http://www.bai.ie/wordpress/wp-content/uploads/JNLR-Results-May-2012.pdf>.

national radio service during the weekday, 69.5% of which was accounted for by listenership to RTÉ radio⁶⁹.

- 3.28 ComReg also noted that independent commercial national digital terrestrial radio services were not expected to be launched in the timeframe of the BTS Review though RTÉ does provide Terrestrial Digital Audio Broadcasting ('T-DAB') via its own sound broadcasting multiplex, with such services being available to approximately 44% of the population⁷⁰.

Salient Features of Retail Broadcasting Market⁷¹

- 3.29 ComReg noted that the Staff Working Document⁷² accompanying European Commission's **2010 Communication**⁷³ highlights the importance of a retail market assessment, and the interrelationship between relevant upstream and downstream markets when undertaking market assessment.
- 3.30 In section 5 of the BTS Consultation ComReg examined the salient features of retail broadcasting services insofar as they influence the conditions of demand for and supply of BTS.

Retail Television Broadcasting Assessment⁷⁴

- 3.31 In terms of TV, ComReg presented its preliminary view that there are two main dimensions according to which the retail market could potentially be divided, namely, either according to the BTS platform or according to the nature of the service (i.e. FTA TV and pay TV).
- 3.32 As noted in paragraph 3.5 above, ComReg's focal point for its analysis was FTA services delivered over the terrestrial BTS platform. From this focal point ComReg set out its assessment as to whether, based on demand-side and supply-side substitutability considerations, the market definition should be broadened.

⁶⁹ RTÉ Radio 1, RTÉ 2FM and RTÉ Lyric FM.

⁷⁰ RTÉ, Digital Radio FAQ. See <http://www.rte.ie/digitalradio/faq.html>.

⁷¹ See paragraphs 5.5 to 5.11 of the BTS Consultation.

⁷² European Commission, Staff Working Document, accompanying document to the Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Region on market reviews under the EU Regulatory Framework (3rd report), Brussels, 1.06.2010 SEC (2010) 659 (the '**2010 Communication Staff Working Document**').

⁷³ European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Region on market reviews under the EU Regulatory Framework (3rd report), Brussels, 1.06.2010 COM(2010) 271 (the '**2010 Communication**').

⁷⁴ See paragraphs 5.5 to 5.39 of the BTS Consultation.

DTT Demand-Side Substitution⁷⁵

- 3.33 ComReg expressed the preliminary view that demand-side substitution to other BTS platforms is unlikely to effectively constrain services provided over the FTA terrestrial BTS platform.
- 3.34 In this regard, ComReg noted that despite the popularity of pay TV, the proportion of FTA TV homes had remained relatively stable in more recent years, ranging from 29% to 33% between 2008 and 2012.
- 3.35 In terms of demand-side substitution, as a Small but Significant Non-Transitory Increase in Price (**'SSNIP test'**⁷⁶) becomes problematic in examining FTA services (as no charge is levied from which the effects of a SSNIP by a hypothetical monopolist⁷⁷ (**'HM'**) supplier of FTA BTS can be examined), ComReg examined these broadcasting services on the basis of product / service characteristics and conditions of intended use and supply.
- 3.36 ComReg set out its preliminary view that FTA satellite services are not substitutes for FTA terrestrial services.
- 3.37 ComReg noted that due to content rights issues (i.e. the costs associated with purchasing broadcasting content rights to enable the satellite broadcast of such content to a footprint outside of Ireland), Irish terrestrial TV programme services are not available via FTA satellite (other than **'Saorsat'**⁷⁸ as discussed below). This means that end-users who wish to view such programme services would require broadcasting equipment (e.g. combi-set top box, aerial / **'Saorview'**⁷⁹ TV and satellite reception equipment) capable of receiving both terrestrial and satellite signals. However, it was noted that one satellite provider (Eutelsat) has launched a satellite

⁷⁵ See paragraphs 5.12 to 5.27 of the BTS Consultation.

⁷⁶ The SSNIP test provides a conceptual framework within which to identify the existence of close substitute products. The SSNIP test examines whether, in response to a permanent price increase in the range of 5% to 10% by a HM supplier of a given product set, sufficient customers would switch to readily available alternative substitute products such that it would render the price increase unprofitable. If the level of switching to alternative products is sufficient to render the price increase unprofitable (owing to a resultant loss of sales for example) then the alternative products are included in the relevant product market.

⁷⁷ Defining a product / geographic market entails establishing the closest substitutes to the product(s) under examination / investigation. To establish which products are sufficiently close substitutes to warrant inclusion in the same market, a conceptual framework called the hypothetical monopolist (**'HM'**) test is usually employed.

⁷⁸ According to [RTÉ's Saorview website](#) *"The channels couldn't be made available on the Astra 28 satellite as this satellite has a broadcast footprint beyond Ireland (all of UK, parts of Europe). Irish channels do not have the rights to broadcast into the UK and Europe. Had these channels been on this platform it would therefore have put Irish broadcasters in breach of copyright and broadcast license agreements and resulted in increased costs for acquired programmes and home produced programmes".* The Irish channels (with the exception of TV3) are available via satellite on SAORSAT" (viewed June 2013).

⁷⁹ Saorview is the name of RTÉ's DTT platform services. See www.saorview.ie

service with a transponder spot beam⁸⁰ specifically focused on the Republic of Ireland and from which RTÉ's DTT programme services are also made available (marketed as Saorsat, albeit as a secondary means of BTS of last resort)⁸¹. TG4's programme service is also available via this Saorsat platform, while TV3's is not.

- 3.38 ComReg noted that, a significant number of households have been unable or unwilling to erect a satellite dish (38% of all TV homes did not use a satellite reception method at all⁸²). In this regard, it was noted that there are legislative⁸³ based planning restrictions that apply to the installation of satellite dishes (planning permission is required to have a satellite dish of more than one metre in diameter on a house or to have more than one satellite dish or to erect it on the front roof slope of the house or higher than the highest part of the roof of the house) and further non-statutory based restrictions may also be imposed by some properties (such as apartment blocks), where restrictions might also be placed on the erection of a satellite dish.
- 3.39 Furthermore, households with existing FTA or subscription based satellite services have their satellite dishes pointing to an orbital position which is different to the satellite from which RTÉ's Saorsat service operates and, it was ComReg's preliminary view that a sufficient number of households would be unlikely to adjust / re-orient their existing satellite dishes towards the satellite from which Saorsat is broadcast, in particular, given the expertise / costs involved in doing so, along with the potential loss of the reception of their existing satellite programme services. The content available via the Eutelsat satellite from which Saorsat is broadcast is far less than that which is available via other satellite services. In view of this, ComReg's preliminary view was that it reduces its attractiveness to households, even those with an existing satellite dish.
- 3.40 ComReg also noted that the content of pay TV programme services (whether cable or satellite) is far greater and diverse than that which is available via FTA platforms, much of which is likely to continue to only remain available through a pay TV service. Indeed, those end-

⁸⁰ EUTELSAT KA-SAT 9A.

⁸¹ In this respect, RTÉ indicates that Saorsat is effectively a service of last resort given that it states that homes should exhaust all options of receiving Saorview (its DTT service) before reverting to Saorsat. RTÉ also states that Saorsat has been put in place in order to reach the 1-2% of television homes who are unable to receive DTT. RTE's website states: *"Due to the topography of Ireland, some areas have always been impossible to reach via a terrestrial network. The development of the new satellite service called SAORSAT will enable RTÉNL to provide television services to the 1% to 2% of households who cannot be served via a terrestrial network, thus providing universal access to public service television services for the first time in the history of television"* (viewed March 2013).

⁸² Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.

⁸³ See the Planning and Development Regulations, 2001 (S.I. No. 600/2001) available at <http://www.irishstatutebook.ie/2001/en/si/0600.html#parti>.

users that subscribe to pay TV services are likely to do so in order to view the particular content they are unable to receive via FTA platforms. As existing FTA end-users have largely shown an unwillingness to switch to a pay TV service (i.e. as noted in paragraph 3.12 above, as of May 2012, circa 31% of TV homes used FTA TV services rather than subscribe to a pay TV service), this suggested to ComReg that for such end-users, the perceived benefits of receiving additional content through pay TV platforms do not outweigh the costs (such as recurring subscription fees, equipment fees and minimum contract term commitments⁸⁴).

DTT Supply-Side Substitution⁸⁵

- 3.41 In the BTS Consultation ComReg was of the preliminary view that effective supply-side substitution is unlikely due to the high costs involved in building digital terrestrial BTS networks, much of which would be sunk. Cable networks do not provide the same level of coverage⁸⁶ as the FTA terrestrial BTS network and is a pay TV service. IPTV is also a pay TV service, with coverage currently limited to a small number of urban areas⁸⁷. While satellite services are national in scope, as noted in paragraphs 3.38 to 3.39 above, planning restrictions may limit the likely ability of end-users to take up such services. Further, content rights issues would likely restrict the ability of Irish terrestrial programme services to be carried via satellite (with the exception of the Eutelsat satellite which, as noted in paragraph 3.37 above, has a specific spot beam focused on Ireland).
- 3.42 These issues are unlikely to make supply-side substitutability 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).

DTT Geographic Scope⁸⁸

- 3.43 ComReg was of the preliminary view that retail TV broadcasting services markets are likely to be national in scope. Unlike terrestrial and satellite broadcast services, cable and IPTV are not nationally

⁸⁴ In this respect, in the BTS Consultation ComReg noted that pay TV services also entail minimum contract commitments (typically 12 months) which are subject to cancellation fees which would be likely to reduce the incentive of end-users to switch between FTA and pay TV services.

⁸⁵ See paragraphs 5.28 to 5.30 of the BTS Consultation.

⁸⁶ It was noted in the BTS Consultation that approximately 54% of homes were passed (i.e. technically available) by cable TV services.

⁸⁷ IPTV subscriptions were estimated at circa 2% of TV homes in Ireland.

⁸⁸ See paragraphs 5.31 to 5.35 of the BTS Consultation.

available. Nevertheless, the content and pricing of all platforms tends to be geographically uniform.

Preliminary Conclusions on Retail Television Broadcasting⁸⁹

3.44 Having regard to the analysis set out in the BTS Consultation and the overview in paragraphs 3.31 to 3.43 above, ComReg's preliminary conclusion in the BTS Consultation was that, within the lifetime of this BTS Review, retail substitution from the FTA terrestrial platform to other broadcasting platforms is not likely to be sufficient to warrant the definition of a broader retail market. In this respect, the FTA terrestrial TV platform was considered to fall within a separate relevant market.

Retail Radio Broadcasting Assessment⁹⁰

Terrestrial Radio Demand-Side Substitution⁹¹

3.45 From the perspective of radio broadcasting, in the BTS Consultation ComReg highlighted that the main means of delivery is terrestrial BTS. The vast majority of people listen to radio through terrestrial means and this has not changed overtime. Therefore, ComReg's preliminary view was that 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.

Terrestrial Radio Supply-Side Substitution⁹²

3.46 ComReg's preliminary view was that broadcasting over other BTS platforms was not likely to be an effective supply-side substitute to terrestrial BTS 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.

Terrestrial Radio Geographic Scope⁹³

3.47 ComReg's proposed position in the BTS Consultation was that the geographic scope of radio services can be distinguished on a local / regional and national basis; given that terrestrial Downstream Radio Broadcasters receive licences with defined coverage limits along these lines. Furthermore, ComReg noted that end-users would likely listen to local / regional broadcasting services mainly for local news

⁸⁹ See paragraphs 5.36 to 5.39 of the BTS Consultation.

⁹⁰ See paragraphs 5.40 to 5.49 of the BTS Consultation.

⁹¹ See paragraph 5.42 of the BTS Consultation.

⁹² See paragraphs 5.43 to 5.45 of the BTS Consultation.

⁹³ See paragraphs 5.46 to 5.48 of the BTS Consultation.

and content but would likely listen to national radio services mainly for national and international news and content.

Preliminary Conclusions on Retail Radio Broadcasting⁹⁴

- 3.48 Having regard to the analysis set out in the BTS Consultation and the overview in paragraphs 3.45 to 3.47 above, ComReg's preliminary conclusion in the BTS Consultation was that, at present, retail substitution from the FTA terrestrial platform is not likely to be sufficiently effective to warrant the definition of a broader retail market in this BTS review. In this respect, the FTA terrestrial radio platform was considered to fall within a separate relevant market.
- 3.49 Having outlined the above structural and behavioural trends with respect to retail TV and radio broadcasting services, ComReg then asked the following question⁹⁵.

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

Respondents' Views

- 3.50 Of the **four responses** received to this question, **three Respondents agreed** (TG4, the BAI and TV3) with ComReg's assessment of the retail TV and radio markets.
- 3.51 **One Respondent disagreed** (RTÉ) with ComReg's preliminary conclusions, stating that the terrestrial BTS platform may be directly substitutable with other BTS platforms i.e. suggesting that they form part of the same retail market. RTÉ also stated that, in the BTS Consultation, no account had been taken of local / regional or quasi-national radio services including consideration of what wholesale service providers exist for supplying such services.
- 3.52 In some cases, Respondents provided information either as a supplement to ComReg's analysis or to justify their views.
- 3.53 **Two Respondents did not express specific views** (the Individual Respondent⁹⁶ and Eircom) on Question 1 above. Rather than commenting directly, these two Respondents highlighted their overall views on the matters considered throughout in the BTS Consultation, with Eircom also referring to previous correspondence with ComReg on the matter (this refers to Eircom's response to

⁹⁴ See paragraph 5.49 of the BTS Consultation.

⁹⁵ See Consultation Question 1, page 55, of the BTS Consultation.

⁹⁶ The individual Respondent was a private citizen, Ken Murray.

ComReg's initial Three Criteria Test BTS Consultation⁹⁷ and information requests issued by ComReg to relevant parties as part of its preparatory work for the BTS Consultation). Both of these Respondents stated that they agreed with ComReg's preliminary views in the BTS Consultation of the need for *ex ante* regulation of the proposed Relevant BTS Markets.

- 3.54 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall assessment.
- 3.55 ComReg considers that Respondents' views can generally be captured under the broad themes identified below.
- Whether retail FTA and pay TV services are in separate retail markets; and,
 - Whether there is a separate product market for retail terrestrial radio services and the geographic scope of the market.
- 3.56 ComReg notes that RTÉ, in commenting on Question 1 above, also raised issues concerning the analysis of non-national analogue radio services. ComReg considers that such matters are more appropriately addressed in its assessment of Respondents' views concerning the definition of the Relevant BTS Markets (Question 2) and, therefore, are considered in section 4 of this Decision⁹⁸.

Whether retail FTA and pay TV services are in separate retail markets

- 3.57 The BAI agreed with ComReg's preliminary view that FTA TV and pay TV services are in separate retail markets and are national in scope, stating that there are clear differences between such services in terms of their cost, choice of programme services available, features, and substitution and consumer migration across them.
- 3.58 TV3 also agreed with ComReg's preliminary view that households with access to Irish terrestrial programme services on a FTA basis are in a separate retail market to pay TV and highlighted that pay

⁹⁷ Prior to the BTS Consultation, ComReg conducted a preliminary Three Criteria Test in 2010 which was publicly consulted on. Consultation – “Three Criteria Test on the Broadcasting Transmission Market”, Document Number 10/98.

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

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

http://www.comreg.ie/publications/response_to_consultation_-_three_criteria_test_on_the_broadcasting_transmission_market.583.103837.p.html

⁹⁸ See paragraphs 4.118 to 4.127 of this Decision.

TV, at an EU level, has long been seen as a separate market, citing a particular case⁹⁹ by way of example.

- 3.59 RTÉ stated that end-users now place less reliance on the exclusive use of FTA terrestrial TV, citing its decline over the last 10 years¹⁰⁰ and noting that a larger proportion of TV homes are now not solely reliant on FTA terrestrial TV. In addition, RTÉ, in commenting on Figure 6 in the BTS Consultation¹⁰¹ (which categorised TV homes by Reception Method data), expressed the view that it was not valid for ComReg to include measures based on reception methods which are not mutually exclusive (i.e. in circumstances where a household may have more than one reception method) as this results in an overstatement of the number of TV homes shown to be accessing FTA TV services.
- 3.60 RTÉ also indicated that the decline in FTA TV and increase in pay TV over the period 2003 to 2012 suggests movement between these platforms and that the FTA terrestrial TV platform may be directly substitutable with other delivery platforms, particularly in light of ASO¹⁰². RTÉ provided an overview of terrestrial TV viewership figures from a number of other European countries showing that terrestrial TV had declined post ASO in a number of such countries. Five out of eight countries illustrated showed a decline of between 2 and 14 percentage points post ASO.
- 3.61 Furthermore, RTÉ stated that there is a blurring of the distinction between FTA and pay TV platforms and that this is accelerating due to the increasing convergence of broadcasting and telecoms services through the offering of retail bundles, citing UPC's triple play offers, Sky's entry into the telecoms market and Eircom's potential move to offer IPTV. RTÉ also stated that all of RTÉ's FTA services are available to any platform on a 'must offer'¹⁰³ basis (to imply that availability of RTÉ DTT programme services are not likely to impact end-user up take of other BTS platforms)
- 3.62 RTÉ noted that while Saorsat is primarily an infill solution for those viewers who cannot receive Saorview (as they are outside the coverage footprint¹⁰⁴), any viewer can also choose its Saorsat satellite service. To do so requires a satellite dish that must be aligned at nine degrees east. RTÉ also stated that by mounting a

⁹⁹ Case M.2876, *News Corp / Telepiu*, 2003.

¹⁰⁰ Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.

¹⁰¹ See paragraph 4.13 of the BTS Consultation.

¹⁰² ASO occurred on 24 October 2012.

¹⁰³ Section 77(11) and (12) of the 2009 Act discusses RTÉ's must offer obligations (which are applicable to transmission via cable and satellite networks) while RTÉ's objects are discussed in section 114 of the 2009 Act and include that RTÉ must broadcast FTA, in so far as reasonably practicable, to the whole community of Ireland.

¹⁰⁴ RTÉ estimate that approximately 2% of homes are outside the coverage footprint of its Saorview service.

second low noise block down-converter (**'LNB'**¹⁰⁵) on an existing satellite used to receive other FTA satellite programme services, an end-user can also simultaneously receive its Saorsat FTA programme services via the same satellite dish (i.e. Saorsat and other FTA satellite services together) and that this may become an attractive option for consumers.

Whether there is a separate product market for retail terrestrial radio services and the geographic scope of the market

- 3.63 The BAI agreed with ComReg's preliminary analysis and stated that analogue terrestrial radio services dominate the retail market and are distinct from other radio services transmitted over other BTS platforms. It also noted that commercial radio services can be delineated on a national and local / regional basis in terms of listenership and advertiser expectations (i.e. differentiated by the reach and type of end-users).
- 3.64 RTÉ stated that ComReg's analysis is specifically addressing the national analogue radio market and did not take account of regional and local analogue radio services or quasi-national Newstalk radio services. RTÉ stated that there are more than 30 local and regional radio services available and it would be interesting to consider what BTS providers exist in order to provide infrastructure / services to enable such radio stations to offer their retail radio broadcast services.

ComReg's Assessment of Respondents' Views

- 3.65 ComReg has updated some of the data originally published in its BTS Consultation, which is set out in Appendix C (the **'Updated Retail Trends Analysis'**) of this Decision.
- 3.66 ComReg has drawn upon this Updated Retail Trends Analysis in considering Respondents' views.
- 3.67 ComReg assesses Respondents' views under the identified themes below.

Whether retail FTA and pay TV services are in separate retail market

- 3.68 To further inform its analysis ComReg updated information concerning trends in the retail broadcasting market(s) (i.e. TV homes by Reception Type and Reception Method data). This can be found in paragraphs C.1 to C.12 of Appendix C of this Decision.

¹⁰⁵ A LNB is the receiving device mounted on satellite dishes used for satellite TV reception, which collects the radio waves from the dish. It receives the microwave signal from the satellite collected by the dish, amplifies it, down converts the block of frequencies to a lower block of intermediate frequencies (**'IF'**), so the signal can be carried to the indoor satellite TV receiver using coaxial cable.

- 3.69 As the BAI and TV3 concurred with ComReg's preliminary determination of a separate retail FTA and pay TV market, ComReg focuses on the issues of disagreement that were raised by RTÉ in its Submission as identified above at paragraphs 3.59 to 3.62 above.
- 3.70 While ComReg acknowledges that there has been a decline in FTA Terrestrial TV Only Homes over the period 2003 to 2013, it also notes that, based on Figure C1 in Appendix C, Irish DTT only homes, at 12%¹⁰⁶ still represent a small but significant number of overall TV homes.
- 3.71 Furthermore, the data in Figure C1 in Appendix C also suggests that an additional 16% of TV homes use FTA satellite services. Therefore, in total, approximately 28% of TV homes do not have a pay TV service (whether cable, MMDS, IPTV or pay TV satellite) post ASO.
- 3.72 ComReg noted, in paragraph 4.13 of the BTS Consultation, that 50% (as of April 2013 this figure is 54%) of TV homes use some form of FTA TV reception method. ComReg acknowledges that TV reception method data is not mutually exclusive and so this figure does not necessarily imply that such 50% of TV homes use particular FTA TV reception methods given that one TV home may employ a combination of two different FTA platforms in the home e.g. FTA DTT and FTA satellite services. However, as a TV home may use multiple TV reception methods, ComReg's position is that it remains valid to consider TV homes' use of secondary multi-platform TV reception methods¹⁰⁷.
- 3.73 In this regard, as noted in Figure C2 of Appendix C, although 12% of TV homes use Irish FTA DTT as their sole means of TV reception, a further 23% of TV homes may also use Irish FTA DTT reception methods¹⁰⁸ for TV viewing alongside the use of other TV viewing methods. ComReg also notes that according to the e-communications household survey conducted on behalf of the European Commission, approximately 25% of households in Ireland have DTT¹⁰⁹.

¹⁰⁶ Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd. April 2013. This measurement is determined by the programme services the TV home receives. This is hierarchically defined and mutually exclusive. A home is classified once within reception type and this is based upon the highest form of reception (the reception means which allows for the most programme services) available in the home.

¹⁰⁷ This is because each TV home can have more than one method of reception e.g. DTT and Cable, or Sky and Cable, etc. Although 12% of TV homes use the terrestrial FTA platform solely for TV viewing, more TV homes may be likely to use the terrestrial platform for TV viewing in combination with other TV platforms. Therefore, this 12% figure would likely underestimate the actual use of the terrestrial TV platform among TV homes.

¹⁰⁸ Saorview and Saorsat only.

¹⁰⁹ Special Eurobarometer 396, E-Communications Household Survey, July 2013. See http://ec.europa.eu/public_opinion/archives/ebs/ebs_396_data_en.pdf

- 3.74 RTÉ's suggested substitutability at the retail level from terrestrial TV services to other reception methods appears to rest on the basis of the decline in FTA Terrestrial TV Only Homes and a rise in use of other retail TV delivery methods. However, as per Figure C1 of Appendix C, at 28% (12% FTA terrestrial TV and 16% FTA satellite TV / UK DTT homes) ComReg notes that a significant number of TV homes maintain FTA services as their sole reception means, a figure which has been relatively stable over the last number of years, notwithstanding ASO.
- 3.75 Given that this is the situation which has occurred post ASO, end-users will likely have already considered whether, as part of the decision to maintain their FTA reception method, pay TV services might also serve their needs. As 28% of TV homes have a FTA reception method post ASO, this suggests to ComReg that such TV homes do not consider pay TV services to be a viable substitute and consumers of such services still perceive there to be sufficient product / pricing differences between FTA TV services and pay TV services, suggesting to ComReg that they are not part of the same retail market.
- 3.76 ComReg discussed such differences in the BTS Consultation¹¹⁰ and noted that in the case where a service has no recurring monthly charge / price (such as in the case of a FTA service) the notion of a SSNIP¹¹¹ test becomes problematic. ComReg therefore examined the issue of substitutability between these FTA TV and pay TV broadcasting services on the basis of product / service characteristics and their conditions of intended use.
- 3.77 As previously discussed, from a demand-side substitution perspective, ComReg noted key differences in the characteristics of FTA and pay TV services¹¹². ComReg also noted from a supply-side substitution perspective effective supply substitution within a reasonable timeframe is highly unlikely without incurring significant upfront (and potentially sunk) costs¹¹³.
- 3.78 ComReg notes RTÉ's view in paragraph 3.61 above that there is a blurring of retail FTA and pay TV platforms, and this is accelerating owing to increasing convergence with broadcasting and telecoms services being offered on a bundled basis.

¹¹⁰ See paragraphs 5.12 to 5.27 of the BTS Consultation.

¹¹¹ As noted in section 2 of the SMP Guidelines: *"One possible way of assessing the existence of any demand and supply-side substitution is to apply the so-called 'hypothetical monopolist test'. Under this test, an NRA should ask what would happen if there were a small but significant, lasting increase in the price of a given product or service, assuming that the prices of all other products or services remain constant."....."If an NRA chooses to have recourse to the hypothetical monopolist test, it should then apply this test up to the point where it can be established that a relative price increase ... will not lead consumers to switch to readily available substitutes or to suppliers located in other areas."*

¹¹² See paragraphs 5.12 to 5.27 of the BTS Consultation.

¹¹³ Also see paragraphs 5.28 to 5.30 of the BTS Consultation.

- 3.79 However, ComReg is of the view that RTÉ has not offered any substantive evidence to support this claim.
- 3.80 Assessing the product scope of a market can be complicated when suppliers provide a range of services together as a bundled product. The constituents of the package / bundle may not be good substitutes for each other, but may have strong complementarities which contribute to their collective provision.
- 3.81 However, irrespective of whether or not TV services are bundled with other services such as broadband and telephone services, the differences in the demand-side and supply-side characteristics of FTA and pay TV services highlighted in paragraphs 3.76 to 3.77 above remain (i.e. content differences, subscription fee requirements, contract commitments, and coverage limitations).
- 3.82 ComReg also notes a substantial number of cable TV customers (approximately 48%)¹¹⁴ buy their TV services on a standalone basis, while IPTV is currently very limited (to some urban areas) in availability.
- 3.83 Sky has recently entered the telecoms market as a broadband provider. However, its TV services remain satellite based and its bundled broadband and TV offers require a subscription fee. Furthermore, the coverage issues and product differentiation in terms of different content to FTA services and minimum contract requirements as noted in paragraphs 3.76 and 3.77 remain relevant.
- 3.84 Likewise, as part of its fibre roll-out Eircom plans to offer IPTV services, however, Eircom is only now in the process of rolling out its fibre network and is initially targeting urban areas in its current building phase¹¹⁵. Eircom's network roll-out is largely targeted at urban centres and has targeted coverage of 1.2 million homes in 2015¹¹⁶. ComReg considers that IPTV is another form of pay TV services and is of the view that, for the reasons discussed in

¹¹⁴ ComReg Quarterly Questionnaire Data Q1 2013.

¹¹⁵ Eircom has recently announced plans to launch an IPTV service later in 2013. See Eircom press release of 29 February 2013 available at: http://pressroom.eircom.net/press_releases/article/herb_hribar_ceo_eircom_group_addresses_ibec_ceo_conference/. This IPTV service is to be provided over Eircom's FTTC network which is currently being rolled out. Its FTTC network initially serves in the region of 300,000 homes and businesses at its launch in May 2013, and is expected to rise to 1.2 million when the rollout completes in 2015. It is unclear at this time as to the nature of the programme content which is to be made available by Eircom via its proposed IPTV service. Pricing of such services is also unclear; however, such a service is likely to be made available on a paid for subscription basis (whether at an additional cost to an existing service or included in the cost of a subscription to an existing service). Both the timing of the roll-out of Eircom's IPTV service and the nature of its content/pricing will likely impact the degree to which it may be an effective substitute for other subscription based services provided over other platforms. However, while noting Eircom's potential IPTV roll-out, having regard to assessment of demand and supply-substitution in section 3 of this Decision ComReg's position is that in the medium term, retail substitution from the FTA terrestrial platform to other platforms (including IPTV, cable and satellite) is not likely to be sufficient such that it might warrant a broader retail market definition.

¹¹⁶ Eircom wholesale, next generation access website. See <http://www.nextgenerationnetwork.ie/ngn-access>.

paragraphs 3.76 and 3.77 above, for existing consumers of FTA services IPTV is not likely to be an effective substitute to FTA DTT services.

- 3.85 ComReg also notes RTÉ's comments in paragraph 3.62 above that it is technically possible to combine Saorsat (for Irish TV programme services) with other satellite FTA programme services (e.g. which enable the viewing of the TV programme services of other Downstream TV Broadcasters such as BBC) and that Saorsat may become an attractive option to end-users. In the BTS Consultation¹¹⁷ ComReg set out its preliminary view that retail FTA satellite TV services are not likely substitutable to retail FTA terrestrial TV services.
- 3.86 ComReg accepts that it is technically possible for Saorsat satellite services and separate FTA satellite platforms to be received on a single satellite dish and, as noted by RTÉ, this would require the end-user to install a second LNB offset on its existing satellite dish. However, ComReg considers that there are a number of issues which make this difficult and are thus likely to limit its attractiveness to even many existing FTA satellite end-users. To receive both Saorsat and other FTA satellite services, an end-user will need to have:
- A solid satellite dish;
 - A LNB for the Ku-Band (that used by the FTA ASTRA satellite service 'Freesat');
 - A LNB for the Ka-Band (that used by the FTA Eutelsat satellite service 'Saorsat');
 - An appropriate support arm to mount both LNBs on the satellite dish; and,
 - A set top box / TV set that can decode the FTA satellite signals as received at the dish.
- 3.87 The need for the above technical adaptations is also acknowledged by RTÉ / RTÉNL in its Saorsat FAQs document¹¹⁸. It is ComReg's view that all but a few technically competent users would be in a position to safely and correctly install most of the above equipment and, in view of this it would likely require an installation service to do so. On page 20 of RTÉNL's Saorsat FAQs document it is noted that a LNB should cost no more than €35, a satellite dish should also cost no more than €35 and full installation of a new satellite with an LNB for Saorsat should cost a maximum of €200 while a service call to fit a new LNB to an existing satellite dish, redirect the dish and a check over should cost between €70 and €100 (excluding the cost

¹¹⁷ See paragraphs 5.22 to 5.26 of the BTS Consultation.

¹¹⁸ See section 7.2 of RTÉNL document entitled "RTÉNL Saorsat FAQs" dated June 2012, available at <http://www.rtenl.ie/wp-content/uploads/2012/07/RT%C3%89NL-SAORSAT-FAQs-June-2012-Rev-2.0.pdf>

of the LNB). Furthermore, a satellite set top box can cost in the region of €50.

- 3.88 As a consequence of these issues including greater complexity of installation, the need for particular equipment (e.g. solid satellite dish) to view both Saorsat and other FTA satellite signals, along with the additional cost to the end-user of making such changes, ComReg's view is that this is likely to limit the attractiveness of such an option.
- 3.89 ComReg also understands that the take up of Saorsat is minimal at this point in time¹¹⁹. The cost of buying and installing equipment capable of receiving satellite TV services versus terrestrial TV only services is far greater¹²⁰. Given the low take up of Saorsat to date (including relative to Saorview services), retail end-users with existing FTA satellite services who wish to receive all of the Irish terrestrial programme services on a FTA basis would be most likely to employ a combination of non-Saorsat FTA satellite and DTT (Saorview) rather than using the solution proposed by RTÉ (i.e. installing a second LNB onto an existing satellite dish).
- 3.90 Furthermore, as previously noted in paragraph 3.38 there are a number of legislative planning restrictions that apply to the installation of satellite dishes. ComReg notes that RTÉ itself considers its Saorsat service to be a service of last resort and states on its Saorview / Saorsat website¹²¹ that:
- “RTÉNL recommends that each home should exhaust all options for receiving Saorview before reverting to Saorsat”,*
- and that
- “Saorsat is the name given to the infill FTA satellite TV service put in place by RTÉNL to deliver Irish TV services to the 2% of homes that are not covered by Saorview”.*
- 3.91 Saorsat is, therefore, unlikely to materially impact upon retail market dynamics over the period of this BTS Review. Nevertheless, ComReg will continue to monitor the situation.
- 3.92 Having regard to the analysis above, ComReg maintains the position set out in the BTS Consultation that:

¹¹⁹ RTÉ estimate that circa [redacted] homes use Saorsat.

¹²⁰ For example, for those without existing satellite equipment, a satellite / terrestrial combo set top box including associated equipment (e.g. satellite dish etc.) could cost €300 or more to get professionally installed. In contrast, in order to receive Irish terrestrial programme services only, a Saorview approved set top box which can in many cases be used in conjunction with, as applicable, an existing aerial can cost circa €50 to €65. For example, see http://www.satellite.ie/acatalog/Ferguson_ariva_150_installed.html, <http://www.satellite.ie/acatalog/Saorview-RTE-digital-set-top-box.html> and [The Triax TR212S Saorview Box. Ireland's Best Saorview Set Top Box.](#)

¹²¹ See www.saorview.ie/about-saorview/saorsat.

- FTA TV services and Pay TV services fall into separate retail markets; and
- FTA TV satellite services and FTA terrestrial TV services are not considered to be substitutable.

Whether there is a separate product market for retail terrestrial radio services and the geographic scope of the market

- 3.93 ComReg notes that the BAI agreed with ComReg's assessment with respect to retail radio services.
- 3.94 With respect to RTÉ's comment that ComReg's analysis is specifically addressing the national analogue radio market and does not take account of local, regional or quasi-national radio services, in the BTS Consultation¹²², ComReg noted that radio broadcasting licences awarded by the BAI contain coverage requirements delineated at different geographic levels i.e. local / regional and national levels. Furthermore, in view of this, the content provided for local / regional radio services is usually largely (but not solely) related to that specific geographic area, whereas for national radio content tends to be mainly national and international driven. As a terrestrial Downstream Radio Broadcaster's licence is delineated on a geographic basis and, given the difference in the resulting focus of content offered by national and local / regional terrestrial Downstream Radio Broadcasters, ComReg maintains its position that the geographic scope of retail radio broadcasting services can be distinguished at separate national and local / regional levels.
- 3.95 ComReg does not, therefore, agree with RTÉ's view that ComReg's analysis has been focused on the national analogue radio market. With respect to RTÉ's other views, on the underlying nature of wholesale infrastructure / services used to underpin radio broadcast services, this is more appropriately considered in section 4¹²³ of this Decision.

ComReg's Position

- 3.96 Having assessed the issues raised by Respondents in paragraphs 3.65 to 3.95 above, ComReg's position with respect to broadcasting services provided at the retail level is that:
- Pay TV services are not likely to be an effective substitute for FTA TV services;
 - FTA satellite TV services are not likely to be an effective substitute for terrestrial FTA TV services;
 - Retail TV broadcasting services broadcast from other BTS platforms are unlikely to act as an effective constraint on the

¹²² See paragraphs 5.46 to 5.48 of the BTS Consultation.

¹²³ See paragraphs 4.118 to 4.127 of this Decision.

FTA terrestrial TV BTS platform, such that a broader retail market definition is not warranted;

- The geographic scope of retail TV broadcasting services is national;
- 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,
- The geographic scope of retail radio broadcasting services can be distinguished at separate national and local / regional levels.

3.97 Notwithstanding the position above, ComReg does not consider it necessary to come to a definitive conclusion on the scope of the retail TV broadcast market or the retail radio broadcast market. Rather, in ComReg's view, what is important is that all constraints, including indirect constraints at the retail level, are adequately taken into consideration as part of the subsequent assessment in section 4 of this Decision regarding the product / geographic scope of the wholesale market definition and the related competition analysis in sections 5, 6, 11 and 12 of this Decision.

3.98 In this respect, it is also important to take account of the two-sided nature of broadcasting markets. As the value of advertising attained by a Downstream Broadcaster is determined by the number and type of viewers / listeners addressed by that Downstream Broadcaster, Downstream Broadcasters typically use several BTS platforms to distribute their programme services to end-users. Therefore, the precise boundaries of the retail market may not also be directly mirrored at the wholesale level, such that even if a broader retail market were to be identified (for example to include FTA and pay TV services as part of the same retail market), wholesale demand will likely still be driven by a Downstream Broadcaster's desire be present on as many BTS platforms as possible, so long as its incremental costs of doing so are recoverable from the associated advertising revenues gained. In the case of radio broadcasting, though available on multiple BTS platforms, ComReg notes that it is mainly listened to by end-users via terrestrial broadcasting means.

3.99 ComReg will continue to monitor the market over the timeframe of this BTS Review in order to take account of any significant developments should they arise.

4 Wholesale Market Definition

- 4.1 In section 5 of the BTS Consultation¹²⁴, ComReg set out its preliminary views on the definition of the Relevant BTS Markets and invited Respondents' views on such. Below, ComReg considers the views expressed by Respondents and sets out its final position.

Preliminary Views set out in the BTS Consultation

- 4.2 In the BTS Consultation ComReg discussed the Relevant BTS Markets under the headings below.

Terrestrial Broadcasting Supply Chain¹²⁵

- 4.3 As a market review should be forward looking and, given the then impending switchover from analogue terrestrial TV BTS to DTT BTS, in assessing the BTS supply chain, ComReg's starting point in the BTS Consultation was to consider the demand from terrestrial analogue Downstream Radio Broadcasters and Multiplex Operators for wholesale access to terrestrial BTS and the demand from terrestrial Downstream TV Broadcasters for wholesale access to DTT multiplexing services (being the narrowest product set).
- 4.4 In line with ComReg's 2004 Broadcasting Analysis, ComReg's view in the BTS Consultation was that local / regional terrestrial radio BTS was likely to fall into a separate wholesale market but it was also considered one which does not likely satisfy the Three Criteria Test (due to low barriers to entry) - and therefore required no further detailed consideration¹²⁶.

Market A: The Market for Wholesale Access to National Terrestrial BTS¹²⁷

Whether Radio BTS and TV Terrestrial BTS are in the Same Product Market

- 4.5 In ComReg's 2004 Broadcasting Analysis, analogue terrestrial TV and radio BTS were viewed as being in separate wholesale markets.
- 4.6 However, as set out in the BTS Consultation, as a network designed for national DTT BTS would also be able to deliver national terrestrial radio BTS, ComReg considered that a HM¹²⁸ supplier of national terrestrial radio BTS could not therefore, appreciably raise its prices above the competitive level, as it would likely face a sufficient constraint from a national DTT BTS provider. ComReg's

¹²⁴ See paragraphs 5.50 to 5.145 of the BTS Consultation.

¹²⁵ See paragraphs 5.57 to 5.65 of the BTS Consultation.

¹²⁶ See paragraph 5.66, footnote 107 of the BTS Consultation.

¹²⁷ See paragraphs 5.66 to 5.116 of the BTS Consultation.

¹²⁸ See paragraph 5.53 of the BTS Consultation.

proposed position, therefore, was that it is appropriate to conclude that terrestrial DTT and radio BTS should fall within the same wholesale market.

- 4.7 ComReg also noted that a Multiplex Operator's demand for access to BTS is derived from digital Downstream Broadcasters' demand for such access and in this context, the question of wholesale demand-side / supply-side substitution must have regard to the demand from the underlying customer i.e. a terrestrial Downstream TV Broadcaster (such as RTÉ, TV3, TG4).

Demand-Side Substitution¹²⁹

- 4.8 ComReg considered that the two-sided nature of the market¹³⁰ means that alternative BTS platforms (cable, satellite, IPTV etc.) are not likely to be considered by terrestrial Downstream Broadcasters and Multiplex Operators to be effectively substitutable to the terrestrial BTS platform.
- 4.9 However, ComReg also highlighted that there are specific considerations that constrain the ability of terrestrial Downstream Broadcasters from switching their wholesale demand from terrestrial BTS platforms to alternative BTS platforms.
- 4.10 In particular, ComReg noted that the PSB¹³¹ Downstream DTT Broadcasters (RTÉ, TG4) and commercial Downstream DTT Broadcasters (TV3) have statutory / licence obligations of FTA national coverage. ComReg noted that other BTS platforms would only be available on a paid for basis and, in some cases (e.g. cable and IPTV), on a non-national coverage basis.
- 4.11 Although satellite platforms are national in scope, as noted in paragraph 3.38 of this Decision, a significant number of households (38% of TV homes) do not use a satellite reception method¹³². Further, content rights issues mean that Irish Downstream DTT Broadcasters cannot broadcast their DTT programme services on FTA satellite other than Saorsat, which is largely an infill service of last resort used where the DTT (Saorview) platform has no coverage¹³³.
- 4.12 ComReg noted that the ability of national analogue terrestrial Downstream 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

¹²⁹ See paragraphs 5.72 to 5.97 of the BTS Consultation.

¹³⁰ See paragraph 3.98 of this Decision.

¹³¹ See paragraph 3.17 of this Decision.

¹³² This data is sourced from Nielsen TV audience Measurement Establishment Survey on behalf of TAM Ireland Ltd., dated April 2013.

¹³³ In this context RTÉ have indicated that, it's FTA digital satellite service, Saorsat, is primarily aimed at the 1 to 2% of the population who cannot receive its DTT Saorview service.

(where it is freely available nationally, at good quality, and offers mobility). Due to the importance of mobility for radio broadcasting (e.g. in-car radios) and the limited availability of cost effective portable devices for receiving radio reception / services on other BTS platforms, ComReg was of the preliminary view that in response to a SNNIP by an terrestrial radio BTS provider, national analogue terrestrial Downstream Radio Broadcasters would be unlikely to switch in sufficient numbers to alternative broadcasting platforms such that it would effectively constrain the price setting behaviour of the HM supplier. ComReg therefore considered that the terrestrial BTS platform is of significant commercial importance to national analogue terrestrial Downstream Radio Broadcasters so that effective demand-side substitution is unlikely.

- 4.13 Therefore, ComReg's preliminary view was that demand-side substitution to other BTS platforms is unlikely to effectively constrain the price setting behaviour of a HM supplier of DTT or national terrestrial radio BTS.

Supply-Side Substitution¹³⁴

- 4.14 In the BTS Consultation ComReg was of the preliminary view that supply-side substitution needs to be considered having regard to the two-sided nature of broadcasting markets, namely the relationship between audience market share on the one hand and advertising revenues on the other as well as the desire for Downstream Broadcasters to be on as many platforms as possible to maximise this two-sided relationship.
- 4.15 As already noted in paragraph 4.10 above, cable TV and IPTV platforms do not offer national coverage, and the costs of rolling out of such networks are high (and largely sunk).
- 4.16 ComReg also noted that effective satellite supply may be somewhat constrained by planning restrictions as well as jurisdictional restrictions regarding terrestrial Downstream TV Broadcasters' programme content rights¹³⁵.
- 4.17 ComReg considered that in response to a SSNIP by a HM supplier of terrestrial BTS, prompt and effective supply-side substitution is highly unlikely due to significant additional costs involved, potential economic risks associated with entry and time delays.
- 4.18 Furthermore, prompt supply substitution to alternative national terrestrial BTS is unlikely. There is currently only one supplier of terrestrial BTS and new entry is highly unlikely due to the high and (partially) sunk costs of entry associated with such networks as well as other entry barriers associated with the availability of suitable site locations and planning permission requirements.

¹³⁴ See paragraphs 5.98 to 5.102 of the BTS Consultation.

¹³⁵ See paragraph 3.38 of this Decision.

- 4.19 Therefore, ComReg's preliminary view was that supply-side substitution is unlikely to effectively constrain the price setting behaviour of a HM supplier of a national terrestrial BTS network.

Indirect Constraints¹³⁶

- 4.20 ComReg's preliminary view was that, having regard to the retail market assessment in section 4 of the BTS Consultation, indirect constraints are not likely to be sufficient to effectively constrain a HM national terrestrial BTS network supplier, as terrestrial Downstream Broadcasters do not charge a price to end-users for the viewership / listenership of their programme services.
- 4.21 An increase in wholesale prices for BTS, while not being capable of being passed through directly to end-users at the retail level, could potentially affect the scope and nature of content offered by a terrestrial Downstream Broadcaster. This in turn, could impact the terrestrial Downstream Broadcaster's retail audience market share and the related advertising revenues it could command which would likely benefit a vertically integrated HM supplier of terrestrial BTS who also competes in the same or related downstream markets. However, a 5-10% rise in wholesale prices above competitive levels was, in ComReg's view, unlikely to pose an effective constraint on the price setting behaviour of the HM supplier of terrestrial BTS, given that an insufficient number of end-users would be likely to switch to other BTS platforms in response.

Geographic Scope¹³⁷

- 4.22 In the BTS Consultation ComReg noted that national terrestrial Downstream Radio Broadcasters' coverage obligations are set out either in legislation or in their BAI awarded licensed programme service contracts, and as a result require / demand terrestrial BTS on a national basis.
- 4.23 These Downstream DTT Broadcasters, given their statutory / licence coverage requirements, demand access to terrestrial BTS on a national basis.
- 4.24 Given the above, and that the actual national coverage footprint of terrestrial BTS networks (estimated at 98% population coverage), ComReg considered the geographic market to be national in scope.

Overall Preliminary Conclusions on Wholesale Market A Definition¹³⁸

- 4.25 Having regard to the analysis in section 5 of the BTS Consultation and as set out in the overview in paragraphs 4.5 to 4.24 above ComReg proposed to define a market for wholesale access to national terrestrial BTS (referred to as Market A). This is a

¹³⁶ See paragraphs 5.103 to 5.110 of the BTS Consultation.

¹³⁷ See paragraphs 5.111 to 5.114 of the BTS Consultation.

¹³⁸ See paragraphs 5.115 and 5.116 of the BTS Consultation.

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:

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

4.26 Having set out a proposed definition of Market A, ComReg then considered the definition of a separate wholesale market for access to DTT multiplexing services (being Market B). This wholesale market operates downstream to Market A.

Market B: The Market for Wholesale Access to DTT Multiplexing Services¹³⁹

4.27 In light of the move to DTT, ComReg's preliminary view was that a distinct wholesale demand arises in a separate product market which operates downstream from wholesale Market A. That is, a demand from Downstream DTT Broadcasters (such as RTÉ, TV3, TG4) for wholesale access to DTT multiplexing services provided by a DTT Multiplex Operator (being a service which combines programme services material and related and other data in a digital form, and the transmission of such programme material and data so combined for reception by the general public / end-users).

Demand-Side Substitution¹⁴⁰

4.28 Having considered demand-side and supply-side substitutability for Market A as set out in paragraphs 4.8 to 4.19 above, ComReg considered whether any effective demand-side substitutes for a wholesale DTT multiplexing service exist.

4.29 As noted in paragraph 4.7, a Multiplex Operator's demand for access to Market A services is derived from digital Downstream Broadcasters' demand for such access and, in that context, ComReg considered the question of wholesale demand-side substitution from the position of the underlying customer i.e. a Downstream DTT Broadcaster (such as RTÉ, TV3, TG4). The particular statutory / licence commitments of Irish Downstream DTT 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.

¹³⁹ See paragraphs 5.117 to 5.143 of the BTS Consultation.

¹⁴⁰ See paragraphs 5.177 to 5.127 of the BTS Consultation.

- 4.30 ComReg noted that RTÉ is the sole DTT Multiplex Operator in Market B, as there are currently no alternative sources of DTT multiplexing.
- 4.31 Therefore, ComReg's preliminary view was that demand-side substitution to other BTS platforms is unlikely to effectively constrain the price setting behaviour of a HM supplier of a national DTT multiplexing service.

Supply-Side Substitution¹⁴¹

- 4.32 ComReg then assessed whether, in response to a SNNIP by a HM DTT Multiplex Operator in Market B, other firms might be able to switch to the supply of DTT multiplexing services in the short term and without incurring significant costs or risks and whether such supply would effectively constrain the price setting behaviour of the HM DTT supplier (i.e. supply-side substitutability).
- 4.33 ComReg's preliminary view was that within the short to medium term, a Downstream DTT Broadcaster is not likely to be in a position to switch to self-supplying of a DTT multiplexing service (or to a third party entering Market B for the purpose of external supply). In particular, issues such as the process involved in acquiring a DTT multiplex contract and associated costs among others¹⁴², would prevent credible and timely supply side substitution which could effectively constrain a HM DTT multiplexing service supplier's behaviour.

Indirect Constraints¹⁴³

- 4.34 For similar reasons to those discussed in the context of Market A in paragraphs 4.20 and 4.21 above, ComReg's proposed position was that indirect constraints on Market B are not likely to be effective.

Geographic Scope¹⁴⁴

- 4.35 ComReg considered that the factors discussed in the context of Market A in paragraph 4.22 to 4.24 above were equally relevant in the context of Market B. Therefore, ComReg considered the geographic market to be national in scope.

Overall Preliminary Conclusions on Wholesale Market B Definition

- 4.36 Having regard to the analysis in section 5 of the BTS Consultation as set out in the overview in paragraphs 4.27 to 4.35 above, ComReg proposed 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

¹⁴¹ See paragraphs 5.128 to 5.131 of the BTS Consultation.

¹⁴² See paragraphs 5.123 to 5.126 of the BTS Consultation.

¹⁴³ See paragraphs 5.132 to 5.136 of the BTS Consultation.

¹⁴⁴ See paragraphs 5.137 to 5.140 of the BTS Consultation.

DTT Multiplex Operator, using purchased wholesale inputs from Market A, combined with carriage on its own DTT multiplex, then supplies wholesale managed BTS to Downstream DTT Broadcasters thereby enabling the transmission of their DTT broadcasting programme signals to end-users.

BTS Consultation Question(s)

4.37 Having outlined the above proposed definitions of Market A and Market B, ComReg then asked the following question¹⁴⁵.

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

Respondents' Views

Overview

- 4.38 Of the **four responses** received to this question, **three Respondents agreed** (TG4, the BAI, and TV3) with ComReg's wholesale market definition assessment with respect to Market A and Market B. Though not commenting specifically on Question 2 above, in its overall views on the matters considered in the BTS Consultation, **one further Respondent agreed** (Eircom) with ComReg's assessment of the definitions of Market A and Market B.
- 4.39 **One Respondent disagreed** (RTÉ) with ComReg's preliminary conclusions. In addition, **one Respondent did not express specific views** (the Individual Respondent) on Question 2 above (although it was broadly supportive of ComReg's overall preliminary conclusions).
- 4.40 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall assessment.
- 4.41 ComReg considers that Respondents' views mainly focused on issues which can broadly be captured under the themes identified below.
- Whether wholesale Market A and Market B should be in the same wholesale market as other BTS platforms (cable, satellite and IP);
 - Whether Market B is a separate wholesale market to Market A and the description of Market B;
 - The appropriateness of defining a single wholesale market for BTS services (Market A) which provides BTS to national

¹⁴⁵ See Question 2, page 78, of the BTS Consultation.

analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators; and,

- Whether digital terrestrial radio services had received adequate consideration.

4.42 As noted in paragraph 3.56 of this Decision, RTÉ also raised an issue in response to Question 1 concerning the analysis of non-national (i.e. local / regional) analogue radio services which ComReg considered would be more appropriately assessed as part of the wholesale market definition analysis. This issue is considered under the theme.

- Analysis of non-national terrestrial analogue radio services.

4.43 Furthermore, ComReg would note that a number of issues raised by RTÉ in its Submission under Question 2 above were not directly related to matters concerning the market definition assessment and, as such, are more appropriately dealt with elsewhere in this Decision. These issues can be broadly categorised as follows:

- The need for due consideration to be given to whether and how the 2009 Act impacts on *ex ante* regulation by ComReg with respect to its SMP and competition analysis in Market A and in Market B¹⁴⁶;
- A lack of consideration of the effect of current SMP regulatory obligations imposed on RTÉNL in Market A¹⁴⁷; and,
- The proportionality of SMP regulation in Market A and Market B having regard to customer demand and the impact of regulation under the 2009 Act¹⁴⁸.

4.44 ComReg provides further detail below on the main issues raised by Respondents as identified in paragraphs 4.41 and 4.42 above.

Main Issues Raised by Respondents

Whether wholesale Market A and Market B should be in the same wholesale market as other BTS platforms (cable, satellite and IP)

4.45 The BAI agreed with ComReg's view that Market A and Market B are in separate wholesale markets to other BTS platforms stating that there are no meaningful, effective substitutes available that can provide national FTA BTS coverage for terrestrial Downstream Broadcasters.

4.46 TV3 indicated that it also agreed that Market A and Market B are distinct markets to other BTS platforms.

¹⁴⁶ See paragraphs 5.34, and 11.31 of this Decision.

¹⁴⁷ See paragraph 8.318, and 8.319 of this Decision.

¹⁴⁸ See paragraphs 8.320, and, 14.154 of this Decision.

- 4.47 However, RTÉ did not agree with ComReg's preliminary views and, drawing on its comments made in response to Question 1 concerning ComReg's assessment of the retail market¹⁴⁹, indicated that it is not appropriate to limit the scope of wholesale Market A and Market B to terrestrial BTS and DTT multiplexing services only, i.e. suggesting that the wholesale market is broader and should also include other BTS platforms such as cable, satellite and IP.

Whether Market B is in a separate wholesale market to Market A and the description of Market B

- 4.48 TG4, the BAI, TV3 and Eircom agreed with ComReg's wholesale market definition and, as such, that there are two distinct wholesale terrestrial broadcast markets (i.e. Market A and Market B).
- 4.49 RTÉ suggested that it would be more correct to include Market B in Market A. RTÉ then stated that this means that Market B can be considered to be a market downstream from Market A, with Market A services being a wholesale input into Market B.

The appropriateness of defining a single wholesale market for BTS services (Market A) which provides BTS to national terrestrial analogue Downstream Radio Broadcasters and Multiplex Operators

- 4.50 The BAI agreed with ComReg's preliminary views stating that both national TV and radio BTS should be considered as the services received from the same wholesale Market A; given that both require the use of existing high power BTS sites for coverage and efficiency reasons.
- 4.51 RTÉ noted that ComReg had reached a different conclusion in this regard in its 2004 Broadcasting Analysis. RTÉ stated that it is unclear why the previous market definition should not continue to apply.

Whether digital terrestrial radio services had received adequate consideration

- 4.52 RTÉ stated that the position of digital terrestrial radio services was not addressed in the BTS Consultation, indicating that it may be interesting to examine this for the future.

Analysis of non-national analogue terrestrial radio services

- 4.53 Furthermore, as noted in paragraph 3.56 of this Decision, RTÉ was also of the view that ComReg's analysis overly focuses on national analogue terrestrial radio BTS and did not take account of local, regional and quasi-national radio services. RTÉ stated that it would be interesting to consider whether other service providers exist which are also capable of providing BTS to analogue terrestrial Downstream Radio Broadcasters.

¹⁴⁹ See paragraphs 3.59 to 3.62 and 3.64 of this Decision.

ComReg's Assessment of Respondents' Views

4.54 Below, ComReg considers the main issues raised by Respondents in paragraphs 4.45 to 4.53 above and sets out its final position on the product definition of Market A and Market B.

Whether wholesale Market A and Market B should be in the same wholesale market as other BTS platforms (cable, satellite and IP)

4.55 Below, ComReg considers whether terrestrial BTS (upstream Market A) is in a separate wholesale market to other BTS platforms, by analysing demand and supply-side substitution and indirect constraints and, thereafter, ComReg undertakes the same approach in order to determine whether DTT multiplexing services (downstream Market B) should be in a separate market to other BTS platforms.

A) Market A: the Market for Wholesale Access to National Terrestrial Broadcast Transmission Services

4.56 In the BTS Consultation¹⁵⁰ and earlier in this Decision¹⁵¹ ComReg has noted that, in assessing the conditions of competition at the wholesale level, it is necessary to examine the retail market within which services are being provided using the BTS at issue, i.e. retail DTT services and retail terrestrial analogue radio services. This is because demand for these TV and radio BTS is derived from the demand for such retail broadcasting TV and radio services as well as Downstream Broadcasters' desires to satisfy advertisers' demand for access to viewers or listeners.

4.57 In line with the methodology espoused by the European Commission¹⁵², ComReg started its analysis by considering the narrow focal products at the wholesale level (in the case of Market A this is terrestrial BTS) and the corresponding narrow retail service involving the ability of Downstream Broadcasters to provide retail FTA DTT services and / or retail terrestrial radio services.

4.58 ComReg also examined whether these narrow focal product sets should be broadened to include other products or services, by

¹⁵⁰ See paragraphs 5.1 to 5.49 of the BTS Consultation.

¹⁵¹ See paragraph 3.29 and 3.30 of this Decision.

¹⁵² See paragraph 41 of the SMP Guidelines and paragraph 16 of the European Commission's Notice on Market Definition.

taking account of demand and supply-side substitutability considerations at the retail level¹⁵³.

- 4.59 In the BTS Consultation, ComReg noted that a Multiplex Operator's demand for access to wholesale BTS is derived from digital Downstream Broadcasters' demand for such access, and in this context, the question of wholesale demand-side / supply-side substitution needs to be considered having regard to the demand from the underlying customer i.e. a terrestrial Downstream TV Broadcaster (such as RTÉ, TV3, TG4).
- 4.60 As noted in the BTS Consultation and this Decision¹⁵⁴, in the context of the retail market assessment relating to BTS, it is important to note the two-sided nature of broadcasting¹⁵⁵, and that Downstream Broadcasters typically use several BTS platforms to distribute their programme services to end-users. For this reason the precise boundaries of the retail market might not be directly mirrored at wholesale level.
- 4.61 In this regard, existing Irish Downstream DTT Broadcasters (RTÉ, TV3 and TG4) have their TV programme services broadcast from each of the terrestrial, satellite, cable and internet BTS platforms.
- 4.62 Notwithstanding the above, in section 3 of this Decision ComReg has considered whether the FTA terrestrial BTS platform and other BTS platforms are likely to fall within the same retail market and set out its position that, for the purposes of this BTS Review, retail substitution away from the FTA terrestrial BTS platform to other BTS platforms is not likely to be sufficiently effective so as to warrant a broader retail market definition encompassing a number of or all BTS platforms.
- 4.63 Having regard to Respondents' views, ComReg further considers wholesale demand-side and supply-side substitutability considerations and indirect constraints below.

¹⁵³ As noted in paragraph 13 of the European Commission's Notice on Market Definition, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a product, and paragraph 15 notes further that "*the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer*". For two products to be effective demand-side substitutes it is necessary that a sufficient number of customers are not only capable of switching between them, but would actually do so in response to a relative price change. As noted in paragraph 20 of the Commission's Notice on Market Definition, supply-side substitution may also be taken into account where "*suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices*". When these conditions are met, the market may be broadened to include the products that those suppliers are already producing.

¹⁵⁴ See paragraphs 5.74 to 5.77 of the BTS Consultation and paragraph 3.98 of this Decision.

¹⁵⁵ This was noted in the European Commission's Explanatory Note. The nature of two-sided markets has been discussed in various pieces of literature. For example, Tilburg Law and Economics Centre Discussion Paper, Identifying Two-Sided Markets, Tilburg University, February 2012 and Mobile Call Termination: a Tale of Two-Sided Markets, Imperial College London, University of Rome "Tor Vergata" and CEPR, Tommaso Valletti, Communications Strategies, no. 61, 1st quarter 2006.

DTT Demand-Side Substitution

- 4.64 In the BTS Consultation, in the context of wholesale demand, ComReg noted¹⁵⁶ that there are a number of specific considerations that constrain the ability of national analogue terrestrial Downstream Radio Broadcasters and terrestrial Downstream TV Broadcasters from switching their wholesale demand for terrestrial BTS to wholesale services provided on other BTS platforms.
- 4.65 In this regard, terrestrial Downstream TV Broadcasters (RTÉ, TG4 and TV3) have statutory / licence obligations which effectively prevent them from switching to other alternative BTS platforms (i.e. cable, satellite and internet). RTÉ and TG4 are required under the 2009 Act¹⁵⁷ to be available, as much as reasonably is possible, to the whole community of Ireland on a FTA basis. Similarly, TV3 is required¹⁵⁸ to be available on a FTA basis to a large percentage of the population (circa 90%).
- 4.66 From a wholesale demand-side perspective, ComReg is of the view that, notwithstanding the two-sided nature of the market, satellite, cable and internet BTS are not an effective substitute for terrestrial BTS given terrestrial Downstream TV Broadcasters statutory / licence FTA and coverage obligations.
- 4.67 As stated in the BTS Consultation¹⁵⁹, although UK TV programme services, among others, can be viewed in Ireland via FTA unencrypted satellite services, Irish DTT programme services such as those offered by RTÉ, TG4 and TV3 are not broadcast from these FTA satellite services, mainly given the coverage footprint of such FTA satellites (which extends beyond the Irish market and into other European countries for example) and owing to restrictions relating to the broadcast of certain content rights in non-Irish jurisdictions¹⁶⁰. As such, ComReg does not consider these FTA satellites services to be a viable terrestrial BTS substitute for TG4, TV3 and RTÉ. ComReg also notes that Irish DTT programme services are available via BSkyB's pay TV service in Ireland only,

¹⁵⁶ See paragraphs 5.78 to 5.81 of the BTS Consultation.

¹⁵⁷ Pursuant to sections 114 and 118 of the 2009 Act, RTÉ and TG4 have, amongst other things, statutory objectives to operate a national free to air broadcasting TV service. Broadcasting Act 2009. See <http://www.irishstatutebook.ie/2009/en/act/pub/0018/index.html>

¹⁵⁸ Pursuant to section 70 of the 2009 Act the BAI has entered into a contract with TV3 and accordingly TV3 has a duty, subject to the terms of its TV programme service contract (with the BAI) and requirements under the 2009 Act to make its TV programme services available on a national FTA basis.

¹⁵⁹ See paragraphs 5.82 to 5.90 of the BTS Consultation.

¹⁶⁰ According to RTÉ's website, "*The channels couldn't be made available on the Astra 28 satellite as this satellite has a broadcast footprint beyond Ireland (all of UK, parts of Europe). Irish channels do not have the rights to broadcast into the UK and Europe. Had these channels been on this platform it would therefore have put Irish broadcasters in breach of copyright and broadcast license agreements and resulted in increased costs for acquired programmes and home produced programmes. The Irish channels (with the exception of TV3) are available via satellite on SAORSAT*" (viewed March 2013). See [RTÉ's Saorview website www.saorview.ie](http://www.saorview.ie).

but are offered as part of its encrypted pay TV service and would not meet RTÉ's, TG4's and TV3's requirements to broadcast their services on a FTA basis.

- 4.68 As noted in the BTS Consultation¹⁶¹, one satellite service is now available with a specific spot beam focused on Ireland which could, in theory, overcome such broadcast content rights issues. This satellite service is the platform used by RTÉ and TG4 to broadcast their DTT programme services via satellite (i.e. under the Saorsat brand) and is primarily used by these parties to reach the 1-2% of the Irish population who are not able to receive DTT (in this context, it is effectively an 'infill'¹⁶² service of last resort, although it can be received by any consumer having the relevant equipment).
- 4.69 Insofar as cable BTS is concerned, this is currently sold to end-users only on a paid for basis and are more limited in coverage in comparison to the terrestrial BTS platform. In this respect, it is estimated that as of Q1 2013 approximately 53% of total households in Ireland were passed with a TV connection by cable operators¹⁶³ although approximately 25% of TV homes actually subscribe to a cable TV service¹⁶⁴. Given the more limited coverage of the cable BTS platform and noting the licensing obligations (e.g. coverage and FTA transmission) of TG4, TV3 and RTÉ, it is ComReg's position that, cable BTS is not likely to be considered as an effective substitute by terrestrial Downstream TV Broadcasters.
- 4.70 ComReg also notes that although TV broadcasting programme content can be viewed via the internet in a non-linear format, this is not, in ComReg's view, comparable to the viewing of linear TV services. Unlike other BTS platforms, the 'public' internet is an unmanaged service which can suffer from degradation, due to internet quality issues¹⁶⁵. As such ComReg does not view the unmanaged public internet to be an effective substitute to terrestrial BTS.
- 4.71 However, IPTV services could be considered to be another BTS platform for the broadcast of retail TV services. Currently there are very few households in Ireland with a subscription to IPTV

¹⁶¹ See paragraphs 4.12 and 5.85 of the BTS Consultation.

¹⁶² "Saorsat is the name given to the new infill Free-To-Air Direct-To-Home satellite television service put in place by RTÉNL to deliver the Irish television services to the 1% to 2% of homes that are not covered by the SAORVIEW Digital Terrestrial Television service". Saorsat FAQs, RTÉNL, dated June 2012. See <http://www.rtenl.ie/wp-content/uploads/2012/07/RT%C3%89NL-SAORSAT-FAQs-June-2012-Rev-2.0.pdf> and Saorsat news (dated May 2012) <http://www.saorview.ie/news/saorsat/>.

¹⁶³ Note that included in this number are homes who have installed equipment capable of receiving MMDS signals. ComReg Quarterly Questionnaire Q1 2013.

¹⁶⁴ Data as of April 2013 sourced from Nielsen TV Audience Establishment Measurement Survey on behalf of TAM Ireland Ltd.

¹⁶⁵ According to Ovum, Internet TV is delivered predominantly to PCs but can also be directly to TVs, however, viewing internet TV directly through TV sets is not a widespread means of viewership. However, See Ovum, Pay TV subscriptions and revenues forecast, 2012 -17, www.ovum.com

services¹⁶⁶. Due to supply side issues (e.g. high cost of network roll out, lack of adequate coverage etc.) and given that this is not currently a predominant means of TV access by end-users¹⁶⁷, it is considered by ComReg to be unlikely that it will be a sufficiently attractive alternative BTS proposition for terrestrial Downstream TV Broadcasters in the timeframe of this BTS Review. In any event, ComReg notes that IPTV generally operates on a pay basis which would restrict RTÉ, TV3 and TG4 from switching to this means of BTS given their statutory / licence requirements to be available on a FTA basis.

National Analogue Radio Demand-Side Substitution

- 4.72 ComReg would note that while satellite services can technically offer a potential alternative means of BTS for Downstream Radio Broadcasters, a listener (consumer) would be required to purchase a satellite receiver to receive a radio signal by such means. There has been limited demand for such receivers in Ireland to date and, in ComReg's view this situation is unlikely to change within the timeframe of this BTS Review¹⁶⁸. Furthermore, it is also unclear to ComReg how the demand for radio services consumed by listeners on the move (e.g. in their vehicles) could be effectively (i.e. within a short timeframe without incurring significant costs) met were satellite BTS to be used as an alternative for terrestrial radio BTS.
- 4.73 As noted in the BTS Consultation¹⁶⁹, the provision of retail radio services over the cable BTS platform is not likely to be considered by terrestrial Downstream Radio Broadcasters to be an effective substitute for the terrestrial BTS platform (owing to subscription costs, the need for additional equipment such as a set top box, a lack of mobility, and coverage limitations compared to terrestrial

¹⁶⁶ Magnet Networks Limited provides an IPTV service as part of a bundled package and Eircom have also recently announced plans to launch an IPTV service later in 2013. See Eircom press release of 29 February 2013 available at: http://pressroom.eircom.net/press_releases/article/herb_hriar_ceo_eircom_group_addresses_ibec_ceo_conference/

This IPTV service is to be provided over Eircom's FTTC network which is currently being rolled out. Its FTTC network initially serves in the region of 300,000 homes and businesses at its launch in May 2013, rising to 1.2 million when the rollout completes in 2015. Both the timing of the roll-out of Eircom's IPTV service and the nature of its content/pricing will likely impact the degree to which it may be an effective substitute for other subscription based services provided over other platforms. However, while noting Eircom's potential IPTV roll-out, having regard to assessment of demand and supply substitution in section 3 of this Decision ComReg's proposed position is that in the medium term, retail substitution from the FTA terrestrial platform to other platforms (including IPTV, cable and satellite) is not likely to be sufficient such that it might warrant a broader retail market definition.

¹⁶⁷ IPTV is currently not nationally available. Informa Telecoms and Media estimate that circa 2% of TV homes in Ireland have IPTV, Global IPTV forecasts, 2005 -2016, Informa Telecoms and Media.

¹⁶⁸ In response to a ComReg broadcasting questionnaire issued in May 2010 Downstream Radio Broadcasters stated that digital radio broadcasting in Ireland faces a number of issues which include a lack of certainty of technology that will be employed in Ireland and a lack of consumer awareness and demand for digital radio services among others.

¹⁶⁹ See paragraph 5.91 to 5.93 of the BTS Consultation.

BTS). Retail demand for cable broadcasting services is predominantly driven by the demand for TV broadcasting content, with the listenership of radio via cable being low. Consistent with ComReg’s 2004 Broadcasting Analysis, ComReg’s position is that radio broadcasting services supplied over the cable BTS platform are not likely to be considered by terrestrial Downstream Radio Broadcasters to be an effective substitute to national FTA terrestrial radio BTS.

- 4.74 Given the lack of comparable mobility of radio broadcasting over the internet and potential quality issues in an unmanaged public internet context, ComReg considers that it is unlikely to be regarded as an effective substitute to terrestrial supply by listeners and, in turn, an attractive substitute platform by terrestrial Downstream Radio Broadcasters. ComReg consumer surveys (while noting this data is a number of years old) and more recent Eurostat data¹⁷⁰ indicate that the internet is not a frequently used access means, particularly compared to terrestrial listenership, in Ireland. Though use of such services may increase in the future, it is unlikely that such services will become a significant alternative access means to traditional terrestrial radio services in the timeframe of this BTS Review.

DTT and National Analogue Radio Supply-Side Substitution

- 4.75 As DTT and national analogue terrestrial radio are broadcast from the same terrestrial BTS network ComReg considers the issue of supply side substitutability for both DTT and national analogue terrestrial radio together below.

- 4.76 As noted in the BTS Consultation¹⁷¹, from a supply-side substitutability perspective, it is also ComReg’s position that neither satellite nor cable nor internet BTS are likely to be an effective substitute for either TV or radio terrestrial BTS. In this context, ComReg examined whether any suppliers not currently active within the terrestrial BTS market would, within the short term, enter the market without incurring significant additional costs or risks in response to a SSNIP in prices. Supply-side substitution is considered where

“Its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy”¹⁷².

- 4.77 In the BTS Consultation, ComReg noted that neither cable nor IPTV provide the same level of coverage as terrestrial BTS. The barriers to entry and expansion arising from the costs of building or

¹⁷⁰ ComReg Consumer ICT Survey, Q4 2008 (Doc. 09/07).

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

¹⁷¹ See paragraphs 5.98 to 5.102 of the BTS Consultation.

¹⁷² See paragraph 20 of the European Commission’s Notice on Market Definition.

expanding a network capable of providing similar coverage to that provided by terrestrial BTS would likely be high, with such costs also mostly being sunk. In terms of satellite, as has been mentioned in paragraph 3.38 of this Decision, planning restrictions and demand-side factors limiting the ability of end-users to take up such services means that effective entry is not credible in the timeframe of this BTS Review.

- 4.78 Furthermore, such cable, IPTV and some satellite networks¹⁷³ operate under a pay subscription basis and would have to be willing to supply terrestrial Downstream TV Broadcasters on the basis that the services would be provided on a FTA basis to end-users given Irish terrestrial Downstream TV Broadcasters' statutory / licence commitments for such.
- 4.79 National terrestrial radio programmes services are also freely available and allow for mobility to end-users via terrestrial means unlike other BTS platforms.
- 4.80 It is ComReg's position that it is unlikely that alternative BTS platforms (such as cable, satellite and Internet) could credibly switch to supplying terrestrial Downstream Broadcasters on a FTA basis and with comparable coverage levels to terrestrial BTS (sufficient to meet these terrestrial Downstream TV Broadcasters' legal requirements) without incurring significant additional costs, risks and time delays.
- 4.81 Prompt or effective supply-side substitution through the entry of a new terrestrial network is highly unlikely due to the high entry costs associated with building such networks, much of which would be sunk in the case of market exit. Other barriers to entry include difficulty in finding suitable sites to enable terrestrial BTS on a national scale, and the likely difficulty of getting planning permission to do so (either at all or in a timely fashion). Therefore, ComReg's position is that effective supply-side substitution is unlikely to effectively constrain a HM supplier of terrestrial radio and TV BTS.

Indirect Constraints on DTT and National Analogue Radio BTS

- 4.82 As DTT and national analogue radio are broadcast from the same terrestrial BTS network ComReg considers the issue of indirect constraints for both DTT and national analogue radio together below.
- 4.83 Having regard to the approach outlined in the EU Commission's 2010 Communication, in the BTS Consultation¹⁷⁴ ComReg also subsequently considered whether indirect constraints from the retail

¹⁷³ For the reasons noted in paragraphs 4.67 and 4.68 of this Decision with the exception of the satellite spot beam from which Saorsat operates RTÉ, TG4 and TV3 programme services are not available via FTA satellites.

¹⁷⁴ See paragraphs 5.103 to 5.110 of the BTS Consultation.

market might impact on the price setting behaviour of a HM supplier of terrestrial BTS.

- 4.84 ComReg's position remains that indirect constraints are not likely to be sufficient in terms of effectiveness of their constraint on a HM supplier of terrestrial BTS, particularly given that neither national analogue terrestrial Downstream Radio nor terrestrial Downstream TV Broadcasters' programme services are made available to end-users on a pay basis (and as such end-users are effectively insulated from any pass through of wholesale price increases into retail prices).
- 4.85 Were terrestrial BTS charges to be raised above competitive levels, assuming that terrestrial Downstream Broadcasters (such as TV3 or TG4) were to try to offset, either partially or fully, this price increase by seeking to pass it through to their advertisers in the form of higher advertising charges, it would, in ComReg's view, likely benefit the downstream arm of a vertically integrated HM supplier of such terrestrial BTS. This is because such advertisers may switch their purchases of advertising to the vertically integrated HM's own downstream arm (which would not itself face the wholesale price increase or need for an increase in its advertising rates).
- 4.86 Furthermore, to the extent that a terrestrial Downstream Broadcaster could not pass through increases in its wholesale charges to advertisers, its own costs would be raised. In turn, the acquisition of programme content, for example, could suffer, which may also result in a degradation of its programme services and, in turn, may impact its viewership / listenership (and consequently impact on its advertising revenues).
- 4.87 However, notwithstanding the above potential effects, as discussed in the BTS Consultation¹⁷⁵, overall, a SSNIP in terrestrial BTS is unlikely to result a sufficient number of end-users switching their consumption of retail FTA terrestrial broadcast services to an alternative TV platform (such as cable, IPTV etc.) such that it would effectively constrain the behaviour of a HM of a national terrestrial BTS network.
- 4.88 In terms of radio, the ability of national terrestrial Downstream Radio Broadcasters to switch to alternative platforms is likely to be significantly limited given that terrestrial radio access is the predominant method of access to such services (i.e. as it is freely available nationally, of good quality, and offers end-users mobility)¹⁷⁶. Given the likely importance of mobility for end-users of

¹⁷⁵ See paragraphs 5.108 to 5.109 of the BTS Consultation.

¹⁷⁶ Most end-users accessing radio via terrestrial means primarily through a radio set or in car radio. Although a number of years old, a ComReg consumer survey indicated that listening to the radio via a radio set was the most popular means of access (81%), followed by listening via car radio (48%). A 2009 BAI report also highlighted that listenership via devices other than through fixed radio set (88%) and car radio (87%) is low.

radio broadcasting services and the limited availability of portable devices / equipment for using platforms other than terrestrial BTS, it is unlikely that national analogue terrestrial Downstream Radio Broadcasters would switch from terrestrial BTS.

ComReg's Position

4.89 Overall, therefore, it is ComReg's position that terrestrial Downstream Broadcasters and Multiplex Operators are not likely to consider cable, IP or satellite BTS to be an effective substitute for terrestrial BTS.

B) Market B: The Market for Wholesale Access to DTT Multiplexing Services

4.90 ComReg has considered demand-side and supply-side substitutability for terrestrial BTS in paragraphs 4.64 to 4.74 above. ComReg now considers below whether any effective demand-side substitutes for a DTT multiplexing service exist (i.e. Market B).

Demand-Side Substitution

4.91 As noted in paragraph 4.59 above, a DTT Multiplex Operator's demand for access to wholesale DTT BTS is derived from Downstream DTT Broadcasters' demand for such access and, in that context, ComReg considered the question of wholesale demand-side (and supply-side) substitution from the position of the underlying customer i.e. a Downstream DTT Broadcaster (such as RTÉ, TV3, TG4). The particular statutory / licence obligations of Irish terrestrial Downstream TV Broadcasters (FTA national coverage) in effect, prevent them from having the ability to credibly switch from the existing FTA DTT multiplexing service platform as there are not currently any effective alternative sources of supply of DTT multiplexing services (RTÉ being the sole FTA DTT Multiplex Operator).

4.92 Therefore, ComReg's position is that demand-side substitution to other BTS platforms is unlikely to effectively constrain the price setting behaviour of a HM supplier of a national FTA DTT multiplexing service.

Supply-Side Substitution

4.93 Having considered demand-side substitutability for DTT multiplexing services, ComReg assessed whether, in response to a SNNIP by a HM DTT Multiplex Operator, other firms might be able to switch to the supply of DTT multiplexing services in the short term and without incurring significant costs or risks and whether such supply

"Consumer ICT Survey", ComReg Document No. 09/07, dated February 2009. See <http://www.comreg.ie/fileupload/publications/ComReg0907.pdf>

"Digital Radio for Ireland: Competing Options Public Expectations", BAI, dated September 2009. See http://www.bci.ie/documents/digital_radio_final_report_2509.pdf.

would effectively constrain the price setting behaviour of the HM DTT supplier i.e. supply side substitutability.

4.94 For the reasons discussed below ComReg's position is that in the short to medium term, a Downstream DTT Broadcaster is not likely to be in a position to switch to self-supplying a DTT multiplexing service nor to a third party entering Market B for the purpose of external supply such that it would sufficiently constrain a HM DTT multiplexing service supplier's pricing behaviour. This includes:

- The likely process of obtaining a commercial DTT multiplex licence from the BAI (via a tendering process) and the timings for any such commercial DTT multiplex contract award¹⁷⁷;
- The differing business model of Downstream DTT Broadcasters and DTT Multiplex Operators, whereby on the one hand the Downstream DTT Broadcaster is mainly interested in availing of wholesale carriage of its own programme services from a DTT Multiplex Operator in order to reach end-users, typically earning revenues on the basis of advertising (the value of which is related to its viewership). On the other hand, a DTT Multiplex Operator is a wholesale supplier of its own and / or third party Downstream DTT Broadcasters' programme services earning its revenues from the provision of its wholesale DTT multiplexing services, and / or advertising and end-user subscription service if the DTT Multiplex Operator has its own programme services and or operates on a pay TV basis;
- The costs to develop a DTT multiplexing service would likely be much higher for a Downstream DTT Broadcaster than the costs it would incur for the carriage of its own DTT programme service on a third party DTT multiplex (particularly where legal obligations of FTA national coverage apply);
- The complexity and possible co-ordination issues in terms of entry as a business partnership (e.g. finding suitable business partners, developing business plans etc.) where it is likely that entry would be contingent on being in a consortium; and,
- The potential switching costs involved whereby Downstream DTT Broadcasters with existing contractual arrangements with a HM supplier may not be readily in a position to switch to an alternative Multiplex Operator within a prompt timeframe and without incurring costs.

¹⁷⁷ See paragraphs 4.42 and 5.123 of the BTS Consultation. ComReg notes the BAI has (as of Q2 2013) appointed a consultant to conduct a review of the potential for commercial DTT in Ireland and the BAI are due to consider the outcomes at a meeting in late 2013.

- 4.95 Therefore, ComReg's position is that supply-side substitution is unlikely to effectively constrain the price setting behaviour of a HM supplier of a national FTA DTT multiplexing service.

Indirect Constraints

- 4.96 For similar reasons to those discussed in the context of Market A in paragraph 4.82 to 4.89 above, ComReg's position is that indirect constraints on Market B are not likely to effectively constrain the price setting behaviour of the HM supplier of a national FTA DTT multiplexing service.

ComReg's Position

- 4.97 Overall, it is ComReg's position that cable, IP or satellite BTS are not likely to be an effective substitute for a national FTA DTT multiplexing service.

Whether Market B is in a separate wholesale market to Market A and the description of Market B

- 4.98 RTÉ stated that it is inappropriate to delineate Market A and Market B as separate markets.
- 4.99 However, ComReg notes that RTÉ stated that Market B can be considered to be a market downstream from Market A, with Market A services a wholesale input into Market B¹⁷⁸. This is, in effect, the description of Market B which ComReg outlined in the BTS Consultation but, for clarity, details this position below.
- 4.100 In section 5 of the BTS Consultation ComReg appropriately considered demand-side and supply-side substitution and indirect constraints and, in so doing, defined two distinct wholesale terrestrial BTS markets.
- 4.101 Market A is a wholesale market where an upstream terrestrial BTS 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:
- The broadcast of national analogue terrestrial radio signals to end-users; and,
 - The broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end-users.
- 4.102 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 Downstream DTT Broadcasters enabling the transmission of their DTT broadcasting signals to end-users.

¹⁷⁸ See paragraphs 2.4 and 2.6, pages 15 and 16 of RTÉ's Submission.

- 4.103 In the BTS Consultation, in defining Market B as being a separate wholesale market that is downstream from Market A, ComReg noted that in an analogue terrestrial broadcasting environment, a Downstream Broadcaster, providing downstream TV and radio services in retail markets, purchased wholesale services directly from the terrestrial BTS network provider operating in Market A. However with the advent of DTT, the TV programme signals received from Downstream DTT Broadcasters must now be multiplexed through the use of DTT multiplex equipment, prior to then being transmitted and distributed via the BTS network. To legally operate, a DTT Multiplex Operator requires a spectrum licence (PSB DTT) or contract (commercial DTT)¹⁷⁹. A Downstream DTT Broadcaster (e.g. RTÉ, TV3, and TG4) then needs to negotiate with the licensed / contracted DTT Multiplex Operator, who uses Market A inputs to transmit the multiplexed broadcasting signals in order to have its DTT programme signal transmitted to end-users.
- 4.104 ComReg's position is that, having regard to the demand-side and supply-side analysis carried out in the BTS Consultation (including differences in the nature of entry barriers to each of the above markets), and having considered Respondents' views, it remains appropriate to identify these two distinct wholesale terrestrial BTS markets.

ComReg's Position

- 4.105 Therefore, ComReg's position is that, having regard to its assessment in paragraphs 4.98 to 4.104 above, it is appropriate to maintain the definition of two separate wholesale terrestrial markets i.e. Market A and Market B fall within separate markets.

The appropriateness of defining a single wholesale market for BTS services (Market A) which provides BTS to national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators

- 4.106 Insofar as RTÉ's comments are concerned in relation to differences between the market definition conclusions in the 2004 Broadcasting Analysis and the current BTS Review, in the BTS Consultation¹⁸⁰ ComReg noted that the 2004 Broadcasting Analysis concluded that there was a separate wholesale national analogue terrestrial radio BTS market and wholesale analogue terrestrial TV BTS market on the basis that (amongst other things), from a supply-side

¹⁷⁹ Section 132 of the 2009 Act provides that ComReg must, at the request of RTÉ, issue at the request of RTÉ, up to two DTT multiplex licence(s) and, separately, at the request of the BAI, issue to the BAI at least four DTT multiplex licences. The BAI may then enter into DTT multiplex contracts with DTT Multiplex Operators (which contracts are likely to be commercial in nature) in relation to these licences.

Part of RTÉ's PSB objects include "...to establish, maintain and operate one or more national multiplexes." For the purposes of this Decision RTÉ multiplexes are hereafter typically referred to as 'PSB Multiplexes'. ComReg typically refer to multiplexes other than RTÉ's PSB multiplexes, as 'Commercial Multiplexes'.

¹⁸⁰ See paragraph 5.67 of the BTS Consultation.

perspective, different equipment / network elements were used for the provision of such services (i.e. separate transmitters and antenna systems were used for analogue terrestrial radio and TV BTS).

- 4.107 However, in the current BTS Review, ComReg noted that a terrestrial BTS network designed for TV BTS would also be able to support the delivery of radio BTS owing to the structure of the TV BTS network, in particular, high towers, masts and associated facilities. In this regard, ComReg stated in the BTS Consultation¹⁸¹ that a HM supplier of national terrestrial radio BTS could not likely raise its prices by a small but significant amount above the competitive level, as an undertaking providing terrestrial TV BTS could, within a reasonable time period, likely commence the supply of radio BTS through the use of existing masts / towers and associated facilities and compete for such radio customers (thereby placing an effective constraint on the HM's pricing behaviour through supply-side substitution).
- 4.108 ComReg remains of the view that, on this basis, it is reasonable and legitimate to conclude that terrestrial TV and radio BTS fall within the same wholesale market and no further narrowing or separation of the Market A definition on these aspects is required.
- 4.109 Furthermore, ComReg notes that what ultimately matters is that all potential demand-side and supply-side substitutes are taken into consideration as part of ComReg's analysis. Such constraints were considered in the BTS Consultation and also in this Decision.
- 4.110 ComReg noted in paragraph 5.69 of the BTS Consultation that to the extent any competitive nuances need to be taken into account in the terrestrial BTS Market(s); these would be reflected in the subsequent SMP and competition analysis, notwithstanding the Market A definition including wholesale radio and TV BTS.
- 4.111 Having considered such competition and SMP analysis in section 7 of the BTS Consultation, and as will later be assessed in section 6 of this Decision, ComReg is of the view that given the characteristics and assessment of the competitive dynamics of national terrestrial BTS in Ireland (BTS network supply by RTÉNL who is a vertically integrated monopoly supplier of such services), if ComReg were to define a separate national terrestrial analogue radio BTS market and a separate terrestrial TV BTS market as it did in its 2004 Broadcasting Analysis, its subsequent SMP (as per section 7 of the BTS Consultation and later in section 6 of this Decision) assessment would remain unchanged.

¹⁸¹ See paragraphs 5.69 of the BTS Consultation.

ComReg's Position

4.112 Having assessed the issues raised by Respondents, ComReg is of the view that at the wholesale level it is appropriate to define Market A as a wholesale national terrestrial market for both terrestrial radio and TV BTS (i.e. for the supply of BTS to national analogue terrestrial Downstream radio Broadcasters and DTT / sound Multiplex Operators).

Whether digital terrestrial radio services had received adequate consideration

4.113 In terms of RTE's opinion that the position of digital terrestrial radio services is not addressed in the BTS Consultation, ComReg would note that this matter was addressed in the BTS Consultation¹⁸².

4.114 In this regard, ComReg set out its view that, on a forward looking basis, a sound broadcasting Multiplex Operator could purchase wholesale BTS provided under Market A.

4.115 However, ComReg noted in the BTS Consultation that, unlike the switchover from to DTT, plans or potential plans for the launch of independent commercial national digital terrestrial radio services are not expected in the coming years. Terrestrial radio broadcasting will likely, therefore, continue to be carried primarily as analogue radio for the foreseeable future.

4.116 In that context, ComReg's position is that, while sound broadcasting multiplexing services notionally operates downstream from Market A, ComReg does not intend, at this time, to define a separate sound broadcasting multiplexing services market. ComReg notes that a Market B supplier of DTT multiplexing services could also supply wholesale digital sound broadcasting services on the same DTT multiplex. ComReg intends to keep this matter under review having regard to potential developments in the market.

ComReg's Position

4.117 Having considered RTE's views above, ComReg's position is that a sound broadcasting Multiplex Operator could purchase wholesale BTS provided under Market A. While noting that wholesale sound broadcasting multiplexing services notionally operates in a downstream market from Market A (in a similar manner that wholesale Market B operates downstream from Market A), ComReg does not consider it necessary or appropriate, at this time, to define a separate downstream sound broadcasting multiplexing services market but ComReg intends to keep this matter under review as appropriate.

¹⁸² See paragraphs 5.116 and 5.117 of the BTS Consultation.

Analysis of non-national analogue radio services

- 4.118 As previously mentioned in paragraph 4.42 above RTÉ stated that the analysis of Market A does not take account of local and regional analogue radio services or the quasi-national Newstalk radio services.
- 4.119 In the BTS Consultation¹⁸³, ComReg stated that it is of the view that, in line with findings in its previous 2004 Broadcasting Analysis non-national terrestrial radio BTS which are provided on a local or regional basis are in a separate market, and such a market does not satisfy the Three Criteria Test (largely due to low barriers to entry). Therefore, it was not considered further in the BTS Consultation in this context.
- 4.120 ComReg would note that terrestrial Downstream Radio Broadcasters enter into a contract with the BAI for the supply of radio services in a defined radio service area which can be local / regional or national. Terrestrial Downstream Radio Broadcasters purchase or self supply (in some cases using access to third party infrastructure) local / regional or national BTS on the basis of this BAI contract. National terrestrial Downstream Radio Broadcasters, as well as purchasing BTS from RTÉNL, may also broadcast their radio programme services from a number of localised and individual third party BTS sites. However, ComReg is of the view that the availability and effective sufficiency of these third party BTS sites to provide for national terrestrial radio BTS is not such that it would sufficiently constrain the price setting behaviour of a HM supplier of a national terrestrial radio BTS provider.
- 4.121 In this respect, ComReg would note that the national terrestrial BTS network operated by RTÉNL¹⁸⁴ has masts located in a number of key high altitude sites around Ireland which enable large population coverage which, in ComReg's view is not likely to be capable of being easily replicated within at least the short to medium term. For cost and efficiency a BTS network is typically designed to give the maximum possible coverage of the target population with a minimum number of broadcast transmission sites. This requires selecting suitable high altitude sites (such as hills or mountain tops) which can yield the greatest coverage of the population. Absence such a national terrestrial network, achieving national radio coverage would not likely be feasibly addressed within a reasonable timeframe.
- 4.122 In the BTS Consultation, ComReg noted that due to significant differences between local and national BTS networks, there are complex technical barriers which would have to be overcome by

¹⁸³ See paragraph 5.66, footnote 107 of the BTS Consultation.

¹⁸⁴ National analogue terrestrial radio broadcasting services are achieved from a lower number of BTS sites than those used for national DTT.

local terrestrial BTS operators before they could collectively provide a BTS which would be capable of being an effective substitute for the national terrestrial BTS network operated by RTÉNL. Moreover, it is unlikely that such local radio networks would be able to compete with a radio BTS network that is leveraged off a network of high towers which has also been built to cater for the broadcast transmission of TV broadcasting services as economies of scale and scope mean that such a network would be better able to compete effectively for national analogue Downstream Radio Broadcasters.

- 4.123 In the BTS Consultation, ComReg also considered the potential to offer BTS via existing sites used by, for example, mobile telecommunications networks. However, ComReg considered that such services would not be sufficient to constrain RTÉNL. It is also unclear whether the level of coverage currently available via RTÉNL's network could be achieved through this means in any event.
- 4.124 ComReg notes that Newstalk operates on a quasi-national licensed basis, and uses a number of third party masts / towers for some of its coverage but nonetheless it requires access to RTÉNL's BTS network in order to achieve its quasi-national terrestrial radio coverage requirements. As noted by the BAI in its response¹⁸⁵ to the BTS Consultation, with the exception of Newstalk, which is planned for 'mono' reception on a quasi-national basis, all national terrestrial Downstream Broadcasters have contractual arrangements with RTÉ / RTÉNL for a fully managed BTS solution. Nevertheless, the BAI noted that Newstalk requires the use of a number of RTÉNL BTS facilities to ensure adequate reception and that the hybrid BTS network (local radio, telecommunications and RTÉNL BTS sites) used by Newstalk is very much an exception due to frequency planning¹⁸⁶, financial and other technical restraints. ComReg shares this view. For the avoidance of doubt, and as noted in the BTS Consultation, quasi-national analogue terrestrial radio services such as Newstalk fall within the scope of those customers¹⁸⁷ to whom RTÉ is required to provide access to regulated Market A BTS.
- 4.125 ComReg notes that RTÉ stated in its Submission¹⁸⁸ that:

¹⁸⁵ See response to Question 2, page 2, of the BAI's Submission.

¹⁸⁶ Newstalk became a quasi-national service in 2006, using frequencies in the 106-108MHz part of the FM band. The BAI and ComReg devised a frequency plan using a mixture of RTÉ and local transmitter sites to support Newstalk's quasi-national coverage requirements. This frequency plan had to be agreed with the UK NRA Ofcom to ensure that the Newstalk broadcast sites did not interfere with UK services.

¹⁸⁷ Also see the definition of 'Sound Broadcasting Service' in section 2, Definitions and Interpretation of Appendix D of this Decision.

¹⁸⁸ See page 18, paragraph 3.4 of RTÉ's Submission.

“RTÉ / RTÉNL do not disagree that there are high costs associated with the construction of a national terrestrial broadcasting transmission network and agree that a national network is not easily duplicated (paragraph 7.26)...”

- 4.126 Overall, although it may be technically feasible for national Downstream Broadcasters or Multiplex Operators to replicate some low lying sites for non-national coverage, this may not be economically (or in some cases technically) viable in a number of cases in the context of having to access the critical mass of key high sites that would be needed to achieve national coverage.

ComReg’s Position

- 4.127 ComReg’s position is that non-national terrestrial radio BTS are not likely to be an effective substitute for national terrestrial radio BTS.

ComReg’s Overall Position

- 4.128 Having assessed the issues raised by Respondents in paragraphs 4.54 to 4.127 above, ComReg’s position is that at the wholesale level, there are two distinct terrestrial BTS markets.
- 4.129 Firstly, Market A is a wholesale market where an upstream terrestrial BTS 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:
- The broadcast of national analogue terrestrial radio signals to end-users; and,
 - The broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end-users.
- 4.130 Secondly, 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 DTT multiplex supplies a managed digital multiplexing service to terrestrial Downstream TV Broadcasters enabling the transmission of their DTT broadcasting signals to end-users.
- 4.131 ComReg maintains its view that, having considered demand and supply-side substitution and potential indirect constraints in each market, other BTS platforms are not effectively substitutable and that it is appropriate to make and maintain the distinction between these two separate wholesale terrestrial product markets.
- 4.132 Furthermore, ComReg maintains its position that the geographic scope of both Market A and Market B is national.
- 4.133 ComReg will continue to monitor both of these markets over the timeframe of this BTS Review in order to take account of any significant developments should they arise.

5 Three Criteria Test – Market A

- 5.1 In section 6 of the BTS Consultation¹⁸⁹, ComReg conducted the Three Criteria Test¹⁹⁰ analysis on Market A.
- 5.2 ComReg noted that in the Explanatory Note to the 2007 Recommendation, the European Commission highlighted that it is necessary to consider whether potential market power problems can be addressed by (non SMP) regulatory / legislative measures in place. ComReg, therefore, identified and reviewed relevant non SMP regulation / legislation, insofar as it might have an impact on the analysis of Market A¹⁹¹.
- 5.3 Below, ComReg considers the issues raised by Respondents and sets out its final position on the Three Criteria Test in Market A.

Position set out in the BTS Consultation

- 5.4 In the BTS Consultation ComReg discussed the Three Criteria Test for Market A under the headings below.

Provisions of other legislation

- 5.5 ComReg considered all relevant legislation which may have an impact on its analysis of the Relevant BTS Markets in Ireland (such as the Universal Service Directive, the Access Directive, the Framework Directive, and the 2009 Act).
- 5.6 Having regard to this analysis, ComReg considered that certain provisions of the 2009 Act are most relevant to this BTS Review.
- 5.7 ComReg noted that for terrestrial radio broadcasting there are legislative provisions under section 115 of the 2009 Act which could potentially confer some elements of *ex ante* regulation to Market A (in terms of access and pricing). However, ComReg expressed the view that these provisions would not necessarily result in regulation, such as providing for access in a fair, reasonable and non-discriminatory manner or a price control, in the form as would arise under *ex ante* regulation.
- 5.8 ComReg noted that given the particular issue of vertical integration in this market, a pricing mechanism under the 2009 Act would not be supported by appropriate cost accounting procedures nor would transparency and non-discrimination issues be addressed by the 2009 Act.

¹⁸⁹ See paragraphs 6.1 to 6.39 of the BTS Consultation.

¹⁹⁰ See footnote 13 of this Decision.

¹⁹¹ For example, Directive 2002/122/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC ("the Universal Service Directive"), the Framework Directive, the Access Directive 2002/19/EC and the 2009 Act.

- 5.9 ComReg stated that the general accounting procedures for RTÉ which are provided for under section 109 of the 2009 Act would not necessarily result in transparent internal transfer pricing as per an accounting separation obligation were it to be imposed in an SMP regulatory context.
- 5.10 ComReg also noted that, as purchasers of Market A inputs, there are no provisions regarding access or pricing for Multiplex Operators in the 2009 Act unlike the provisions of section 115 for terrestrial radio broadcasting.
- 5.11 Therefore, ComReg was of the preliminary view that, in the context of RTÉ being a vertically integrated operator in Market A (through its wholly owned network subsidiary RTÉNL), operating downstream in wholesale Market B (as the PSB DTT Multiplex Operator), and operating in the retail broadcasting market(s) (as a Downstream Broadcaster), the provisions of such legislation do not undermine the need for consideration of *ex ante* regulation in Market A as such legislation would not likely sufficiently address competition problems associated with the potential exercise of market power in an anti-competitive manner.
- 5.12 ComReg then set out in sequence its consideration of each criterion of the Three Criteria Test.

High and Non-Transitory Barriers to Entry¹⁹²

- 5.13 ComReg first assessed whether there were high and non-transitory barriers to entry to Market A.
- 5.14 ComReg noted that there is one BTS supplier in Market A, RTÉNL, and this has remained unchanged over time. It was also noted that there are likely substantial fixed (and sunk) and variable costs of entry in Market A associated with building the necessary infrastructure and finding suitable high location sites which have suitable radio propagation characteristics to support a national coverage footprint.
- 5.15 It was considered that for any potential new entrant seeking to build its own BTS network, these factors may result in an increased level of investment being required, owing to the need to establish a greater number of lower lying altitude sites than would otherwise be the case for the existing BTS supplier in Market A. These costs and the technical know-how required to compete with an established player such as RTÉNL would likely make it uneconomical for an entrant to compete with RTÉNL and it is unclear whether coverage levels offered by RTÉNL could, in any event, be sufficiently replicated.

¹⁹² See paragraphs 6.12 to 6.20 of the BTS Consultation.

- 5.16 It was also noted that there would likely be a medium to high risk of planning rejection for the development of new BTS sites or the use of existing BTS sites (where they are feasible).
- 5.17 The possibility of using a dense network of lower towers / masts such as those utilised by mobile operators was also considered by ComReg, but similar to the above, it was ComReg's preliminary view that using such network sites would likely lead to increased costs associated with the need to establish a greater number of sites due to their lower height (and therefore lower level of coverage). Additionally, signing commercial agreements across multiple site owners / mast owners to create a national footprint was also considered to be difficult. It was also noted that it is unclear whether RTÉNL coverage levels could be replicated in such circumstances.
- 5.18 Further, as RTÉNL has used existing infrastructure for the purpose of its provision of digital BTS, it may be in a position to offer better contractual terms to national terrestrial Downstream Radio Broadcasters and Multiplex Operators than a new entrant who may be required to recoup a greater level of return from a higher risk greenfield investment.
- 5.19 ComReg also noted that the business case for building a national analogue terrestrial radio only network is likely to be weakened by ASO and, while in theory, local terrestrial radio operators might be able to collectively achieve national coverage by pooling their BTS resources, due to technical differences between local and national BTS networks (associated with frequency planning and the need to avoid interference) there are complex technical barriers which would have to be overcome, therefore, making this a very unlikely proposition.
- 5.20 ComReg's overall preliminary view was that, having regard to the foregoing assessment, there are high and non-transitory barriers to entry in Market A and that this situation is not likely to materially change within the timeframe of this BTS Review.

No Tendency towards Effective Competition over the Relevant Time Horizon¹⁹³

- 5.21 ComReg then considered whether Market A was likely to tend towards effective competition absent *ex ante* regulation.
- 5.22 ComReg again noted that there is one BTS supplier in Market A, RTÉNL, and this has remained unchanged over time. It was noted that an important consideration related to the competitive structure / conditions of Market A is the vertical integrated relationship of RTÉ. ComReg's preliminary view was that, as a vertically integrated

¹⁹³ See paragraphs 6.21 to 6.34 of the BTS Consultation.

monopolist, RTÉ can influence the competitive conditions of both the Relevant BTS Markets and related downstream retail markets.

- 5.23 ComReg also noted that, across all TV platforms, RTÉ provides both the most viewed TV programme services (RTÉ One and RTÉ Two had a combined viewing market share of 27.2%¹⁹⁴ with the remaining viewing shares distributed among other Downstream TV Broadcasters). Terrestrially, RTÉ had the most listened to national radio programme services (RTÉ's radio services¹⁹⁵ had a national listenership market share of 69.5%¹⁹⁶). Its wholly-owned subsidiary, RTÉNL, also owns the only national terrestrial tower / mast network infrastructure in Ireland and therefore, provides a key wholesale input related to the supply of national terrestrial FTA BTS for both RTÉ and other competing terrestrial Downstream Broadcasters and Multiplex Operators.
- 5.24 ComReg also expressed the preliminary view that as a vertically integrated operator, it may not be in RTÉ's interest to facilitate competition which could ultimately result in a loss of market share of its viewers / listeners to other Downstream Broadcasters (with associated loss of advertising revenues). Therefore, absent regulation, ComReg considered that there is the possibility that RTÉNL could seek to exploit absolute / strategic barriers to entry and expansion (such as by excluding potential downstream competitors and / or charging excessive and / or discriminatory BTS fees), thereby impeding the ability for alternative terrestrial Downstream Broadcasters and Multiplex Operators to compete with RTÉ in downstream wholesale (e.g. Market B) and / or retail markets.

Insufficiency of Competition Law Alone¹⁹⁷

- 5.25 ComReg set out its preliminary view that competition law alone is insufficient to deal with such potential competition problems which could arise in Market A. In this respect it was noted that competition law is limited to *ex post* investigation which can take considerable time to complete. Addressing a particular harm through the application of *ex post* competition law in Market A may not generate sufficient legal / regulatory certainty or predictability to existing or potential downstream wholesale and / or retail market participants.
- 5.26 In particular, ComReg considered that *ex post* enforcement of competition law would not likely provide a sufficient suite of remedies to be applied to the range of competition problems that

¹⁹⁴ In the week of 09 April 2012 to 15 April 2012. TAM Ireland. See <http://www.tamireland.ie/box-clever/tv-basics/share-and-reachhttp://www.tamireland.ie/>

¹⁹⁵ RTÉ Radio 1, RTÉ2FM and RTÉ Lyric FM.

¹⁹⁶ Ipsos MRBI JNLR survey results, April 2011 to March 2012. See <http://www.bai.ie/?p=2389>

¹⁹⁷ See paragraphs 6.35 to 6.37 of the BTS Consultation.

could potentially arise. ComReg noted that an Irish court applying competition law¹⁹⁸ will not normally mandate remedies such as imposing specific prices or pricing methodologies or police the evolution of prices on an ongoing basis as ComReg, as an NRA, can do. In addition, it was considered that it would be difficult to apply competition law to address strategic decisions (e.g. tactical refusals of access) which may attempt to limit the possibility of new terrestrial programme services entering downstream wholesale and retail markets.

Proposed Preliminary Conclusion on the Three Criteria Test¹⁹⁹

5.27 Having regard to the analysis in the BTS Consultation ComReg's preliminary view was that the Three Criteria Test was satisfied in Market A and, therefore, that Market A was susceptible to *ex ante* regulation.

BTS Consultation Question(s)

5.28 Having outlined the above assessment on Market A, ComReg then asked the following question²⁰⁰.

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

Respondents' Views

5.29 **Four Respondents agreed** (TG4, the BAI, TV3 and Eircom) with ComReg's preliminary conclusions on the Three Criteria Test.

5.30 **One Respondent disagreed** (RTÉ) with ComReg's preliminary conclusions on the Three Criteria Test stating that its reasons are aligned to its response to Question 2 in the BTS Consultation. In this regard, RTÉ stated that it did not accept the scope of the wholesale market definition for Market A and its comments on the Three Criteria Test were made without prejudice to that position.

5.31 **One Respondent did not express specific views** (the Individual Respondent) on Question 3 above (although it was broadly supportive of ComReg's overall preliminary conclusions on the need for *ex ante* regulation in the proposed BTS markets).

¹⁹⁸ A National Competition Authority ('NCA') in Ireland (such as the Irish Competition Authority or ComReg) cannot make a finding that competition law has been breached. AN NCA would need to bring a prosecution before the Irish courts which would then determine whether the law has been breached.

¹⁹⁹ See paragraphs 6.38 to 6.39 of the BTS Consultation.

²⁰⁰ See Consultation Question 3, page 88, of the BTS Consultation.

- 5.32 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall assessment.
- 5.33 Respondents' views are mainly focused on issues which can generally be captured under the following themes:
- Consideration of the impact of other existing legislation on competition problems associated with the exercise of market power; and,
 - The effect of competition from other BTS platforms.
- 5.34 As noted in paragraph 4.43 RTÉ raised an issue in response to Question 2 which ComReg considers would be more appropriately addressed as part of the Three Criteria Test analysis herein, namely:
- The need for due consideration to be given to whether and how the 2009 Act impacts on *ex ante* regulation by ComReg with respect to its SMP and competition analysis.
- 5.35 The issue in paragraph 5.34 above is also considered in the context of the theme identified in the first bullet of paragraph 5.33 above.
- 5.36 Furthermore, ComReg notes that an issue was raised by RTÉ in its Submission which is not directly related to matters concerning the Three Criteria Test for Market A and, as such, is more appropriately dealt with elsewhere in this Decision²⁰¹. This issue can be categorised under the heading below:
- The need for careful consideration of the constraints placed on RTÉ by section 130 of the 2009 Act.
- 5.37 This issue above is more appropriate for consideration to the assessment of the Three Criteria Test in Market B.

Consideration of the impact of other existing legislation on competition problems associated with the exercise of market power

- 5.38 The BAI stated that while some of the provisions of the 2009 Act are helpful, they do not necessarily address competition issues concerning transparency, non-discrimination and the vertically integrated nature of RTÉ as a Downstream Broadcaster and the sole national terrestrial BTS operator through its subsidiary RTÉNL.
- 5.39 Furthermore, TV3 stated that the 2009 Act does not provide enough detail to ensure access on a fair, reasonable and non-discriminatory basis to third parties.
- 5.40 However, RTÉ was of the view that ComReg did not give sufficient consideration to the potential impact that existing legislation may

²⁰¹ See paragraph 11.31 of this Decision.

have in addressing the question of whether *ex ante* SMP regulation was warranted in Market A. RTÉ stated that the question is not whether the legislative provisions in place result in similar conditions which would arise in an *ex ante* SMP regulatory context, but whether the scope of existing legislation allows for SMP regulation and, if so, that such regulation should not encroach on existing obligations arising under the 2009 Act.

- 5.41 RTÉ further stated that ComReg should consider the purported constraint imposed on RTÉNL by section 115 of the 2009 Act²⁰² which concerns the provision of access to and payments of sound broadcasting services.

Effect of competition from other BTS platforms

- 5.42 RTÉ was also of the view that, regardless of whether barriers to entry in Market A are high, there are already several BTS platforms and suggested that this, as identified by the European Commission²⁰³, gives more power to broadcasters in their negotiations with BTS companies.
- 5.43 RTÉ's comment appears to be that terrestrial Downstream Broadcasters and Multiplex Operators have the ability to exert countervailing buying power in relation to the acquisition of wholesale Market A services.

ComReg's Assessment of Respondents' Views

- 5.44 Below, ComReg considers the main issues raised by Respondents on ComReg's preliminary Three Criteria Test and sets out its final position in this regard.
- 5.45 As a preliminary matter, ComReg refers to the comments of the European Commission that:

“The terrestrial broadcasting markets in Ireland present strong features of lack of competitive conditions, with only one vertically integrated supplier so far and therefore appear to warrant ex ante regulation”.

²⁰² Section 115 of the Broadcasting Act 2009 provides that the Minister may, at the request of the BAI and after consultation with RTÉ, require RTÉ to co-operate with a holder of a sound broadcasting contract in the use of any mast, tower, site or other installation or facility needed in connection with the provision of transmission facilities for sound broadcasting services under the sound broadcasting contract. It also states that a sound broadcaster shall make to RTÉ such periodical or other payments in respect of any facilities as the Minister, after consultation with RTÉ and the BAI directs.

²⁰³ ComReg notes that although NRAs have the power to determine whether *ex ante* regulation may be necessary in markets within their own jurisdictions, in the Explanatory Note to the 2007 Recommendation the European Commission commented that there were a number of reasons as to why it removed BTS from its list of recommended markets susceptible to *ex ante* regulation at an EU wide level. This included that, in many Member States, there were likely to be 3 to 4 competing BTS platforms and that the transition from analogue to digital broadcast services reduces capacity constraints on BTS platforms.

Consideration of the impact of other existing legislation on competition problems associated with the exercise of market power

- 5.46 ComReg notes Respondents' views on this issue and does not agree with RTÉ's view that ComReg has given inadequate consideration to the impact of existing legislation in its application of the Three Criteria Test.
- 5.47 In carrying out its analysis of the Three Criteria Test, ComReg was mindful of the European Commission's approach, as expressed in the Explanatory Note to the 2007 Recommendation²⁰⁴, that it is relevant to consider the effect that other legislation may have on BTS in terms of its ability to sufficiently address potential competition problems associated with SMP.
- 5.48 Contrary to RTÉ's view and as noted above, ComReg has considered all legislation which may have an impact on its analysis of Market A (such as the Universal Service Directive, the Access Directive, the Framework Directive, and the 2009 Act).
- 5.49 ComReg notes RTÉ's statement that, having regard to the 2009 Act there is little scope for SMP regulation in Market A. Further to this, RTÉ specifically refers to section 115 of the 2009 Act.
- 5.50 The sections of the 2009 Act that ComReg considers to be of most relevance to the assessment of the Three Criteria Test in Market A are set out below²⁰⁵.
- **Section 108** of the 2009 Act concerns the exploitation of commercial opportunities by RTÉ and TG4, and states that such exploitation shall be at arm's length basis and would be used to subsidise public service broadcasting objects;
 - **Section 109** of the 2009 Act requires RTÉ and TG4 to maintain financial records and accounts and sets out consequent auditing, financial transparency and reporting obligations; and,
 - **Section 115** of the 2009 Act provides that the Minister for Communications, Energy and Natural Resources (**the Minister**) may, at the request of the BAI and after consultation with RTÉ, require RTÉ to co-operate with a holder of a sound broadcasting contract in the use of any mast, tower, site or other installation or facility needed in connection with the provision of transmission facilities for sound broadcasting services under the sound broadcasting contract. It also states that a sound broadcaster shall make to RTÉ such periodical or

²⁰⁴ See page 48 of the European Commission Staff Working Document, Explanatory Note accompanying the 2007 Recommendation (C(2007) 5406).

²⁰⁵ See paragraphs 6.6 to 6.11, 9.24, and 9.87 to 9.89 of the BTS Consultation.

other payments in respect of any facilities as the Minister, after consultation with RTÉ and the BAI directs.

- 5.51 ComReg's position is that the above provisions of 2009 Act do not adequately address the potential competition problems which, absent SMP regulation, could arise in Market A (such as those relating to lack of transparency, potential discrimination on price and non-price terms, constructive denial of access and inefficient pricing issues). Neither would such provisions of 2009 Act address the identified competition problems in a targeted and proportionate manner such as could be addressed under an *ex ante* SMP regulatory approach that seeks to address SMP related competition concerns having regard to the policy objectives set out in Regulation 16 of the Framework Regulations 2011 and Regulation 12 of the Communications Regulations Acts 2002 - 2011.
- 5.52 Insofar as price controls are concerned, unlike the non-specific payment related provisions of section 115 of the 2009 Act (which relate to the power of the Minister to direct a sound broadcaster to make certain payments to RTÉ), the proposed imposition of *ex ante* SMP regulatory price controls in accordance with Regulation 13 of the Access Regulations 2011 would seek to ensure that the appropriate cost recovery mechanism is put in place to ensure an undertaking does not charge, for example, excessive prices, and to do so in a manner which serves to promote efficiency and sustainable competition and maximises consumer benefits.
- 5.53 Unlike the above provisions of the 2009 Act, *ex ante* SMP regulation has the benefit of specifying well defined obligations tailored to target, in advance, potential competition problems in accordance with the regulatory framework and can, by reacting to changes in market circumstances, provide regulatory stability and predictability in a market which, in ComReg's view, is characterised by high and non-transitory entry barriers.
- 5.54 *Ex ante* SMP regulatory measures, unlike the above provisions of the 2009 Act above, coupled with enforcement capabilities, also provide the necessary mechanisms to deal with questions regarding regulatory compliance on an ongoing basis (either by investigation on an own-initiative basis or in response to complaints / disputes received from undertakings). *Ex ante* regulation also provides both regulatory certainty and predictability to market participants.
- 5.55 Insofar as the specific provisions of sections 108 and 109 of the 2009 Act relate to Market A, these are, in ComReg's view, aimed at securing accountability for expenditure of public monies and protecting against any inappropriate use of public funds. These provisions are not designed to address issues associated with the anti-competitive exercise of significant market power *per se*, and neither of these provisions would, in ComReg's view, result in full transparency of internal pricing across RTÉ in the same manner as is envisaged under the electronic communications regulatory

framework (and in the transparency obligations now set out in this Decision).

5.56 The provisions of the 2009 Act are not designed to address issues of discriminatory pricing or encouraging efficient market entry (if and to the extent that such entry is likely) by making access to an SMP operator's wholesale service available to undertakings competing in downstream markets. It is also ComReg's view that the current form of publicly available financial statements from RTÉ does not provide sufficient transparency of financial information to a sufficient level of granularity or segmentation such that it would effectively assist ComReg in targeting identified competition problems in a manner which achieves the policy objectives under Regulation 16 of the Framework Regulations 2011.

5.57 ComReg would note that, although section 115 of the 2009 Act provides for the Minister to direct that payments are made by a holder of a sound broadcasting contract to RTÉ, it is limited to sound broadcasting infrastructure and therefore has no direct relevance to Multiplex Operator access or payments to RTÉNL for BTS.

5.58 Furthermore, section 115 of the 2009 Act does not necessarily imply that a cost-oriented (and efficient) price control could be put in place by the Minister and, as such, it is ComReg's view that it would not necessarily resolve potential excessive or other pricing problems.

5.59 ComReg also notes that section 115 of the 2009 Act does not, of itself, appear to specify the form / methodology for such payments. ComReg notes that given the particular issue of the vertically integrated nature of RTÉ, this setting of payments would also appear not to be supported by an appropriate cost accounting and accounting separation obligation which would likely also be necessary to effectively implement *ex ante* price controls in Market A particularly given the vertically integrated nature of RTÉ. Nor would it effectively address the need for transparency and non-discrimination, as under the 2009 Act there would be no effective requirement that RTÉ make payments to itself in the same manner.

5.60 [REDACTED]

[REDACTED]

In any event, it is ComReg’s view that section 115 does not address *ex ante* SMP related competition problems at all or at least in as effective a manner as that which can be achieved through clearly specified *ex ante* regulatory controls.

5.61 ComReg would also note that the Minister has not to date exercised his discretion to make a direction under section 115 of the 2009 Act.

5.62 An *ex ante* regulator such as ComReg also has considerable experience and knowledge of regulating other electronic communications markets and determining the appropriate course of regulatory intervention to take, where required, to address SMP related competition concerns. Inevitably, price control decisions and disputes regarding the same require a detailed knowledge and understanding of an undertaking’s costs and internal transfer charges (those to be subjected to the price control), as well as the various methodologies which can be employed in setting efficient cost-oriented prices. This is one of the reasons why independent NRAs were established.

5.63 Under the market review process envisaged under Regulation 27 of the Framework Regulations 2011, SMP regulation may be imposed, amended, or removed as required. While ComReg is of the view that effective competition is unlikely to materialise in Market A within the timeframe of this particular BTS Review, ComReg intends to monitor Market A to assess if there are indeed any changes in market dynamics which would alter its findings now set out in this Decision, including its regulatory approach on obligations imposed. In this respect, if and to the extent that the Minister were to exercise his discretion under section 115 of the 2009 Act to direct that sound broadcasters make payments to RTE, ComReg would revisit its approach to price control in Market A, as appropriate.

5.64 In terms of the impact of the 2009 Act with respect to the provision of access to RTÉNL’s BTS in Market A, ComReg is of the view that the provisions of the 2009 Act would not adequately address the potential SMP related competition problems in Market A (associated with the ability and incentive for an SMP operator to constructively or effectively refuse access to competing downstream or wholesale undertakings) in a manner that would provide the necessary regulatory certainty and to do so in an effective manner. This is in contrast to the access remedies which can be imposed through the *ex ante* regulatory framework. These include granting access to specified network elements, to provide access in a fair, reasonable and timely manner, and to negotiate in good faith with undertakings requesting such access. To counter the potential ability and

²⁰⁶ [REDACTED].

incentive for an SMP operator to employ constructive refusals of access in Market A, ComReg can also impose conditions which support the provision of timely and efficient access, such as the implementation of SLAs, and fair, reasonable and timely access.

- 5.65 As noted above, the purpose of SMP regulation is to address potential competitive concerns *ex ante* and, in doing so having regard to the achievement of the policy objectives of Regulation 16 of the Framework Regulation 2011. ComReg considers that the relevant legislative provisions under the 2009 Act, however, are more akin to *ex post* intervention measures. The enactment of such provisions are more likely to arise, for example, where actual concerns / representations have been made to the Minister about the distribution and transmission charges by RTÉNL after the facts and, as such, may not provide sufficiently timely or effective regulatory predictability and legal certainty to market participants.
- 5.66 Finally, it is worth noting that, as part of its assessment of this overall BTS Market Review ComReg has met and consulted with Downstream Broadcasters. In this respect, concerns have been expressed by RTÉNL / RTÉ's BTS customers about a lack of transparency and potential excessive pricing in an analogue BTS context and there are also concerns that such issues could continue in the context of DTT BTS. In ComReg's view, for the reasons detailed above, such concerns could not be adequately addressed or effectively under the legislative provisions of the 2009 Act.
- 5.67 Having assessed Respondents' views, ComReg's position is that the provisions of the 2009 Act do not obviate the need for *ex ante* regulation, as appropriate.

Effect of competition from other BTS platforms

- 5.68 As noted in paragraph 5.42 above, RTÉ expressed the view that, regardless of whether barriers to entry in Market A are high, there are several BTS platforms, and this gives more power to Downstream Broadcasters in their negotiations with BTS operators (i.e. countervailing buyer power).
- 5.69 For the reasons previously discussed in section 4²⁰⁷ of this Decision, ComReg does not agree that other BTS platforms exercise an effective constraint on Market A and, therefore, do not provide an effective substitute for terrestrial BTS. Terrestrial BTS are important for national Downstream Radio Broadcasters as the majority of end-users listen to the radio via this means, in particular, given the limitations of other platforms (e.g. lack of comparable mobility, and lack of prevalence of receivers). Furthermore, in the context of terrestrial TV BTS, Irish Downstream DTT Broadcasters have statutory / licence obligations (FTA national coverage) which mean

²⁰⁷ See paragraphs 4.55 to 4.89 of this Decision.

that the broadcasting of their programme services via other BTS platforms are not likely to be an effective substitute.

- 5.70 ComReg notes that in response to a ComReg broadcasting questionnaire²⁰⁸, broadcasting customers indicated they believe that they have had not been able to exert effective countervailing buyer power constraints on RTÉNL.
- 5.71 Other than RTÉNL's supply of national terrestrial analogue radio BTS, there are is no similarly effective alternative source of national radio BTS and it is ComReg's position that this is unlikely to change within the timeframe of this BTS Review. Given the absence of effective sources of supply, purchasers of national terrestrial radio BTS could not, as part of negotiations with RTÉNL, credibly refuse to purchase such services, which in ComReg's view, underlines their lack of effective countervailing buyer power.
- 5.72 Similarly, commercial DTT Multiplex Operators seeking to enter Market B, (in order to provide their wholesale services to Downstream Broadcasters), have no option but to negotiate with RTÉNL for access to its BTS network. For such DTT Multiplex Operators there is no alternative source of supply of comparable BTS provided by RTÉNL. Given the absence of effective sources of supply, Multiplex Operators who purchase national terrestrial BTS could not, as part of negotiations with RTÉNL, credibly refuse to purchase such services, which in ComReg's view, underlines their lack of effective countervailing buyer power.
- 5.73 Overall given the barriers to entry and expansion set out by ComReg in the BTS Consultation²⁰⁹, ComReg does not consider it likely that the competitive conditions in Market A will materially change within the timeframe of this BTS Review as credible entry is unlikely. Buyers (i.e. national analogue terrestrial Downstream Radio broadcasters and Multiplex Operators) are also unable to credibly exert a significant constraint on the price or other terms and conditions of supply offered by RTÉNL given the lack of alternative options. There are no alternative suppliers apart from RTÉNL who could provide national terrestrial BTS, and the conditions of the market do not allow for self-supply.
- 5.74 No alternative national terrestrial BTS network operators have entered Market A since ComReg's 2004 Broadcasting Review. In addition, there has there been no indication that there will be effective entry in the timeframe of this BTS Review.
- 5.75 Therefore, ComReg maintains its view that it is unlikely that there will be effective entry and competition in Market A in the timeframe of this BTS Review, and related to this; effective countervailing

²⁰⁸ ComReg broadcasting questionnaire, dated April 2011.

²⁰⁹ See paragraphs 6.12 to 6.20 of the BTS Consultation.

buyer power is unlikely to constrain RTÉNL's behaviour in Market A²¹⁰.

ComReg's Position

5.76 Having regard to the analysis set out in the BTS Consultation²¹¹ and the consideration of Respondents' views above, ComReg's position is that Market A satisfies the Three Criteria Test, such that Market A is deemed by ComReg as susceptible to *ex ante* regulation²¹². In this regard:

- Market A is characterised by high and non-transitory entry barriers;
- Market A exhibits characteristics such that it will not tend towards effective competition over time; and,
- Competition law, while complimentary, by itself is inadequate to address potential competition problems associated with SMP problems in Market A.

5.77 In addition, ComReg is also of the view that other regulatory measures / legislation in place are ineffective to address potential competition problems associated with potential SMP problems.

5.78 ComReg will monitor Market A over the timeframe of this BTS Review to determine whether the Three Criteria Test remains satisfied.

²¹⁰ See paragraphs 7.60 to 7.66 of the BTS Consultation.

²¹¹ See paragraphs 6.1 to 6.39 of the BTS Consultation.

²¹² Furthermore, as noted in paragraph 5.32 of this Decision the European Commission did not contest ComReg's Article 7 Notification to it.

6 Competition Analysis and Assessment of SMP – Market A

- 6.1 Having set out its preliminary view that the Three Criteria Test is satisfied in Market A ComReg then undertook a competition analysis and an assessment of SMP in Market A in section 7 of the BTS Consultation.
- 6.2 Below, ComReg considers the issues raised by Respondents and sets out its final position on the matter.

Position set out in the BTS Consultation

- 6.3 ComReg examined the level of existing competition²¹³, the potential for competition to develop²¹⁴ and whether countervailing buying power²¹⁵ is effective in constraining market power in Market A.
- 6.4 The criteria examined by ComReg in its SMP assessment in Market A were:
- Market shares;
 - Overall size of the undertaking;
 - Relevant strength of existing competitors;
 - Control of infrastructure not easily duplicated;
 - Financial (sunk) costs;
 - Economies of scale;
 - Economies of scope;
 - Vertical Integration;
 - Overall strength of potential competitors; and
 - Countervailing buying power.
- 6.5 ComReg also considered the other criteria identified in the SMP Guidelines²¹⁶, but ComReg considered that these were of no or less relevance for the purpose of the assessment of SMP in Market A.
- 6.6 ComReg identified that RTÉNL has 100% market share in Market A and that this has remained unchanged overtime.
- 6.7 ComReg noted that RTÉNL's Market A BTS are provided from an extensive range of high sites located throughout Ireland and that there is no effective alternative terrestrial BTS network capable of

²¹³ See paragraphs 7.13 to 7.20 of the BTS Consultation.

²¹⁴ See paragraphs 7.21 to 7.59 of the BTS Consultation.

²¹⁵ See paragraphs 7.60 to 7.66 of the BTS Consultation.

²¹⁶ See paragraph 7.12 of the BTS Consultation.

ensuring the same level of coverage in Ireland for Downstream Broadcasters and Multiplex Operators.

- 6.8 ComReg's proposed position was that barriers to entry and expansion exist in the form of, for example, high fixed (and largely sunk) costs, RTÉNL's control of infrastructure that is not easily duplicated, economies of scale and scope and vertical integration.
- 6.9 ComReg also noted that RTÉNL, as a vertically integrated monopoly entity, could influence the state of competition in the downstream wholesale and / or retail markets. In particular, by restricting competitive threats to RTÉ, through limiting / foreclosing access to RTÉNL's BTS and / or charging excessive and / or discriminatory prices to actual or potential customers.
- 6.10 ComReg's preliminary view was that there is insufficient countervailing buying power in Market A such that terrestrial Downstream Broadcasters and Multiplex Operators do not have the ability to exert effective influence on RTÉNL's charges and other terms and conditions of supply and use.
- 6.11 Having regard to the analysis in section 7 of the BTS Consultation, ComReg's preliminary view was that, over the timeframe of this BTS Review, Market A was not likely to be subject to effective competition and that RTÉNL should be designated as having SMP in Market A.

BTS Consultation Question(s)

- 6.12 Having set out its preliminary views on the SMP assessment, ComReg then asked the following question²¹⁷.

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

Respondents' Views

- 6.13 **Four Respondents agreed** (TG4, the BAI, TV3 and Eircom) with ComReg's overall preliminary SMP assessment.
- 6.14 **One Respondent disagreed** (RTÉ) with ComReg's preliminary views on the basis that it considered that the definition of Market A was unjustifiably narrow due to its view that other BTS platforms should not have been excluded from the definition of Market A. RTÉ suggested that there are indirect (retail) constraints faced by RTÉ / RTÉNL from other BTS platforms which warrant a broader market definition. RTÉ stated that its response to Questions 1 to 3 also apply to Question 4 (which, among other things, included RTÉ's

²¹⁷ See Question 4, page 103 of the BTS Consultation.

view that the Three Criteria Test is not satisfied) and further added that it did not agree with ComReg's analysis of its incentives to engage in exclusionary and / or exploitative behaviour in Market A.

- 6.15 **One Respondent did not express specific views** (the Individual Respondent) on Question 4 (although it was broadly supportive of ComReg's overall preliminary conclusions).
- 6.16 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall assessment.
- 6.17 ComReg considers that Respondents' views can broadly be categorised under the themes identified below.
- Whether the vertically integrated nature of RTÉ gives it the potential ability and incentives to engage in anti-competitive exclusionary behaviour; and,
 - The purported narrow definition of Market A and that SMP is unwarranted.
- 6.18 RTÉ also raised other issues concerning the SMP assessment which related to remedies and, in ComReg's view, these are more appropriately dealt with elsewhere in this Decision²¹⁸.
- 6.19 RTÉ also stated that it considered that ComReg's analysis in paragraph 8.19 (which falls under the assessment of competition problems in Market A) of the BTS Consultation was flawed. This point is addressed in paragraphs 6.24 to 6.35 below, rather than later in section 7 (assessment of competition problems in Market A) of this Decision.

Whether the vertically integrated nature of RTÉ gives it the potential incentives to engage in exclusionary behaviour

- 6.20 As noted in paragraph 6.14 above, RTÉ did not agree that its vertically integrated structure meant that it has an incentive to exclude potential downstream competitors from accessing Market A. RTÉ stated that it faces the incentives to ensure that many Downstream Broadcasters and Multiplex Operators are on its network so it can recover its BTS network costs from them. Further to this, RTÉ stated that the analysis of its incentives to limit competition through engaging in exclusionary and exploitative behaviour in paragraph 8.19 of the BTS Consultation is flawed.

The purported narrow definition of Market A and that SMP is unwarranted

- 6.21 As stated in paragraph 6.14 above, RTÉ also did not agree with the scope of ComReg's wholesale market definition which it perceived as being too narrow (i.e. it was of the view that the scope of Market

²¹⁸ See paragraphs 8.316 and 8.317 of this Decision.

A should include other BTS platforms due to its view that there are indirect (retail) constraints on Market A which warrant a broader wholesale market definition).

- 6.22 RTÉ also contended that ComReg had not given sufficient consideration to the constraints imposed on it from existing non SMP regulation such as the 2009 Act and that the Three Criteria Test was not satisfied. Consequently, RTÉ considered that SMP designation was not warranted.

ComReg's Assessment of Respondents' Views

- 6.23 ComReg assesses Respondents' views under the identified themes below.

Whether the vertically integrated nature of RTÉ gives it the potential ability and incentives to engage in anti-competitive exclusionary behaviour

- 6.24 As stated in the BTS Consultation²¹⁹, ComReg notes that, in Ireland, RTÉ provides both the most viewed TV services and the most listened to national radio programme services in the State²²⁰ and its wholly owned subsidiary RTÉNL provides BTS for the terrestrial FTA reception of radio and TV services to most households.
- 6.25 RTÉ, through its wholly owned subsidiary RTÉNL, not only supplies terrestrial BTS network services to terrestrial Downstream Broadcasters, but also competes with them at the retail level for radio listenership and TV viewership. It is ComReg's position that a vertically integrated entity, such as RTÉ, has both the ability and incentive to establish strategic barriers to entry and / or expansion by excluding actual or potential terrestrial competitors (being national terrestrial Downstream Broadcasters at the retail level and Multiplex Operators at the downstream wholesale level) from gaining access to RTÉNL's BTS network and / or for example, potentially charging them excessive BTS fees, thus impeding their ability to compete in said downstream wholesale and retail markets.
- 6.26 As noted in the BTS Consultation²²¹ and this Decision²²², ComReg is of the view that there are high and non-transitory (structural, regulatory and strategic) entry barriers which limit the prospects for

²¹⁹ See paragraph 6.25 and footnote 123 of the BTS Consultation and Appendix C of this Decision.

²²⁰ The share of viewing by channel for the week May 12 2013 showed RTÉ One had 19.15%, RTÉ One +1 had 0.45%, and RTÉ Two had 5.61%. See consolidated viewing summary at <http://www.tamireland.ie/box-clever/tv-basics/share-and-reach>

According to Ipsos MRBI JNLR survey results over April 2012 to March 2013 RTÉ radio programme services (RTÉ Radio 1, RTÉ 2fm and RTÉ Lyric FM) had a market share of national market listenership (share of all minutes listened on a weekday between 7am and 7pm) of 76%. http://www.bai.ie/wordpress/wp-content/uploads/201304_PressRelease-April_PK.pdf

²²¹ See paragraphs 7.30 to 7.35 of the BTS Consultation.

²²² See paragraphs 5.13 to 5.20 of this Decision.

the development of effective competition in Market A over the lifetime of this BTS Review. As a vertically integrated entity and the sole undertaking providing services in Market A, it is ComReg's position that RTÉNL has the ability and incentive to behave in an anti-competitive manner, in particular given its control of infrastructure not easily duplicated.

- 6.27 In this regard, RTÉNL is the only provider of national BTS in Market A in the State and this has remained unchanged since ComReg's 2004 Broadcasting Review. Therefore, all current national terrestrial Downstream Broadcasters must directly or indirectly (through Market B) purchase BTS from RTÉNL.
- 6.28 Where a vertically integrated firm such as RTÉ is the only or primary source of access for certain inputs necessary for competing in downstream markets, the possibility of it leveraging its upstream control into downstream retail / wholesale markets could inhibit entry and / or expansion into those related markets, and, in turn, reinforce entry barriers at the upstream level.
- 6.29 ComReg would note that it is not necessary to point to examples of actual anti-competitive activity within the meaning of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and / or section 5 of the Competition Act, 2002 that have occurred or are occurring²²³. A finding of SMP indicates the potential for competition problems to arise and coupled with RTÉ / RTÉNL's incentives to behave anti-competitively this justifies the imposition of proportionate *ex ante* regulation, albeit tailored to the particular circumstances of each wholesale market, having regard to the competition problems identified. As noted in the Explanatory Note to the European Commission's 2007 Recommendation, the underlying purpose of the *ex ante* regulatory framework is to deal with predictable competition problems that have their origin in structural factors in the industry. The finding of durable barriers to entry / expansion and an absence of effective competition in Market A indicates to ComReg the potential for competition problems to arise over the period of this BTS Review, thereby justifying the imposition of *ex ante* regulation.
- 6.30 As noted in paragraph 6.20 of this Decision ComReg RTÉ stated that paragraph 8.19 of the BTS Consultation is flawed.
- 6.31 Having considered RTÉ's comments in this regard, ComReg maintains its position as set out in paragraph 8.19 of the BTS Consultation. In particular, faced with competitors in downstream

²²³ Indeed, according to the Commission's SMP Guidelines, the designation of an undertaking as having SMP in a market identified for the purpose of *ex ante* regulation does not automatically imply dominance for the purpose of Article 102 TFEU and has no bearing on whether that undertaking has committed an abuse of a dominant position within the meaning of Article 102 TFEU. A finding of SMP merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers (see paragraph 30).

markets who rely on the purchase of upstream inputs sold by RTÉNL through Market A, RTÉNL has the ability and incentive to engage in anti-competitive activity to protect its own downstream arms' position in the downstream markets. RTÉNL may earn more wholesale revenues from carriage of a greater number of terrestrial Downstream Broadcasters and Multiplex Operators (and in the process lower the charges levied on its own downstream arm given the sharing of overall costs). However, the revenues earned by RTÉNL from the supply of terrestrial BTS are not comparable to the advertising revenues commanded by RTÉ at the retail level²²⁴.

6.32 RTÉNL may, therefore, be willing to forego wholesale revenues (through, for example, denying RTÉ's downstream competitors access (at the upstream level), either tactically or outright to achieve greater advertising revenues or offset a potential loss of advertising revenues at the downstream retail level). Therefore, it is ComReg's position that market conditions are not likely to be conducive to a competitive outcome, as entry and / or expansion may be limited in downstream retail markets through exclusionary and / or exploitative anti-competitive behaviour in Market A.

6.33 In addition, although not all directly relevant to Market A, a number of issues have arisen over the last number of years which suggest that, absent *ex ante* regulation, RTÉNL may have the ability and incentive to engage in potential anti-competitive behaviours given its SMP position in Market A.

- Potential commercial DTT Multiplex Operators failed to negotiate successfully with RTÉNL for access to its BTS network following a BAI commercial DTT tendering process between 2008 and 2010. In its Submission to consultation, one of the parties involved in this process (Eircom), has stated its view that, RTÉNL held significant power in the negotiation process, and prevented downstream competitors from entering the downstream DTT market;
- A report by Athena Media in 2010, commissioned by the BAI, included the suggestion that RTÉ and RTÉNL should separate its corporate financial and network activities and allow its

²²⁴ For example, according to RTE Annual Report and Group Financial Statements 2011, total group (after removal of intra group revenues and costs) advertising income was €123.8 million in the year ended 2011, while transmission, mast and towers income was €14.7 million. However, it should be noted that these advertising revenues are derived across all broadcast platforms and not solely the terrestrial transmission platform.

<http://www.rte.ie/documents/about/RTE%202011%20Annual%20Report%20-%20English.pdf>

transmission costing to be reviewed by an independent third party²²⁵; and,

- The BAI submitted a report to the Minister with recommendations regarding the carriage of broadcasting content on RTÉ's PSB DTT multiplexes which highlighted that the proposed cost structure for carriage envisaged by RTÉ / RTÉNL is of concern and should this continue, it was the BAI's view that it is unlikely that any new services, other than those proposed by RTÉ, would be carried on the platform²²⁶.

6.34 Concerns have also been expressed to ComReg from a number of Irish terrestrial Downstream Broadcasters regarding the pricing of RTÉNL's BTS. There is a perceived lack of transparency in the tariffs being charged by RTÉNL for analogue terrestrial transmission services, which could continue following the move to DTT as none of RTÉ / RTÉNL tariffs have been the subject of *ex ante* regulatory review by ComReg.

6.35 Having regard to the analysis set out in the BTS Consultation²²⁷, and consideration of Respondents' views above, ComReg's position is that Market A is characterised by a monopoly provider which operates as part of a vertically integrated entity with a significant presence in downstream markets. Market A exhibits high structural barriers to entry and in view of the above, it is ComReg's position that market failure(s) are likely to arise such that RTÉNL has the ability and incentive to act, to an appreciable extent, independently of its competitors, customers and consumers.

The purported narrow definition of Market A and that SMP is unwarranted

6.36 ComReg has previously considered these issues in its assessment of RTÉ's responses to Question 1 to Question 3 in sections 3 to 5 of this Decision.

6.37 Having considered Respondents' views, ComReg's position is that:

- The scope of the wholesale Market A definition is appropriate (having undertaken a demand and supply-side substitution and indirection constraints assessment)²²⁸;

²²⁵ This report noted that *'There is clear agreement across the sector that the economic landscape and competitive quality of the broadcasting sector would benefit from a separation of RTÉ and RTÉNL'*. "Irish Broadcasting Landscape: Economic and Environmental Review for the BAI", Athena Media, dated 31 August 2010. See http://www.bai.ie/wordpress/wp-content/uploads/20110323_StratEconAnlysRpt_vFINAL_AC.pdf.

²²⁶ "Report and Recommendations by the Broadcasting Authority of Ireland on the exercise of its functions under Statutory Instrument No.67 of 2011", the BAI, dated August 2011. See http://www.bai.ie/wordpress/wp-content/uploads/20110815_BAIDTTEOI_FINAL.pdf.

²²⁷ See paragraphs 7.13 to 7.71 of the BTS Consultation.

²²⁸ See paragraphs 5.72 to 5.145 of the BTS Consultation and paragraphs 4.55 to 4.112 of this Decision.

- Non SMP regulation is insufficient to address potential competition problems associated with SMP in Market A²²⁹; and,
- The Three Criteria Test is satisfied in Market A²³⁰.

ComReg's Position

6.38 Having regard to the assessment of actual and potential competition²³¹ in Market A and the assessment of SMP criteria²³² in the BTS Consultation, and having considered Respondents' views in this Decision, ComReg's position is that it remains appropriate to designate RTÉNL with SMP in Market A.

SMP Designation(s)

6.39 Having regard to Regulation 25 of the Framework Regulations, ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that Market A identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive.

6.40 In accordance with Regulation 27(4) of the Framework Regulations, ComReg hereby designates **RTÉ Transmission Network Limited**²³³ as having SMP within Market A.

²²⁹ See paragraphs 6.3 to 6.11 of the BTS Consultation and paragraphs 5.46 to 5.67 of this Decision.

²³⁰ See paragraphs 6.12 to 6.39 of the BTS Consultation and paragraphs 5.46 to 5.78 of this Decision.

²³¹ See paragraphs 7.13 to 7.26 of the BTS Consultation.

²³² See paragraphs 7.27 to 7.66 of the BTS Consultation.

²³³ Formerly trading as RTÉNL, and as of Q2 2013 trading as 2RN.

7 Competition Problems – Market A

- 7.1 Following the proposed designation of SMP on RTÉNL in section 7 of the BTS Consultation, ComReg then assessed the potential for competition problems to arise in Market A²³⁴, absent regulation.
- 7.2 Below, ComReg considers the issues raised by Respondents and sets out its final position on the matter.

Position set out in the BTS Consultation

- 7.3 In the BTS Consultation, ComReg explained that, further to Regulation 27(4) of the Framework Regulations, it is obliged to impose at least one remedy on an undertaking designated with SMP.
- 7.4 ComReg also noted that it is not necessary to point to actual examples of anti-competitive activity, but a finding of SMP indicates the potential for competition problems to arise and this is sufficient to justify imposition of proportionate *ex ante* regulation.
- 7.5 ComReg expressed its view that three broad types of competition problems may arise in Market A. These are:
- **Exclusionary practices:** RTÉ competes with other Downstream Broadcasters for retail audience market share (and related advertising revenues). In this context, as a vertically integrated monopoly operator with SMP, RTÉNL has the ability and incentive to foreclose or limit access to its Market A inputs either tactically or out-right. In this regard, ComReg also noted the failure of potential commercial DTT Multiplex Operators to negotiate successfully with RTÉNL for access to its terrestrial BTS network during a BAI DTT tendering process between 2008 and 2010²³⁵.
 - **Exploitative behaviour:** ComReg was also of the view that, in the absence of *ex ante* regulation, RTÉNL has the potential ability and incentive to price excessively and / or margin squeeze to dis-incentivise the entry or expansion of downstream wholesale and retail competitors. ComReg also stated that due to a lack of effective competitive pressure on RTÉNL in Market A, there may be less pressure on RTÉNL to provide an efficient service than may otherwise be the case in the presence of effective competition, such that delays in providing access could impede effective competition in related markets and effectively foreclose downstream market entry.
 - **Vertical leverage:** ComReg noted that there is also the potential ability and incentive for a vertically integrated SMP

²³⁴ See paragraphs 8.1 to 8.32 of the BTS Consultation.

²³⁵ See paragraph 4.43 of the BTS Consultation.

undertaking in Market A, to leverage market power into vertically related markets. For example, this could take place via forms of outright or constructive denial of access, application of discriminatory charges or margin squeeze.

Preliminary Conclusions on Competition Problems in Market A

- 7.6 In summary, having regard to the analysis in section 8 of the BTS Consultation, ComReg was of the preliminary view that RTÉNL has the incentive and ability 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 the downstream retail market.

BTS Consultation Question(s)

- 7.7 Having considered the potential for the types of competition problems to arise in Market A, ComReg then asked the following questions²³⁶.

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

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

Respondents' Views

- 7.8 **Three Respondents agreed** (TG4, the BAI and TV3) with ComReg's preliminary views. However **one Respondent disagreed** (RTÉ). **Two Respondents' did not express specific views** (the Individual Respondent and Eircom) on Question 5 and Question 6 above (although they were broadly supportive of ComReg's overall preliminary conclusions).
- 7.9 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall assessment.
- 7.10 ComReg considers that Respondents' views are mainly focused on issues which can generally be captured under the theme identified below.
- The assessment of the nature of potential competition problems in Market A.

²³⁶ See Questions 5 and 6, page 110 of the BTS Consultation.

- 7.11 ComReg notes that RTÉ suggested that ComReg's analysis of its incentives to engage in anti-competitive behaviour as set out in paragraph 8.19 of the BTS Consultation was flawed. ComReg has already provided its consideration of such issues in paragraphs 6.24 to 6.35 of this Decision and, therefore, does not repeat the analysis again in this section.

The assessment of the nature of potential competition problems in Market A

- 7.12 TG4 agreed that ComReg had highlighted the potential competition problems that could arise in Market A absent *ex ante* regulation. TG4 stated that it had raised pricing issues in earlier consultation with ComReg²³⁷. TG4 stated that it believes RTÉNL has been operating abusive pricing for a number of years in terms of terrestrial BTS access costs.
- 7.13 The BAI also agreed with ComReg's view that the issues such as the limiting of access, foreclosure, or excessive pricing or margin squeeze could potentially arise in Market A given RTÉNL's likely market power. The BAI highlighted the failure of the BCI, and, subsequently the BAI, to conclude a DTT multiplex contract with the 'Boxer' or 'OneVision' consortia²³⁸. The BAI noted that both parties failed to conclude multiplex contracts, citing an inability to reach agreement with RTÉNL for a BTS contract as a principle reason for such failure. These consortia expressed concern about RTÉNL's requirement for financial guarantees while the licence competition was underway, as well as difficulties regarding the transparency of RTÉNL's tariff model and the basis on which RTÉNL proposed to charge these consortia for access to its BTS.
- 7.14 TV3 believed that foreclosing / excluding competitors has occurred in Market A, referring to its own experience as a terrestrial Downstream TV Broadcaster. TV3 pointed to an *ex post* competition law complaint it has raised with ComReg alleging that RTÉNL had engaged in excessive / discriminatory pricing. TV3 set out its view that, given ComReg has opened this case after a screening process, there is at least a prima facie case relating to such issues of abuse in Market A. TV3 also stated that, as part of its complaint,

²³⁷ In response to ComReg broadcasting market analysis questionnaires dated May 2010 and April 2011 and in response to ComReg's preliminary Three Criteria Test Consultation – "Three Criteria Test on the Broadcasting Transmission Market", ComReg Document Number 10/98. See <http://www.comreg.ie/fileupload/publications/ComReg1098.pdf> and Response to Consultation – "Three Criteria Test on the Broadcasting Transmission Market", ComReg Document Number 11/24, available at http://www.comreg.ie/publications/response_to_consultation_three_criteria_test_on_the_broadcasting_transmission_market.583.103837.p.html

²³⁸ In April 2008, applications for commercial DTT multiplex contracts were received from three consortia / groups and following a competitive application process, the BCI entered into contract negotiations firstly with 'Boxer' and subsequently the 'OneVision' consortium, both of whom were unable to negotiate with RTÉNL for access to its BTS network to the satisfaction of all parties. The third consortium, 'Easy TV', thereafter decline to pursue negotiations for commercial DTT multiplex contracts. See <http://www.bai.ie/?p=1462>

a list of material has been provided to ComReg to support its position.

- 7.15 Furthermore, TV3 stated that, in relation to leveraging / refusal to deal, it had asked RTÉ for details on how its tariffs are derived and that this request had been refused by RTÉNL.
- 7.16 TV3 also referred to independent reports which it believed had identified competitive problems in the market for terrestrial BTS. These include the *“Irish Broadcasting Landscape: Economic and Environmental Review”*²³⁹ conducted for the BAI by Athena Media in 2010 where, TV3 said, one of its recommendations was that RTÉ should be removed from ownership of the DTT network. TV3 referred to a BAI press release in August 2010 outlining the inability of any of the DTT multiplex consortia to conclude a deal with RTÉNL for providing BTS and a BAI report²⁴⁰ in August 2011 about the provision of programme services on RTÉ’s PSB DTT multiplex(es). TV3 stated that this report found that RTÉ’s wholesale tariff strategy was unsustainable for any party other than RTÉ.
- 7.17 RTÉ was of the view that, having regard to what it termed ComReg’s finding that there may be only room for one BTS network provider in Market A, it is RTÉ’s own understanding that ComReg is not concerned with facilitating entry of a supplier in Market A, but rather that ComReg is concerned with the supply of Market A BTS to Downstream Broadcasters and Multiplex Operators that are competing downstream with RTÉ.
- 7.18 RTÉ stated that, were this to be the case, it is of importance / relevance to how any potential competition problems are addressed. In this respect, RTÉ stated that concerns regarding access to Market A inputs should be framed in terms of providing access to a fully managed national BTS and not in terms of providing access to individual specific BTS network elements.
- 7.19 As such, RTÉ was also of the view that ComReg’s analysis of competition problems relating to access would differ if access requests were based on individual specific BTS network elements rather than access to a fully managed national BTS, due to differences in the level of difficulty in the replicability of such access requests.
- 7.20 RTÉ was of the view that an obligation of non-discrimination is sufficient to address competition problems in Market A.

²³⁹ “Irish Broadcasting Landscape: Economic and Environmental Review for the BAI”, Athena Media, dated 31 August 2010. See http://www.bai.ie/wordpress/wp-content/uploads/20110323_StratEconAnlysRpt_vFINAL_AC.pdf.

²⁴⁰ “Report and Recommendations by the Broadcasting Authority of Ireland on the exercise of its functions under Statutory Instrument No.67 of 2011”, the BAI, dated August 2011. See http://www.bai.ie/wordpress/wp-content/uploads/20110815_BAIDTTEOI_FINAL.pdf.

ComReg's Assessment of Respondents' Views

7.21 ComReg assesses Respondents' views under the identified theme below.

The assessment of the nature of potential competition problems in Market A

7.22 With respect to the BAI's comment on the failure to conclude a DTT multiplex contract, this was noted by ComReg in paragraph 4.43 of the BTS Consultation.

7.23 On TV3's comments concerning its *ex post* competition complaint, ComReg would note that this is currently being investigated under a different regulatory framework (i.e. the Competition Act 2002, as amended) to this BTS Review. ComReg has not yet concluded on this matter. Furthermore, the fact that ComReg has opened an investigation is not, in and of itself, indicative that an abuse under competition law is likely to have occurred.

7.24 ComReg also notes TV3's view that it previously sought details on RTÉNL's tariffs and had been refused such. In this regard, ComReg assessed and proposed the need for such an *ex ante* transparency regulatory obligations in paragraphs 9.55 to 9.81 of the BTS Consultation and will consider this further, in light of Respondents' views, when determining appropriate remedies for Market A later in section 8 of this Decision.

7.25 ComReg notes RTÉ's comment in paragraph 7.17 above setting out its view that ComReg's concern is with the supply of terrestrial Market A network services to Downstream Broadcasters and Multiplex Operators and not with facilitating entry to Market A itself. In paragraph 7.46 of the BTS Consultation, ComReg noted that the barriers to entry in Market A, including financial costs of entry, are likely to be significant and that the minimum efficient scale ('MES') may be so large relative to the market as a whole, there may be room for only one BTS network provider in Market A to fully exploit economies of scale in light of finite spectrum availability in bands allocated to broadcasting of terrestrial programme services.

7.26 ComReg considers the possibility of competitors entering Market A to be unlikely, particularly in the timeframe of this BTS Review. Though not precluding such entry, ComReg's focus is therefore on ensuring that the right conditions exist to allow actual and potential customers (i.e. national analogue radio and Multiplex Operators) gain effective access to Market A upstream inputs in order to facilitate downstream competition (in wholesale Market B and retail markets).

7.27 ComReg notes RTÉ's related comments on the replicability of network elements and the proportionality of the proposed form of the access remedy.

- 7.28 In this regard, ComReg would note that it has previously considered the level of constraints imposed on RTÉNL from other terrestrial supply in section 4 of this Decision. Therein, ComReg set out its position that, although it may be technically feasible for national Downstream Broadcasters or Multiplex Operators to replicate some low lying sites for non-national terrestrial BTS coverage, this may not be economically (or in some cases technically) viable in a number of cases, particularly in the context of having to access the critical mass of key high location sites that would be needed to achieve national coverage. Issues related to (the proportionality and justification of) Market A remedies, including access remedies will be discussed later in sections 8 to 10 of this Decision.
- 7.29 While RTÉ has expressed its view, as noted in paragraph 7.20 above, that a non-discrimination obligation is sufficient to address competition problems in Market A, ComReg considers that this is more appropriately considered in section 8 (i.e. discussion of remedies) of this Decision.
- 7.30 Notwithstanding, ComReg's position, as set out in section 6 of this Decision, is that RTÉNL has SMP in Market A and it is not likely to be effectively constrained in its ability to act, to an appreciable extent, independently of its competitors, customers and consumers. This lack of effective competition also enables RTÉNL to engage in a range of anti-competitive behaviours including in respect of access, prices, and the variety or quality of services provided²⁴¹. Therefore, a non-discrimination regulatory obligation on its own would be unlikely to effectively address such competition problems.

ComReg's Position

- 7.31 Having regard to section 8 of the BTS Consultation and the discussion of Respondents' views above, ComReg's position is that a vertically integrated monopoly SMP undertaking in Market A such as RTÉNL, has the ability and incentive to engage in a range of the competition problems which ComReg has identified in section 8 of the BTS Consultation and section 7 of this Decision.

²⁴¹ See paragraphs 6.28 to 6.29, and 7.54 to 7.58 of the BTS Consultation.

8 Remedies – Market A

Overview of Approach to Remedies in the BTS Consultation

- 8.1 In section 9 of the BTS Consultation, ComReg presented its preliminary views on the imposition of appropriate and proportionate remedies to address the competition problems identified in section 8 of the BTS Consultation, which could arise in Market A absent *ex ante* regulation.
- 8.2 ComReg noted that, in accordance with Regulation 8(1) of the Access Regulations, where an undertaking is designated with SMP on a relevant market, ComReg is required to impose on that undertaking, such of the obligations set out in Regulations 9 to 13 of the Access Regulations as ComReg considers appropriate.
- 8.3 ComReg also noted that Regulation 8(6) of the Access Regulations provides that such obligations must be based on the competition problem identified, proportionate and justified.
- 8.4 Furthermore, such obligations should only be imposed following public consultation and notification of draft measures to the European Commission, BEREC, and other NRAs.
- 8.5 In addition, ComReg noted that Regulations 12(1)(4) of the Access Regulations provide statutory criteria ComReg that must take into account before imposing access obligations on an SMP undertaking²⁴².
- 8.6 Other considerations²⁴³ were also taken into account by ComReg as appropriate (e.g. relevant comments letters issued by the European Commission to other NRAs pursuant to Articles 7 and 7a of the Framework Directive).
- 8.7 ComReg then went on to consider whether regulatory forbearance was appropriate, but set out its preliminary view that it was not, given that Market A was considered unlikely to be subject to effective competition within the timeframe of this BTS Review²⁴⁴.
- 8.8 ComReg then proceeded to consider each of the regulatory obligations set out in Regulations 9 to 13 of the Access Regulations, justifying why or why not such regulation is required in Market A.
- 8.9 Below, ComReg considers the issues raised by Respondents, and sets out its final position on the imposition of remedies in Market A.

²⁴² Including the technical and economic viability of using or installing competing facilities; the feasibility of providing access; the initial outlay of investment by the undertaking; and the need to safeguard competition in the long term.

²⁴³ See paragraph 9.6 of the BTS Consultation.

²⁴⁴ See paragraphs 9.8 to 9.15 of the BTS Consultation.

Imposition of Access Remedies

Position set out in the BTS Consultation

- 8.10 In the BTS Consultation, ComReg set out its preliminary view that RTÉNL should be subject to **access obligations**²⁴⁵ that include requirements to meet reasonable requests for access to BTS having regard to the reliance of national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators on access to RTÉNL's wholesale network and associated facilities, and given the potential for exclusionary / foreclosure problems to occur in Market A (as had been previously identified in section 8 of the BTS Consultation and section 7 of this Decision).
- 8.11 ComReg proposed the following access obligations:
- An obligation to negotiate in good faith²⁴⁶;
 - An obligation not to withdraw access to services and facilities already granted²⁴⁷;
 - An obligation to grant access in a fair, reasonable and timely manner²⁴⁸;
 - An obligation to ensure that SLAs are concluded and implemented²⁴⁹; and,
 - An obligation to provide objective criteria for any refusal or part refusal of access²⁵⁰.

BTS Consultation Question(s)

- 8.12 Having proposed the imposition of access obligations on RTÉNL in Market A, ComReg then asked the following questions²⁵¹.

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

²⁴⁵ See paragraphs 9.17 to 9.27 of the BTS Consultation.

²⁴⁶ See paragraphs 9.28 to 9.30 of the BTS Consultation.

²⁴⁷ See paragraphs 9.31 to 9.34 of the BTS Consultation.

²⁴⁸ See paragraphs 9.35 to 9.36 of the BTS Consultation.

²⁴⁹ See paragraphs 9.37 to 9.44 of the BTS Consultation.

²⁵⁰ See paragraph 9.45 of the BTS Consultation.

²⁵¹ See Questions 7 to 11, pages 120 and 121 of the BTS Consultation.

- Question 8.** ComReg has proposed an access remedy to RTÉNL's transmission and distribution network including associated facilities. What services / facilities do you consider RTÉNL should be obliged to provide in light of the considerations contained in Regulation 12(4) of the access Regulations. In addition, what services / facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.
- Question 9.** ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider that service credits should be a condition of the proposed SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.
- Question 10.** ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg Decision Notice (D16/04) should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.
- Question 11.** Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Respondents' Views

- 8.13 **Three Respondents agreed** (TG4, the BAI, and TV3) with ComReg's proposed access obligations and, in some cases, provided comments on them.
- 8.14 **One Respondent disagreed** (RTÉ) with ComReg's proposed access obligations on the basis of its view that non-discrimination and transparency obligations would be sufficient to address the identified competition problems in Market A and that the access remedy, in its proposed form, was disproportionate. RTÉ highlighted a number of concerns it had with the requirement that access is

provided on what it called, an ‘unbundled’ basis, in particular, the potential impact of the scope of such obligations on the integrity of its network.

- 8.15 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 7 to Question 11 above. However, these Respondents stated that, overall, they agreed with ComReg’s preliminary view in the BTS Consultation regarding the need for *ex ante* regulation in Market A.
- 8.16 ComReg considers that Respondents’ views are mainly focused on issues which can be generally captured under the following themes.
- Whether access obligations are justified in Market A;
 - Concerns related to the proposed substance and form of the access obligations;
 - Transparency and monitoring of the access obligations; and,
 - Issues concerning SLAs and service credits.

Whether access obligations are justified in Market A

- 8.17 RTÉ stated that ComReg’s proposed access obligations represented a fundamental departure from the approach ComReg had adopted in its 2004 Broadcasting Review and that no proper justification is offered for this change in approach, in circumstances where RTÉNL has not strengthened its position in the market.
- 8.18 RTÉ also stated that the provision of access in the extensive form suggested by ComReg is unnecessary. RTÉ was of the view that if access obligations were appropriate, then what is required in Market A is access to fully managed national BTS and not access to individual elements of its BTS network.
- 8.19 Furthermore, RTÉ was of the view that in the presence of vertical integration, obligations of non-discrimination supported by transparency obligations are sufficient in Market A. In this regard, RTÉ stated that the access remedy is inappropriate as the competition problems that it would address do not exist and, in any event, were not proportionate.

Concerns related to the proposed substance and form of the access obligations

- 8.20 RTÉ made the following comments concerning the substance and form of the proposed access obligations:
- The access obligations need to be clearly specified and further clarified, including the proposed services and associated facilities that must be provided;
 - The access remedies, as proposed, were open ended and, on the basis of ComReg’s preliminary findings in the BTS

Consultation, access to fully managed national BTS is required rather than access to individual network elements;

- The access obligations proposed by ComReg potentially regulate the provision of access to RTÉNL sites and masts which are not in a unique position (i.e. could be replicated) and such an obligation has not been justified. As such, the requirement to provide access to individual network elements as suggested by ComReg cannot be justified on the basis of the statement in paragraph 9.17 of the BTS Consultation that the broadcasting transmission infrastructure is non-replicable. RTÉ also suggested that there was no demand for access to individual network elements;
- An obligation to provide access to unbundled or piecemeal elements of the transmission network coupled with the proposed non-discrimination and transparency obligations would require a large number of issues (technical, operational and contractual complexity) to be addressed which make the provision of such access technically difficult. In this respect, RTÉ suggested that such an obligation would not be proportionate having regard to Regulation 12 of the Access Regulations;
- There would be significant issues with the access obligation in its proposed form in terms of the potential impact on network integrity. In terms of distribution, RTÉ elaborated that it has no difficulty with any party installing equipment at any of its sites where the site is capable of accommodating that equipment. It noted that while such equipment, where faulty or malfunctioning, would have little potential to cause actual physical damage, transmission equipment has the potential to significantly damage existing antenna systems (combiners, cables and antenna);
- RTÉ noted that while RTÉ does grant access to third parties²⁵² to specific areas of the buildings located at transmission sites, such third parties are not allowed to access the parts of the buildings containing the transmitter and other equipment used to provide national terrestrial broadcasting services. RTÉ stated that it did not believe, in the interests of maintaining system integrity, that it would be appropriate to allow direct third party access to these transmitters / other equipment. It stated that were such access to be allowed, significant constraining procedures would have to be put in place to protect the integrity of equipment intrinsic to RTÉNL's core services; and,

²⁵² For local, regional, quasi-national radio, telecommunication, emergency, and army services among others.

- Further to the above, RTÉ was of the view that were there demand for access to individual network elements by third parties (such as masts and sites) for the purpose of national BTS, it would expect to apply the same / similar terms it has already reached under commercial arrangements for the provision of the same or similar access.

Transparency and monitoring of the access obligations

8.21 TV3 had a number of comments relating to the transparency and monitoring of the access obligations. These included:

- The access obligations should be subject to published criteria and the approval of ComReg;
- A quarterly performance report should be published on ComReg's website or similar;
- Monitoring and reporting of compliance with remedies should be conducted;
- A specific right of access to any co-location servers, racks or similar equipment owned or managed by TV3 should be granted to TV3; and,
- The necessity to carry out maintenance on associated facilities should be a legal requirement in the access obligations.

Issues concerning SLAs and service credits

8.22 In relation to SLAs and service credits TV3 made the following comments:

- Service credits should ensure that a customer's commercial loss (including reputational damage) is compensated in full in the event of breach of SLAs;
- ComReg should determine the service credits on a case by case basis should a breach of SLAs occur;
- SLAs should be readily accessible to customers, and SLA service credit costs incurred by RTÉNL should be excluded from RTÉNL's DTT tariff model; and,
- The SLAs should include an agreed closing out process in respect of any fault incident.

8.23 RTÉ had the following comments in relation to SLAs and service credits:

- In current contracts with RTÉNL, service credits are linked to the extent and duration of national coverage lost and it viewed this as being consistent with ComReg's proposals on service credits as set out in paragraph 9.42 of the BTS Consultation. RTÉ indicated that the service credit regime should not require compensation for consequential losses that may be suffered by customers;

- RTÉ was concerned that service credits should be the subject of negotiation (as it suggested was indicated in paragraph 8.2 (iii) of section 11 in the BTS Consultation). If this implies that SLAs may differ across customers, then this suggested to RTÉ that such matters may raise issues relating to commercial confidence. If RTÉ's understanding was correct, it was of the view that this is inconsistent with paragraph 9.80 of the BTS Consultation which stated that SLAs should be published on its website (which ComReg suggested would not contain any commercial sensitive information);
- A service credit regime can work well in terms of the provision of fully managed BTS but this is more difficult under ComReg's proposals whereby the nature of the access provided to each customer could differ;
- Service credits under *ex ante* access obligations would need to be site and customer specific and it was unclear if this is what ComReg meant in the BTS Consultation when it stated that RTÉNL should 'negotiate' with Downstream Broadcasters and Multiplex Operators to conclude SLAs. If this was the case, then RTÉ expressed concern, stating that individually negotiated SLAs should not be subject to publication;
- A right to 'off-set' service credits against the customer's next invoice should be allowed;
- It would be inappropriate to require RTÉNL to pay service credits to a customer whose account is in arrears;
- RTÉ cannot make commitments in an SLA that were beyond its ability to deliver and, in this regard, the conclusion of any SLA will be dependent on negotiations being entered into in good faith by all parties; and,
- RTÉ stated that it was unsure on what basis it is possible for ComReg to impose an obligation on parties to ensure that legally binding SLA agreements are concluded (as set out in paragraph 9.37 of the BTS Consultation) and suggested that, as drafted, this obligation is unworkable.

ComReg's Assessment of Respondents' Views

8.24 ComReg assess Respondents' views on the access obligations under the themes identified.

Whether access obligations are justified in Market A

8.25 In sections 7 to 9 of the BTS Consultation, and sections 6 and 7 of this Decision, ComReg identified that RTÉNL had the ability and incentive to engage in a range of exclusionary and exploitative behaviours in Market A which could give rise to reduced competition in downstream wholesale and retail markets, and thereby potentially

reduce the quality, choice and diversity of programme services to end-users.

- 8.26 ComReg was of the view that such anti-competitive behaviours include the effective or constructive denial of access to Market A BTS to competitors of its downstream arm (RTÉ). ComReg considered the access obligations proposed in section 9 of the BTS Consultation to be justified and proportionate having regard to the need to address such potential competition problems in Market A.
- 8.27 A denial of access to Market A wholesale inputs and associated facilities, or the imposition of unreasonable terms and conditions having a similar effect would, in ComReg's view, hinder the emergence of sustainable competition in downstream wholesale and retail markets in which RTÉ and other Downstream Broadcasters and Multiplex Operators (using Market A access inputs) compete. Such behaviours concerning actual or constructive denial of access would ultimately be detrimental to the interests of end-users and would also otherwise hinder the objectives set out in section 12 of the Communications Regulation Acts 2002 to 2011 and Regulation 16 of the Framework Regulations (among others, to promote competition).
- 8.28 ComReg notes that there is no alternative to RTÉNL's supply of Market A services in Ireland and ComReg considers this is unlikely to change in the timeframe of this BTS Review. Therefore, having regard to the SMP assessment, analysis of potential competition problems and justification of remedies and the RIA (as discussed later in this Decision) in sections 7 to 10 of the BTS Consultation and sections 6 to 9 of this Decision, ComReg considers that access obligations are required in Market A in order to promote the development of effective competition in downstream wholesale and retail markets to the benefit of end-users.
- 8.29 ComReg considers that RTÉNL's national BTS network is largely non-replicable in a timely or effective timeframe and does not accept RTÉ's view that ComReg's proposed substance and form of the access obligations are unwarranted, due to the potential replicability of some of RTÉNL's infrastructure. ComReg has previously considered such issues in sections 5 to 7 of the BTS Consultation and in section 4 of this Decision²⁵³. In this regard, ComReg has noted that although it may be technically feasible to replicate some low lying sites for non-national coverage, this may not be economically (or in some cases technically) viable in a number of cases in the context of having to access the critical mass of key high sites that would be needed to achieve national coverage.

²⁵³ See paragraphs 4.118 to 4.127 of this Decision.

- 8.30 In addition, given the ability and incentive for RTÉNL to engage in a range of anti-competitive exploitative and exclusionary behaviours, ComReg does not consider that non-discrimination and transparency obligations would, of themselves, be sufficient to address issues pertaining to denial of access in Market A. Such obligations typically support other *ex ante* obligations such as access and price control. For example, obligations of non-discrimination and transparency of themselves do not specify what type of product or service should be offered, or how it should be offered.
- 8.31 ComReg considers that it has taken a prudent approach to the imposition of the access obligations, as ComReg has specified the minimum necessary obligations to address identified competition problems (including denial of access).
- 8.32 Furthermore, ComReg would note that many of these access obligations are likely to be capable of being implemented by RTÉNL through its existing processes and procedures for dealing with third party access requests, subject to modification, as appropriate. In this regard, ComReg would note that, in RTÉ's Submission, it stated that it already provides a range of such access solutions to a number of third parties²⁵⁴.

Concerns related to the proposed substance and form of the access obligations

- 8.33 ComReg notes RTÉNL's concerns regarding the proposed scope of the access obligations in Market A, particularly concerning the potential impact this could have on its network integrity. ComReg would note that the access obligations are to provide a fully managed BTS and meet reasonable requests for access to BTS on an unbundled basis, and are considered by ComReg to be justified and proportionate having regard to the need to address potential Market A failures owing to RTÉNL's ability and incentives arising from its position of SMP in Market A.
- 8.34 As noted in paragraphs 8.28 and 8.29 above, ComReg is of the view that RTÉNL's infrastructure is not effectively replicable insofar as it relates to the provision of national BTS services. ComReg also notes that RTÉ itself stated²⁵⁵ that RTÉNL currently provides forms of access to third parties similar to those proposed by ComReg. Therefore, having regard to the identified competition problems in Market A ComReg does not consider that its proposed form of access obligations is disproportionate or unreasonable.
- 8.35 RTÉNL's obligations of unbundled access extend to the requirement to meet all reasonable requests from national analogue terrestrial

²⁵⁴ For local / regional / quasi-national radio, and telecommunications services among others.

²⁵⁵ See page 23, paragraphs 8.11 to 8.13 of RTÉ's Submission.

Downstream Radio Broadcasters and Multiplex Operators for the provision of such. Where RTÉNL considers that such particular forms of access requested are unreasonable, it will need to clearly justify to the party requesting such access why this is the case, and ComReg may intervene, as appropriate.

- 8.36 To clarify the scope of the access obligation, and noting RTÉNL's concerns regarding network integrity, ComReg outlines two potential access scenarios below, which ComReg envisages could occur under the access obligations to be imposed in Market A.
- 8.37 **Scenario 1:** In this scenario, RTÉNL provides access to a fully managed broadcast transmission (including distribution) service, including associated facilities which includes, but is not limited, to:
- The provision of co-location space for the transmitter equipment;
 - The provision of power and the backup power supply for the transmitter and associated equipment;
 - The provision of telemetry services;
 - The provision of access to the antenna combiner and feeder to enable the connection of the transmitter equipment to the combiner;
 - The provision of access to the microwave distribution system; and,
 - The provision of support services.
- 8.38 **Scenario 2:** In this scenario, RTÉNL meets all reasonable requests from national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators for access on an 'unbundled' / 'unmanaged' basis whereby access to those elements listed in Scenario 1 above may be sought by national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators on a disaggregated site by site basis.
- 8.39 Where genuine issues of network integrity arise, RTÉNL would manage any integration and ongoing operation of third party transmission equipment into its existing shared national broadcasting antenna, feeder and combiner system (for DTT and radio), as appropriate.
- 8.40 While there are a number of processes / procedures that may need to either be adapted from those currently employed by RTÉNL in its provision of existing access to its BTS network or developed afresh, given the potential for bespoke requests for unbundled (i.e. access at the level of individual network elements) forms of access from national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators, RTÉNL would nonetheless need to provide a transparent process that can accommodate the effective management of such requests as outlined above.

- 8.41 ComReg considers that the management of such requests could be achieved via a Statement of Requirements ('**SoR**') process²⁵⁶, which is essentially a mechanism which transparently sets out the information required by RTÉNL to consider requests for particular forms of access that fall outside access that would be provided via a fully managed BTS solution and the procedure according to which such access requests will be assessed and managed by RTÉNL within defined timeframes. Therefore, the SoR process itself would need to specify reasonable response timeframes within which such bespoke requests can be considered, with RTÉNL ultimately responding to such requests as sought, in a modified form or a refusal (at all times having regard to its regulatory obligations). Where an unbundled access request is refused or granted only in part, RTÉNL would need to provide the objective justifications for such refusal or partial granting of such access (at the same time of the refusal or partial granting of the access request is made).
- 8.42 ComReg appreciates that legitimate issues of network integrity / interference may arise which may impact on the nature of the access which could be provided by RTÉNL. In this regard, by ensuring that clear processes and standards are in place governing the treatment of access requests, certainty and assurance can be provided to all relevant market participants.
- 8.43 With respect to RTÉNL's comments, regarding third party access to specific areas within co-location sites containing transmitters and other equipment, ComReg would clarify that it is not suggesting that third parties should have unconstrained access to RTÉNL's network infrastructure. ComReg considers that such matters would be appropriately dealt with through the development of access procedures and associated accreditation and security arrangements (which may be included in the treatment of access requests via the SoR process). ComReg understands that RTÉNL already has similar processes in place at a number of its network sites which could be utilised or adopted, as appropriate.

Transparency and monitoring of the access obligations

- 8.44 In section 9 of the BTS Consultation ComReg proposed that obligations of transparency and accounting separation be imposed on RTÉNL in Market A which provide for the publication of accounting information, technical specifications, network characteristics, terms and conditions of supply and use and prices of services and facilities provided under the proposed access obligation in Market A. ComReg was of the preliminary view that these obligations should provide sufficient visibility of Market A services to ComReg and market participants.

²⁵⁶ Such a process may include, but is not limited to, issues related to health and safety, non-interference with other equipment, technical specifications, and operating procedures for example.

- 8.45 Ultimately, the onus to ensure compliance with such *ex ante* regulatory obligations will rest with RTÉNL. However, it is within ComReg's power to investigate the compliance of RTÉNL with its *ex ante* obligations, either in response to a complaint / dispute²⁵⁷ or on its own initiative.
- 8.46 Insofar as TV3's comments concerning the publication of performance reports are concerned, rather than requiring the publication of performance metrics, ComReg considers that concerns relating to service performance can, at this stage, be appropriately addressed through access (including SLAs) and non-discrimination obligations. ComReg will seek to ensure that any non-compliance brought to its attention or through ComReg's own initiative, will be addressed accordingly and ComReg may revisit the issue of service performance metrics at a later date.
- 8.47 Therefore, ComReg is of the view that a requirement to publish performance metrics is unwarranted (either on a quarterly basis as suggested by TV3 or otherwise) in Market A. However, ComReg will keep the situation under review, and, if warranted, reserves the right to make necessary amendments in the future, as required and appropriate.
- 8.48 In section 9, paragraph 9.19 of the BTS Consultation and earlier in section 8 of this Decision²⁵⁸, ComReg discussed the issue of rights of access to co-location services and associated facilities in Market A. For clarity, ComReg would note that as a Downstream DTT Broadcaster, TV3 would be directly purchasing Market B services from RTÉ and not Market A services from RTÉNL. Market B services are reliant on Market A inputs due to the interrelationship between upstream Market A and downstream Market B. Therefore, in this context, TV3 would not have a direct right of access to Market A services, unless it were to enter the broadcast market as a national Downstream Radio Broadcaster or Multiplex Operator.

Issues concerning SLAs and service credits

- 8.49 As previously noted, the ability to demonstrate compliance with its regulatory obligations rests with RTÉNL. Pursuant to Sections 10(1) (a), 10(1) (d) and 10(2) of the Communications Regulation Acts 2002 to 2011, ComReg may either, through its own initiative or in response to a complaint or dispute it receives, investigate RTÉNL's compliance with its regulatory obligations, as appropriate.
- 8.50 Transparency obligations coupled with non-discrimination obligations (as discussed later in this Decision) provide ComReg and market participants with visibility of RTÉNL's compliance with its

²⁵⁷ For detail on ComReg's dispute procedures, see Response to Consultation & Decision Notice: Dispute Resolution Procedures (Decision No: D03/10, Document No: 10/18 R, 29, March 2010). <http://www.comreg.ie/fileupload/publications/ComReg1018R.pdf>

²⁵⁸ See paragraphs 8.33 to 8.43 of this Decision.

SLA obligations and provide assurances that all market participants should be provided with equivalent conditions and quality of supply for BTS. In this regard, ComReg would note that in section 9²⁵⁹ of the BTS Consultation it was proposed that SLAs should be published on RTÉNL's website.

- 8.51 The SLA obligation imposed on RTÉNL is, amongst other things, to publish an SLA that, when entered into by parties, is legally binding, and, to negotiate in good faith in relation to the conclusion of such SLAs.
- 8.52 In general, negotiations with respect to concluding an SLA are not bilateral given that they must be non-discriminatory. Typically, the SMP operator would engage in multilateral negotiations with actual and potential third parties (i.e. in Market A this is national terrestrial analogue Downstream Radio Broadcasters and Multiplex Operators) to agree the details of the SLA. If an agreement is reached between all parties then the SLA is published and becomes part of the reference offer, which is contractually binding. However, if the SLA cannot be concluded, after RTÉNL has negotiated in good faith and has made all reasonable efforts to reach agreement, then RTÉNL may publish its SLA for its regulated products and services and include it as part of its reference offer. If a third party is of the view that the SLA is not fit-for-purpose then that third party can raise a complaint / dispute with ComReg on same. In that case, ComReg will follow due process and, if required and appropriate, ComReg may require RTÉNL to amend the SLA.
- 8.53 The SLA may also be subject to review from time to time by RTÉNL and third parties may also request RTÉNL to review the SLA. The process to request a review of the reference offer (and SLA) would normally be catered for under a 'review clause' within the reference offer, setting out the terms and conditions on, and, when, such a review can occur.
- 8.54 Further to this, ComReg would also note that SLAs are typically treated as a contractually binding document as part of the reference offer (once signed by the party), and therefore, if SLAs were subject to revision, this does not mean that all other aspects of the reference offer itself would also have to be revised.
- 8.55 ComReg would also note that the purpose of service credits is to incentivise the achievement of SLA parameters and to provide adequate compensation where a breach of an SLA occurs. ComReg does not consider it to be practical, or that it would provide necessary certainty to market participants, were service credits to be determined on a case by case basis as was suggested by TV3. The service credits mechanism should therefore be clearly set out in the SLA and should be applied in a non-discriminatory manner.

²⁵⁹ See section 9, paragraphs 9.79 and 9.81 of the BTS Consultation.

- 8.56 ComReg is also of the view that any service credit costs that RTÉNL incurs should not be recoverable by RTÉNL through the tariffs it charges its customers as this would negate the principal of a service credit regime. Service credit costs would be incurred by RTÉNL where RTÉNL breaches its SLA agreements. As service credit costs are typically incurred for failure to achieve targets this should encourage efficiency in the operation of RTÉNL's Market A services.
- 8.57 ComReg has not specified what level or format service credits should take. However, it is ComReg's position that service credits should be negotiated between RTÉNL and third parties having regard to, amongst other things, RTÉNL's non-discrimination obligations as proposed in the BTS Consultation and later in this Decision. In this regard, no differences in service credits should exist where the services provided to customers are of an equivalent nature.
- 8.58 However, service credits could differ to reflect any differences in the services being provided to customers. For example, if a request for BTS is granted by RTÉNL which differs from that currently availed of by RTÉNL's other customers then different SLAs and service credits may need to be negotiated for this different form of access. Such SLAs including the service credits should then be published in line with RTÉNL's transparency obligations and, also be made available to other third parties on a non-discriminatory basis.
- 8.59 ComReg agrees that one mechanism to 'pay' service credits could be to 'off-set' them, in a timely and efficient manner, against invoices relating to payments from customers to RTÉNL. However, customers may make a request for other payment mechanisms, and RTÉNL would be required to meet reasonable requests for such.
- 8.60 With respect to RTÉ's comments on the payment of service credits to a customer whose account is in arrears, ComReg does not specify the approach which should be adopted in such circumstances. The off-setting of service credits against an invoice (which would include outstanding monies owed by customers) could contribute to the resolving of such issues.

ComReg's Position

- 8.61 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing access obligations in Market A.
- 8.62 Having regard to the analysis set out in the BTS Consultation²⁶⁰, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of access obligations as now presented in section 7 of the Decision Instrument to Market A

²⁶⁰ See section 8 - competition problems and paragraphs 9.17 to 9.45, 10.38 to 10.43, 10.51 to 10.58, and 10.71 to 10.78 of the BTS Consultation.

in Appendix D of this Decision (having also considered Respondents' views concerning the draft Decision Instrument in Market A, later, in section 10 of this Decision).

Imposition of Non-Discrimination Remedies

Position set out in the BTS Consultation

8.63 In the BTS Consultation ComReg set out its preliminary view that **non-discrimination obligations**²⁶¹ should be imposed on RTÉNL to ensure that RTÉNL does not discriminate in its provision of BTS to national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators.

8.64 ComReg proposed the following non-discrimination obligations:

- An obligation to apply equivalent conditions in equivalent circumstances, and to ensure that services and information are provided under the same conditions and of the same quality²⁶²; and,
- An obligation to ensure that SLAs are offered in accordance with the non-discrimination obligation²⁶³.

BTS Consultation Question(s)

8.65 Having proposed the imposition of non-discrimination remedies on RTÉNL in Market A, ComReg then asked the following questions²⁶⁴.

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

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

²⁶¹ See paragraphs 9.46 to 9.54 of the BTS Consultation.

²⁶² See paragraphs 9.51 to 9.53 of the BTS Consultation.

²⁶³ See paragraph 9.54 of the BTS Consultation.

²⁶⁴ See Questions 12 and 13, page 123 of the BTS Consultation.

Respondents' Views

- 8.66 **Three Respondents agreed** (TG4, the BAI, and TV3) with ComReg's proposed non-discrimination obligations and, in some cases, provided comments on them.
- 8.67 **One Respondent disagreed** (RTÉ) with ComReg's preliminary proposals on the basis that, in the proposed form, the non-discrimination obligations are unworkable in practice and disproportionate.
- 8.68 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 12 and Question 13 above. However, these Respondents stated that, overall, they agreed with ComReg's preliminary view in the BTS Consultation regarding the need for *ex ante* regulation in Market A.
- 8.69 ComReg is of the view that Respondents' views are mainly focused on issues which can be generally captured under the following themes.
- Scope of the non-discrimination obligations;
 - Implementation of the non-discrimination obligations; and,
 - Format and application of the non-discrimination obligations.

Scope of the non-discrimination obligations

- 8.70 TV3 generally agreed with the imposition of non-discrimination obligations. However, it was of the view that they should be extended to those who want to compete (but who have not signed a reference offer) as well as those who have accepted a reference offer, stating that to encourage entry, new market entrants need access to similar information to existing terrestrial Downstream Broadcasters in order to facilitate informed investment decisions.
- 8.71 TV3 then went on to state that ComReg should define specific areas where discrimination is not appropriate (e.g. products, information, services) and areas where discrimination is acceptable (e.g. price).

Implementation of the non-discrimination obligations

- 8.72 TV3 expressed its view that it has concerns as to how the non-discrimination remedies will work in practice and sought explicit clarity regarding the implementation and supervision of such obligations. TV3 stated that the fees payable by all relevant parties for Market A services should be made publicly available in an open and transparent manner to all contracting parties (suggesting that they should be published on ComReg's website).

Format and application of the non-discrimination obligations

- 8.73 RTÉ was of the view that given the specificities of Market A, the proposal in paragraph 9.53 of the BTS Consultation (i.e. that the provisioning of information and services should be made to others

at the same time as it is made to RTÉ) is unworkable in practice. In particular, due to the ownership and governance structures of RTÉ and RTÉNL, RTÉ stated it will be aware of information about the future level or direction of tariffs before its competitors. RTÉ stated that, similarly, in this regard, it is necessary for RTÉNL to share information with RTÉ.

- 8.74 RTÉ stated that a further practical difficulty is that RTÉ is a direct customer of RTÉNL in Market A and a supplier in Market B such that in order for prices in both markets to be communicated simultaneously, RTÉ will need to know of any changes to the tariffs levied by RTÉNL in respect of its PSB multiplexes before its downstream competitors.
- 8.75 RTÉ went on to say that it is sufficient that an appropriate notice period be provided to relevant customers before implementing any change in services provided to customers and that the focus of the obligation of non-discrimination should not be on the time at which information is provided to customers of RTÉNL, but the substance of what is being provided.
- 8.76 RTÉ was of the view that there is inconsistency between what is proposed in paragraph 9.53, section 9 of the BTS Consultation and paragraph 9.3 of the draft Decision Instrument in section 11 of the BTS Consultation, where the former refers to ensuring services and information is made known to others at the same time as it is known to RTÉ, and the latter refers to ensuring that services and information made available to RTÉNL (including RTÉ) is provided at the same time to others. RTÉ stated it is unclear as to what this means and how this should apply in practice given its reasoning set out above.
- 8.77 Further, RTÉ stated that following ASO it will have only two national terrestrial customers in Market A (RTÉ and Today FM) and the non-discrimination obligations proposed are impractical, disproportionate and unworkable in their present form.

ComReg's Assessment of Respondents' Views

- 8.78 ComReg assesses Respondents' views on the non-discrimination obligations under the themes identified.

Scope of the non-discrimination obligations

- 8.79 ComReg would note that the non-discrimination obligations in relation to the provision of Market A services relate to BTS purchased by national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators (who in turn supply wholesale Market B services).
- 8.80 ComReg notes that TV3 is a direct consumer of Market B services not Market A services, purchasing its DTT multiplexing services from RTÉ. It is therefore the non-discrimination obligations in Market

B that are of most relevance to TV3 (which are discussed later in section 14 of this Decision).

- 8.81 The non-discrimination obligations set out in section 9 of the Market A draft Decision Instrument apply to both pricing and non-pricing aspects of RTÉNL's provision of Market A services and information.
- 8.82 For the avoidance of doubt, all available wholesale products, services information, and pricing should be published by RTÉNL as part of its Reference Offer, SLA and other supporting documentation, in compliance with its regulatory obligations. Such relevant information requested by purchasers and potential purchasers of RTÉNL's wholesale Market A inputs should be provided on request. However, if issues of commercial sensitivity were to arise this may not be appropriate. ComReg discusses issues of commercial sensitivity in paragraphs 8.125 to 8.127 below.
- 8.83 Furthermore, RTÉNL will also be required to publish specific financial and accounting data under its accounting separation obligations while other such information will be provided directly to ComReg as appropriate. Such information should provide sufficient transparency to Market A participants and to consumers of broadcasting services in related wholesale market(s), in particular, with respect to the internal transfer activities between RTÉNL and RTÉ.
- 8.84 In addition, the non-discrimination obligations oblige RTÉNL to apply equivalent conditions in equivalent circumstances to all national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators and to offer the same conditions and the same quality of services to other national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators as RTÉNL provides to itself or subsidiaries or partners. This also applies to products, services, information, and pricing.
- 8.85 Consequently, the purpose of the non-discrimination obligation is to prevent a scenario occurring whereby one national analogue terrestrial Downstream Radio Broadcaster and Multiplex Operator receives preferential treatment (or is disadvantaged) over another national analogue terrestrial Downstream Radio Broadcaster or Multiplex Operator, or, indeed that RTÉNL treats itself or subsidiaries or partners in a more preferential fashion in comparison to how it treats a national analogue terrestrial Downstream Radio Broadcaster or Multiplex Operator.

Implementation of the non-discrimination obligations

- 8.86 ComReg would note that the proposed non-discrimination obligations do not include "non-discrimination targets". The onus will be on RTÉNL to ensure that it operates in a manner which is consistent with its non-discriminatory obligations and as noted above, such obligations include prices and other terms and conditions of supply and use.

- 8.87 However, ComReg will keep the situation under review, and, if warranted, ComReg reserves the right to consult on the implementation of key performance indicators ('KPIs') at a later date in order to monitor the implementation of non-discrimination obligations.
- 8.88 ComReg considers that the financial information which will be published on RTÉNL's website as part of its transparency obligations and other information submitted to ComReg in confidence should offer sufficient transparency and assurance to market participants on RTÉNL's compliance with its non-discrimination obligations.

Format and application of the non-discrimination obligations

- 8.89 ComReg does not agree that those aspects of the non-discrimination obligation dealing with the provision of information by RTÉNL / RTÉ to itself on the one hand and to other Downstream Radio Broadcasters and Multiplex Operators on the other is unworkable, in particular, given RTÉ's governance structures.
- 8.90 ComReg would note that the wording of the Regulation 10(2) of the Access Regulations specifically refers to information and services being provided to other undertakings under the 'same' conditions as the SMP undertaking provides to itself.
- 8.91 ComReg notes that the non-discrimination obligations are required to address potential competition problems of discrimination in Market A by ensuring that on the one hand RTÉ / RTÉNL treats all national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators in an equivalent manner and on the other hand that RTÉNL treats RTÉ in the same manner as it treats all other national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators. The nature of the ownership and governance structure of RTÉNL and RTÉ should not facilitate the potential for discriminatory behaviour to occur and therefore it is for RTÉNL to ensure that its governance structures are compliant with its regulatory obligations.
- 8.92 As RTÉ notes, output prices for Market A services are input prices to Market B services. As such, non-discrimination and transparency remedies would apply in each market. There is no requirement for Market A prices to be published simultaneously with Market B prices (although this may occur in practice). National analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators should be made aware of (changes to) Market A prices simultaneously, and Market B Downstream DTT Broadcasters should also be made aware of (changes to) Market B prices simultaneously.
- 8.93 Contrary to RTÉ's view, ComReg also does not accept that there is any inconsistency between paragraph 9.53 of the BTS Consultation and paragraph 9.3 of the draft Decision Instrument in the BTS Consultation which explain that the provision of information and

services by RTÉNL to national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators should be provided at the same time that RTÉNL provides it to its downstream arm, RTÉ (who also operates in wholesale Market B).

- 8.94 The form of the non-discrimination remedy therefore aims to ensure that national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators are treated in the same fashion as RTÉNL treats its own downstream arm as well as ensuring that RTÉNL treats all national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators in an equivalent manner.

ComReg's Position

- 8.95 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing non-discrimination obligations in Market A.
- 8.96 Having regard to the analysis set out in the BTS Consultation²⁶⁵, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of non-discrimination obligations which are now presented in final form in section 9 of the Decision Instrument to Market A in Appendix D of this Decision (having also considered Respondents' views concerning the draft Decision Instrument in Market A, later, in section 10 of this Decision).

Imposition of Transparency Remedies

Position set out in the BTS Consultation

- 8.97 In the BTS Consultation ComReg set out its preliminary view that **transparency obligations**²⁶⁶ should be imposed on RTÉNL to, among other things, support the effectiveness and monitoring of other proposed remedies.
- 8.98 ComReg proposed the following transparency obligations:
- An obligation to publish a reference offer²⁶⁷;
 - An obligation to publish information about products and services²⁶⁸; and,
 - An obligation to publish SLAs²⁶⁹.

²⁶⁵ See section 8 - competition problems and paragraphs 9.46 to 9.54, 10.35 to 10.37, 10.59 to 10.60 and 10.79 of the BTS Consultation.

²⁶⁶ See paragraphs 9.55 to 9.81 of the BTS Consultation.

²⁶⁷ See paragraphs 9.64 to 9.76 of the BTS Consultation.

²⁶⁸ See paragraphs 9.77 to 9.78 of the BTS Consultation.

²⁶⁹ See paragraphs 9.79 to 9.81 of the BTS Consultation.

BTS Consultation Question(s)

8.99 Having proposed the imposition of transparency remedies on RTÉNL in Market A, ComReg then asked the following questions²⁷⁰.

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

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

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

Respondents' Views

8.100 **Three Respondents generally agreed** (TG4, the BAI, and TV3) with ComReg's proposed transparency obligations and, in some cases, provided comments on them.

8.101 **One Respondent disagreed** (RTÉ) on the basis that it considered that the obligation to publish a reference offer was unduly burdensome, as well as expressing concerns that the transparency obligations could result in a requirement to publish confidential information.

8.102 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 14 to Question 16 above. However, these Respondents stated that, overall, they agreed with ComReg's preliminary view in the BTS Consultation regarding the need for *ex ante* regulation in Market A.

8.103 ComReg is of the view that Respondents' views are mainly focused on issues which can be generally captured under the following themes.

²⁷⁰ See Questions 14 to 16, page 128 of the BTS Consultation.

- The practical application and detail of the transparency obligations;
- The need for a formal complaints process;
- Timing of changes to the reference offer; and,
- The proportionality of the reference offer obligations.

The practical application and detail of the transparency obligations

8.104 TV3 made the following comments regarding the application and detail of the transparency obligations:

Tariffs

- Customers should be clearly informed as to how each element of their tariffs is calculated / derived, including an explanation of any differences between customers' charges. If this is not possible, TV3 stated this information should be made known to ComReg;
- ComReg should approve tariffs; and,
- The proposed requirement to publish a description of how tariffs are derived is not sufficiently detailed.

Compliance with the reference offer

- ComReg should explain how it intends to monitor RTÉNL's compliance with its requirement to publish a reference offer.

8.105 RTÉ also provided comments on the application and detail of the transparency obligations:

Tariffs

- The reference offer should be limited to a fully managed BTS and the prices set out in the reference offer should be calculated on the basis of incremental capital and operating costs, together with new services' share of common costs;
- The reference offer should not include indicative charges for any aspects associated with access to individual elements of its network. As RTÉNL already has contractual arrangements in place with local radio services for such unbundled access and it expected to apply the same charging principles to customers requiring access to its regulated BTS;
- RTÉ suggested that paragraph 10.2 (iii) of section 11 of the BTS Consultation, stating that the reference offer will include at least an overview of how prices are derived, appears to be at odds with paragraph 9.64 of the BTS Consultation which stated that the reference offer should include prices. RTÉ stated that it would be helpful if ComReg could clarify these aspects; and,

- Due to RTÉNL's limited customer base and significant level of common costs, charges are sensitive to the allocation of these costs and, to the number of customers purchasing access to BTS. It therefore proposed that it calculate, for its reference offer, the charges that would be levied to the next new customer, assuming no other changes to the prevailing customer base or changes to costs other than those associated with meeting the requirements of the new customer.

The publication of confidential material

- RTÉ expressed some concerns with the content of paragraphs 9.77 and 9.78 (i.e. requiring publication of information about products and services) of the BTS Consultation given they appeared to potentially involve an obligation to publish commercially sensitive information; and,
- There should be no requirement on RTÉNL to publish RTÉ's own commercially sensitive data given that may benefit potential competitors. Instead, RTÉNL should, in the context of commercially meaningful discussions and / or in good faith negotiations, be required to disclose information under appropriate confidentiality agreements.

The need for a formal complaints process

- 8.106 TV3 was of the view that ComReg should formalise a complaints procedure in a written, published format and make it available on ComReg's website. This should detail exactly how user complaints related to RTÉNL's BTS network will be responded to, including a detailed list of the steps that will be taken and the response time for a conclusive outcome.

Timing of changes to the reference offer

- 8.107 TV3 expressed the view that the proposed three month advance notification period for any proposed changes to a reference offer is inappropriate given the longer term of duration of contracts and the long term commitment which TV3 would have entered into. TV3 believed that a notice period of one year is more appropriate.
- 8.108 RTÉ stated that the periods proposed for notification of changes to the reference offer should be achievable but it is possible that there will be circumstances where delays may arise.

The proportionality of the reference offer obligations

- 8.109 RTÉ had concerns about the feasibility of providing and publishing a reference offer due to uncertainty regarding the scope of this obligation.
- 8.110 RTÉ stated that in principle it could provide a reference offer for a fully managed national analogue terrestrial radio transmission service. However, it was of the view that it would be

disproportionate to do so because currently there is insufficient spectrum available to launch such a service. It stated that it could only provide a reference offer for such a service if it were provided with the details of the terms on which the BAI and ComReg would award a licence for such a service.

- 8.111 RTÉ went on to say that an obligation to publish a reference offer for services not presently provided by RTÉNL would be unreasonable in the absence of any actual request for such a service and it stated that the task of publishing a reference offer is further complicated if what is requested by an undertaking is unbundled to individual sites rather than to all sites.
- 8.112 In this regard, RTÉ considered that the reference offer should only be based on the status quo and applied to the next new customer accessing Market A services. In this respect, such work should only be performed in response to a genuine enquiry or when given notice by ComReg and or the BAI that a licence for a new service is forthcoming.
- 8.113 RTÉ, therefore, proposed that any obligation to publish a reference offer should be limited to providing a reference offer to the first new multiplex operator wishing to connect to RTÉNL's assets at the combiner at all sites currently used by its own PSB multiplexes.
- 8.114 TV3 was of the view that the transparency obligations should include the publication of relevant information on spare network capacity, infrastructure not in use and capacity consumed by each programme service, as well as applications made for new services.

ComReg's Assessment of Respondents' Views

- 8.115 ComReg assess Respondents' views on the transparency obligations under the themes identified above.

The practical application and detail of the transparency obligations

Tariffs

- 8.116 In response to TV3's and RTÉ's comments regarding the application of the transparency obligations with respect to tariffs, ComReg discusses the application of such obligations in the paragraphs below. ComReg considers that this is an appropriate approach which should provide sufficient transparency to market participants.
- 8.117 In the BTS Consultation, ComReg proposed the publication of a reference offer as part of the transparency obligations. In this respect, RTÉNL would publish its tariffs for Market A services and a detailed explanation as to how such tariffs are derived.
- 8.118 As such, how costs are derived and their allocation methods should be more readily transparent (similar provisions were also proposed for in Market B in the BTS Consultation which is discussed later in

section 14 of this Decision). In addition, in the BTS Consultation ComReg proposed the imposition of accounting separations in Market A (this is discussed later in paragraphs 8.147 to 8.214 below). This will further increase transparency of tariffs and the internal transfer pricing of RTÉ, thereby supporting other *ex ante* obligations in Market A (such as non-discrimination and price control).

- 8.119 In section 8 of the BTS Consultation, ComReg also proposed the imposition of a price control obligation in Market A under which RTÉNL would be required to ensure its tariffs are cost oriented (this is also discussed later in paragraphs 8.215 to 8.315 below). The burden of proof in this regard will rest with RTÉNL and ComReg can intervene, where appropriate, to ensure RTÉNL complies with such obligations. If ComReg considers that RTÉNL's tariffs are not in line with its obligations, ComReg can require RTÉNL to amend them.
- 8.120 Furthermore, RTÉNL is to be required to publish a reference offer, SLA(s) and information about products and services including prices. Under its transparency obligations RTÉNL will, therefore, be required not only to publish prices for the services covered by its access (and other) obligations, but also to document how such prices are derived.
- 8.121 Together with the proposed accounting separation obligations, ComReg's position is that the imposition of these transparency, price control and accounting separation obligations should provide sufficient visibility to ComReg and market participants regarding the supply characteristics, terms and conditions of use (including prices) of BTS in Market A.
- 8.122 Where new services or alternative forms of access to RTÉNL's network are requested by national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators and such requests are reasonable, RTÉNL will be required to provide pricing information to the party making the request. These prices will also have to be cost-oriented and based on the detailed cost models available and in line with the principles set out later in the discussion below concerning accounting separation and price control obligations (see paragraphs 8.147 to 8.315 below).
- 8.123 The onus will be on RTÉNL to ensure that its prices are reflective of costs (in accordance with its price control obligations). Prices for such new or amended services should then be published by RTÉNL in its reference offer so that there is visibility of such charges and customers can make an informed decision as to whether or not to avail of such forms of access.

Compliance with the reference offer

- 8.124 With respect to TV3's comments regarding monitoring of compliance, ComReg would note that any non-compliance with transparency obligations would be enforced through compliance

procedures that ComReg already has in place. This means that ComReg will monitor RTÉNL's compliance with its regulatory obligations through a process of investigation, either in response to a complaint or dispute from national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators (or from RTÉNL) or on ComReg's own initiative, as appropriate.

The publication of confidential material

- 8.125 ComReg agrees that where information is genuinely confidential and / or commercially sensitive, it may not be appropriate for it to be published. Where RTÉNL notes that certain information should not be published due to considerations regarding commercial sensitivity and / or confidentiality then ComReg would consider such circumstances on a case by case basis in accordance with ComReg's guidelines on the treatment of confidential information²⁷¹.
- 8.126 In this regard, ComReg would note that it is open to national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators to request information from RTÉNL in the context of request for access. RTÉNL must consider whether such a request is reasonable having regard to its regulatory obligations. RTÉNL may refuse requests for information or provide the information only in part. In so doing, however, RTÉNL must objectively justify the reasons for not meeting the request (in accordance with its access obligations).
- 8.127 In the event that national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators are not satisfied with the response provided by RTÉNL, then they should seek to resolve the matter with RTÉNL in the first instance and, failing that, can raise such issues with ComReg (through its complaints / disputes process) where they consider that RTÉNL has breached its regulatory obligations. This approach should ensure that national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators can obtain information necessary for access that they need while simultaneously ensuring that RTÉNL is not required to provide access to commercially sensitive and / or confidential information that is unnecessary for the purpose of the access being requested.

The need for a formal complaints process

- 8.128 ComReg would note that the purpose of the transparency obligations is not for ComReg to approve a reference offer, but to ensure that RTÉNL makes all necessary information visible to actual or potential customers. The onus will be on RTÉNL to ensure that the details contained in its reference offer are consistent with its

²⁷¹ Guidelines on the treatment of confidential information, final text guidelines, (Document No: 05/24, March 2005). See <http://www.comreg.ie/fileupload/publications/ComReg0524.pdf>

regulatory obligations and ComReg may direct changes to be made to the reference offer, as appropriate.

- 8.129 For the avoidance of doubt, ComReg has dispute procedures already in place, which are published in ComReg Decision D03/10²⁷². ComReg's enforcement powers are provided for in, amongst other things, the Communications Regulation Acts 2002 - 2011 and the Access Regulations. This should provide adequate visibility to TV3 as to how complaints / disputes will be investigated.

Timing of changes to the reference offer

- 8.130 In ComReg's view, TV3's proposal for a one-year advance notification period for changes to the reference offer is neither justifiable nor reasonable. The purpose of the notification period is to provide sufficient advance notice of changes to the reference offer and it is ComReg's position that a three-month advanced notification to ComReg is appropriate for purposes of transparency obligations while at the same time providing sufficient flexibility for tariffs and other terms and conditions to be adjusted as appropriate. ComReg is also of the view that two months advance notification to national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators is sufficient. These timeframes balance the need for RTÉNL to be able to make changes within a reasonable timeframe without unduly restricting developments in the market, while at the same time providing adequate notice of changes to customers.
- 8.131 ComReg would also note that these are minimum notification timeframes which are also subject to RTÉNL's non-discrimination obligations and that a similar three / two month cycle is currently used in notifying changes to reference offers in other regulated electronic communications markets, and has proven to be an effective notification process that balances the needs of all market participants. ComReg will monitor developments and, if evidence emerges, that different notification periods may be required, then ComReg may seek to amend the notification periods as appropriate.
- 8.132 ComReg does not anticipate that there will be frequent changes in the charges for BTS. Indeed, RTÉNL's charges are to be cost orientated and once such rates have been established, changes to charges should only likely occur if there is a material change in the cost of the inputs or cost allocation parameters to the cost model.
- 8.133 In the Decision Instrument to Market A in Appendix D of this Decision, ComReg has made allowance for ComReg to also agree to alternative advance notification timeframes with RTÉNL, in exceptional circumstances. Therefore, it is open to RTÉNL to make

²⁷² Response to Consultation & Decision Notice: Dispute Resolution Procedures (Decision No: D03/10, Document No: 10/18 R, 29, March 2010).

See <http://www.comreg.ie/fileupload/publications/ComReg1018R.pdf>

a case for longer / shorter advance notification timeframes, as appropriate, with such being considered by ComReg on a case by case basis.

The proportionality of the reference offer obligations

- 8.134 ComReg acknowledges that the preparation of a reference offer and associated documentation i.e. product description, process manuals etc. will involve some effort.
- 8.135 However, ComReg is of the view, as outlined below, that a reference offer should not be as burdensome as RTÉ has perceived it to be and that this also has to be balanced against the benefits that transparency will bring to market participants and to support the development of effective and sustainable competition to the benefit of end-users.
- 8.136 Further to the above, there are likely to be a number of processes and procedures that may need to be either adapted from those currently employed by RTÉNL in providing access to its BTS infrastructure and associated facilities, or, may need to be developed afresh, given the potential for bespoke requests for 'unbundled' (i.e. access at the level of individual network elements) access requests from national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators.
- 8.137 RTÉNL will need to provide a process that can accommodate the effective management of a national analogue terrestrial Downstream Radio Broadcasters' and Multiplex Operators' request(s) for access to BTS network elements (such as tower services and site facilities) on a disaggregated basis. ComReg has previously indicated, in paragraphs 8.33 to 8.43 above, that this could be achieved by means of a SoR process.
- 8.138 However, RTÉ appears to have interpreted the draft regulatory obligations proposed in the BTS Consultation to mean that RTÉNL must productise every individual input of its BTS network infrastructure which is provided to national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators. ComReg does not expect RTÉNL to provide, at the outset, a reference offer that covers all potential forms of unbundled access to its BTS network infrastructure. As previously noted in this Decision²⁷³, ComReg is requiring RTÉNL to meet reasonable requests for access to unbundled requests for access including specified network elements and associated facilities.
- 8.139 ComReg is of the view that the preparation of a reference offer should not be as complex as RTÉ has perceived it to be. The reference offer will be initially limited to the fully managed BTS RTÉNL currently grants to national analogue terrestrial Downstream

²⁷³ See paragraphs 8.25 to 8.43 of this Decision.

Radio Broadcasters and Multiplex Operators, with reasonable requests for unmanaged access being productised as and when they are granted. At that point, such access, where granted, would then also fall within the scope of the reference offer obligations.

- 8.140 Furthermore, ComReg would note that a typical reference offer consists of information covering the generic contractual terms and conditions under which access are to be provided. For example, the governing law, force majeure, termination, disputes and arbitration etc. as well as a series of individual service schedules that relate to each particular form of access being provided.
- 8.141 RTÉNL currently provides particular BTS and associated facilities to national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators, as well as to telecommunication operators. ComReg understands that contracts already exist for the provision of these services and facilities. It is likely that RTÉNL's existing contracts could be used as inputs into the structure and form of a reference offer, albeit noting that RTÉNL would also have to ensure that it complies with all of its regulatory obligations, including non-discrimination.
- 8.142 Furthermore, ComReg's position is that a reference offer is entirely justified and proportionate having regard to the competition concerns identified in section 8 of the BTS Consultation and section 7 of this Decision.
- 8.143 In this respect, the purpose of a reference is to provide *ex ante* regulatory and legal certainty for purchasers of Market A wholesale inputs, as well as to aid the monitoring of non-discrimination. This allows potential purchasers of Market A inputs to have clear visibility of the services available to them and their associated terms and conditions, thereby facilitating investment decisions associated with entry in downstream wholesale and retail markets. Developing a reference offer only on request would not facilitate these objectives.
- 8.144 While ComReg notes that potential spectrum availability issues could impact the likelihood of any new entry of Downstream Radio Broadcasters, existing national analogue terrestrial Downstream Radio Broadcasters such as Today FM and Newstalk already purchase Market A inputs from RTÉNL. A reference offer would, therefore, provide transparency to such customers that their services are being provided to them on a non-discriminatory basis. Therefore, ComReg does not agree that a reference offer should only be produced on request by the next new customer of Market A wholesale services.

ComReg's Position

- 8.145 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing transparency obligations in Market A.

- 8.146 Having regard to the analysis set out in the BTS Consultation²⁷⁴, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of transparency obligations as now presented in section 10 the Decision Instrument to Market A in Appendix D of this Decision (having also considered Respondents' views concerning the draft Decision Instrument in Market A, later, in section 10 of this Decision).

Imposition of Accounting Separation Remedies

Position set out in the BTS Consultation

- 8.147 In the BTS Consultation ComReg set out its preliminary view that **accounting separation obligations**²⁷⁵ should be imposed on RTÉNL to, amongst other things, support the transparency and non-discrimination obligations by making wholesale internal transfer prices and allocation of costs across different services visible (as RTÉNL is, as a wholly owned subsidiary of RTÉ, a vertically integrated entity).
- 8.148 ComReg's main proposals with respect to the accounting separation obligations covered the:
- Presentation of accounts²⁷⁶;
 - Transfer charging mechanism²⁷⁷;
 - Allocation of costs²⁷⁸;
 - Audit²⁷⁹; and,
 - Documentation²⁸⁰.

BTS Consultation Question(s)

- 8.149 Having proposed the imposition of accounting separation obligations on RTÉNL in Market A, ComReg then asked the following questions²⁸¹.

²⁷⁴ See section 8 - competition problems and paragraphs 9.55 to 9.81, 10.33 to 10.34, 10.61 to 10.64 and 10.80 to 10.83 of the BTS Consultation.

²⁷⁵ See paragraphs 9.82 to 9.145 of the BTS Consultation.

²⁷⁶ See paragraphs 9.99 to 9.121 of the BTS Consultation.

²⁷⁷ See paragraphs 9.122 to 9.124 of the BTS Consultation.

²⁷⁸ See paragraphs 9.125 to 9.126 of the BTS Consultation.

²⁷⁹ See paragraphs 9.127 to 9.137 of the BTS Consultation.

²⁸⁰ See paragraphs 9.138 to 9.145 of the BTS Consultation.

²⁸¹ See Questions 17 and 18, page 140 of the BTS Consultation.

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

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

Respondents’ Views

- 8.150 **Four Respondents generally agreed** (TG4, the BAI, TV3 and RTÉ²⁸²) with ComReg’s proposed accounting separation obligations and, in some cases, provided further comments on them.
- 8.151 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 17 and Question 18 above. However, these Respondents stated that, overall, they agreed with ComReg’s preliminary view in the BTS Consultation regarding the need for *ex ante* regulation of Market A.
- 8.152 ComReg considers that Respondents’ views are mainly focused on issues which can be generally captured under the following themes.
- Treatment of commercially sensitive information;
 - Review of international best practice;
 - Complaints process and treatment of non-compliance; and
 - Clarifications and timings of the commencement of the accounting separation obligations.

Treatment of commercially sensitive information

- 8.153 TV3 was of the view that commercially sensitive information should not be used as a mechanism by RTÉNL to justify non-disclosure and believed that this category of information should be defined and agreed with all relevant market participants to ensure that the transparency of the accounting separation obligations is fully adhered to.
- 8.154 TV3 went on to say that it had concerns about the nature of the material ComReg is allowing RTÉ to treat as confidential. In this regard, TV3 was of the view that, if RTÉ is allowed to keep a large amount of information from its customers, it will be difficult to assess

²⁸² Without prejudice to RTÉ’s views, expressed in response to previous questions, that if *ex ante* regulation in Market A was required; it should be limited to non-discrimination and transparency obligations.

whether separated accounts are being prepared correctly or even to assess the basis upon which they are being prepared.

- 8.155 Further to this, TV3 expressed its view that ComReg should review the Secondary Accounting Documentation and ensure that commercial sensitivity is not used by RTÉNL to avoid disclosing accounting / financial information to the market.

Review of international best practice

- 8.156 TV3 considered that ComReg should review international best practice for each of the following, and enforce them:

- Presentation of accounts;
- Transfer Charging Mechanism;
- Allocation of costs;
- Audit; and,
- Documentation.

- 8.157 Furthermore, TV3 considered that both Austria and Finland provided a good example of what was appropriate and considered such jurisdictions to be of more comparability to Ireland than others.

Complaints process and treatment of non-compliance

- 8.158 TV3 stated that a strictly defined time limited ComReg complaint handling process is essential and that it was concerned that TV3 and other customers would have no role in this.

- 8.159 TV3 considered that sanctions for non-compliance should be identified by ComReg as part of the process and that these measures should be identified and implemented in order to deter any non-compliance by RTÉNL with its accounting separation obligations.

Clarifications and timings of the commencement of the accounting separation obligations

- 8.160 RTÉ stated that it was confident it could satisfy the proposed requirements set out in section 9 and Appendix C of the BTS Consultation if these are specified in sufficient detail and RTÉNL is given sufficient time to make any necessary changes to its accounting systems and other processes.

- 8.161 RTÉ also discussed the consistency in the terminology used for the accounting separation obligations by noting that in paragraph 9.84 of the BTS Consultation ComReg referred to requiring separated accounts to be prepared for its 'main products and services', while in paragraph 2.1b of Appendix C of the BTS Consultation, the obligations appeared to be in relation to Market A and, where specified, for services, as defined by ComReg. Based on this, RTÉ was unclear as to what level of accounting separation ComReg intended that RTÉNL would provide. RTÉ then went on to state that

the definition of services and the presentation of separated accounts can be agreed between RTÉNL and ComReg.

- 8.162 Furthermore, RTÉ considered that there was a need for changes to support accounting separation obligations to be made in advance of the financial year for which additional or new information is required or for the financial years in which new policies and procedures are to be required.
- 8.163 In this respect, it also noted that a full timeframe for the review process and the decisions on the imposition of obligations on RTÉNL by ComReg has not been defined and so it considered it to be unreasonable to set out a timescale for the implementation of any specific measures that may form part of the overall package of the accounting separation obligations until the composition of all requirements has been defined.
- 8.164 In this regard, RTÉ proposed a start date of no earlier than January 1 2014 for implementation of accounting and reporting obligations. In its view this would be the first financial year which can be reasonably reported upon in view of the changes that are required. RTÉ also indicated that it would commit to working with ComReg to determine if certain information could be reasonably provided at a date earlier than this.
- 8.165 RTÉ was also of the view that the format of the accounting separation obligations to apply in any financial year should be determined as early as possible, and ideally, sufficiently in advance of the start of the relevant financial year to be reported upon, mainly due to the need to allow necessary changes to the accounting records and other systems and processes to be made.
- 8.166 RTÉ went on to state that the normal practice within the RTÉ Group is for financial statements to be audited within three months of the year end, but that the accounts are not finalised until they have been approved by Cabinet. RTÉ stated that it can make draft financial statements available to ComReg within four months of year end on a confidential basis but that publication of such should be aligned with finalisation, approval and publication of RTÉ's annual report and financial statements.
- 8.167 RTÉ stated that it had some concerns with paragraph 9.117 of the BTS Consultation where it will only be before the end of the financial year that ComReg will discuss audit requirements with respect to the Additional Financial Data ('AFD'). It was RTÉ's view that requirements for AFD and associated audits should be agreed before the start of the financial year so that RTÉNL has sufficient time to put in place any changes that may be required (which it viewed as being particularly important given paragraph 4.5 of Appendix C in the BTS Consultation regarding survey techniques and the need to ensure adequate controls are in place throughout the year on which management and auditors can rely to ensure the

cost allocation system is free from error, as noted in paragraph 5.4e of Appendix C of the BTS Consultation).

- 8.168 RTÉ went on to say that it would be helpful if RTÉNL and ComReg could agree and publish a standardised annual timetable which sets out when the requirements for the AFD and associated audits for any particular financial year are to be determined and when after the year end different information is to be provided to ComReg and / or published on the RTÉNL website.
- 8.169 It also stated that as the proposed requirement under 6.3 of Appendix C of the BTS Consultation (draft Regulated Accounts schedules and AFD) had no detail as to the extent or scope of this requirement, it is not in a position to confirm whether or not it can comply with this requirement.

ComReg's Assessment of Respondents' Views

- 8.170 ComReg assesses Respondents' views on the accounting separation obligations under the themes which were identified above.

Treatment of commercially sensitive information

- 8.171 Given the potential competition problems outlined in section 8 of the BTS Consultation, ComReg is of the view that it is important that a sufficient level of information is made publicly available in order to provide transparency to market participants as well as to ComReg. This can be achieved in a manner which assures that commercially sensitive / confidential information is protected.
- 8.172 ComReg considers that the accounting separation obligations proposed in the BTS Consultation strike an appropriate balance between providing sufficient transparency to ComReg and industry on the one hand, and acknowledging RTÉNL's legitimate concerns regarding commercial sensitivity on the other.
- 8.173 ComReg notes that not all of the accounting separation information that RTÉNL must provide, pursuant to its accounting separation obligations, must be published. Only ComReg will obtain certain information for its oversight of RTÉNL activities in relation to RTÉNL's AFD requirements. Furthermore, should ComReg require more information, this can be requested from RTÉNL as required. For example, if required, ComReg could request RTÉNL to produce and provide to ComReg, on a confidential basis, an income statement concerning radio services or for a specific Downstream Radio Broadcaster. However, such reporting may only be necessary in exceptional circumstances. A similar approach has been adopted by ComReg for regulated electronic communications and postal markets. ComReg considers that such an approach, as necessary, should allow the users of the separated accounts to understand and receive assurances regarding the internal transfer charges between RTÉ and RTENL.

- 8.174 RTÉNL will also be required to provide detailed accounting documentation to ComReg only, describing how it allocates costs. This will enable ComReg to understand the basis for such cost allocations and, where it has concerns, ComReg may require RTÉNL to amend the basis of its cost allocation. ComReg also imposes an obligation on RTÉNL which requires that its regulated accounts are audited by an independent firm of auditors, which must provide an audit opinion on the regulated accounts. This will provide a further level of assurance to ComReg as it will require a “duty of care” from the auditors to ComReg.
- 8.175 The requirement for RTÉNL to provide ‘Secondary Accounting Documentation’ will also enable ComReg to gain a further understanding of RTÉNL’s cost allocation process. This Secondary Accounting Documentation will be reviewed annually by RTÉNL and any change in the Secondary Accounting Documentation from the prior year will be subject to ComReg’s oversight. Where necessary, ComReg may require changes to ensure the cost allocation rules comply with the overall cost orientation obligation (as discussed later in paragraphs 8.215 to 8.315 this Decision) and the principles set out in this Decision.
- 8.176 ComReg considers that the above approach balances the need to give sufficient transparency to market participants, and having due regard to genuine issues of confidentiality of information, which will be visible to ComReg, as appropriate.

Review of international best practice

- 8.177 ComReg is imposing accounting separation obligations which it considers should satisfactorily meet the needs of all market participants and which should address the identified competition concerns, as outlined in section 8 of the BTS Consultation and section 7 of this Decision, in a proportionate manner.
- 8.178 ComReg has long established expertise in this area through regulating electronic communications and postal markets and its approach has scored highly in comparison to other NRAs in the latest available European Competitive Telecommunications Association (‘**ECTA**’) Regulatory Scorecard of 2009²⁸³.
- 8.179 ComReg will require RTÉNL to publish accounts which provide information and explanations on the principles of the services it offers (for both TV and radio) and supporting documentation²⁸⁴. In addition, ComReg will receive more detailed financial information (e.g. AFD) and documentation which will allow it to review the

²⁸³Regulatory Scorecard, 2009, ECTA. See http://www.ectaportal.com/en/upload/Scorecards/Regulatory_Scorecard_2009/ECTA%20Regulatory%20Scorecard%20Report%202009.pdf

²⁸⁴ On the basis of preparation of the accounts.

accounts at a more granular level. Such information will not be published, due to the commercial sensitive nature of the data.

- 8.180 ComReg is of the view that its accounting separation proposals are appropriate, conforms to international best practice, and this represents a proportionate approach to addressing competition concerns.

Complaints process and treatment of non-compliance

- 8.181 As previously noted in paragraphs 8.128 and 8.129, the requirement to demonstrate compliance with its regulatory obligations rests with RTÉNL. Pursuant to Sections 10(1) (a), 10(1) (d) and 10(2) of the Communications Regulation Acts 2002 to 2011, ComReg may either through its own initiative or in response to a complaint or dispute it receives, investigate RTÉNL's compliance with its regulatory obligations, as appropriate.

Clarifications and timings of the commencement of the accounting separation obligations

- 8.182 In response to RTÉ's request, ComReg further clarifies its requirements on the accounting separation obligations below.
- 8.183 ComReg considers that, at a minimum, RTÉNL's separated accounts, which are to be published, should clearly identify the revenues and costs associated with the provision of regulated services. AFD, which is confidential, is a subset of the separated accounts.
- 8.184 ComReg also requires RTÉNL to produce separated accounts which, in their public format, distinguish between regulated and non-regulated activities, and, in its AFD, to further subdivide regulated activities into radio, multiplex operators, and other regulated activities (where these may arise). RTÉNL should also be able to produce further financial information, as part of its AFD, to a more granular level (i.e. individual Downstream Radio Broadcasters) if necessary. RTÉNL will, with sufficient notice, be advised by ComReg should this information be required.
- 8.185 In agreeing the annual requirements of the AFD with RTÉNL, ComReg will allow sufficient time for RTÉNL to make the necessary preparations for reporting this requirement. However, RTÉNL's cost allocation processes should ensure the correct allocation of costs to regulated and non-regulated services (and regulated customers). It is envisaged that the AFD will be consistent from year to year for material activities, supplemented with ad hoc information requests from ComReg, as appropriate. It is likely that much of the information required will be in a standardised annual format.
- 8.186 ComReg is of the view that RTÉNL should implement the necessary procedures and policies to ensure that where survey data is used, it is reflective of generally accepted survey techniques or other

appropriate methods, and that the survey output ensures that services receive an appropriate allocation of costs.

- 8.187 ComReg will inform RTÉNL annually of its AFD and audit reporting requirements and provide it with sufficient time to obtain / prepare the necessary information. It is likely that the information requirement will be standardised from year to year.
- 8.188 RTÉNL is also required to produce draft templates for an income and expenditure account and a statement of Mean Capital Employed ('MCE') for regulated services, as reconciled to its statutory financial statements (thereby excluding non-relevant or non-regulated activities). It is also required to produce draft templates for material services under its AFD (i.e. services provided to Downstream Radio Broadcasters and Multiplex Operators). Draft templates for income and expenditure accounts and a statement of MCE are required to be produced for the first regulated financial year only (i.e. 2013).
- 8.189 For clarity, when produced, the information contained within the AFD should reconcile to RTÉNL's publically available income and expenditure accounts. RTÉNL will be required to submit draft Regulated Accounts schedules and AFD to ComReg within four months of the effective date of this Decision. The requirement to produce draft templates for its AFD is also for the first regulated financial year only (i.e. 2013).
- 8.190 ComReg further clarifies its position on the following below:
- (a) Transfer charges;
 - (b) Balance sheets;
 - (c) Definition of services for reporting purposes;
 - (d) Timing of the imposition of the remedy; and,
 - (e) Functional cost categories.

Transfer charges

- 8.191 To understand the basis for reporting of transfer charges, ComReg describes what '**External**', '**Inter**' and '**Intra**' charges relate to in Market A.
- 8.192 An External transaction refers to charges from RTÉNL as a supplier of non-regulated / regulated services to its customers who are independent or unaffiliated with RTÉNL / RTÉ. For example, External transactions include:
- The charges related to the supply of non-regulated / regulated services by RTÉNL to telecommunications operators; and,
 - The charges related to the supply of non-regulated / regulated services to Downstream Broadcasters and Multiplex Operators other than RTÉ.

- 8.193 An Inter transaction means a transaction between companies within one Group (i.e. between RTÉNL and RTÉ) for regulated and non-regulated services. For example, an Inter transaction refers to:
- The charges from RTÉNL to RTÉ for the regulated services RTÉNL provides to RTÉ such as national analogue radio broadcast transmission and distribution services; and,
 - Charges from RTÉ to RTÉNL (such as centrally incurred costs).
- 8.194 An Intra transaction means the charges within RTÉNL itself for the provision of non regulated / regulated services. For example, an Intra transaction refers to:
- The consumption of Market A inputs by other regulated / non regulated services supplied by RTÉNL, for example, towers or masts may form part of a charge for an overall network service supplied. In these cases the input charge from Market A will need to be separately disclosed.
- 8.195 In accounting for charges, RTÉNL must be able to clearly identify those elements of the transaction which are regulated and those which are non-regulated. Therefore, if, for example, RTÉNL supplies services to telecommunications operators, which include both the use of mast space (regulated) as well as ancillary services (non-regulated), it would be required to account for the transaction as an Intra transaction as this cost is part of the regulated Market A services.
- 8.196 The cost of ancillary services (if they are not regulated) when sold outside RTÉ would be an External transaction, and if sold to a subsidiary it would be an Inter company charge.
- 8.197 In order to support the obligations of transparency and non-discrimination ComReg requires RTÉNL to account for Inter and Intra transactions (transfer charges) using the same cost allocation and apportionment principles as if it were an External transaction.
- 8.198 In doing so, RTÉNL will ensure that cross-subsidisation between Inter / Intra and External transactions do not arise. Cross-subsidisation would arise were External transactions are charged higher rates than Inter / Intra transactions for equivalent services. Cross-subsidisation would also arise where charges for non-regulated services are sold below cost and are compensated by the above cost sale of the regulated services.
- 8.199 In accounting for Inter / Intra transactions RTÉNL should adopt the following approach:
- In the first instance, the charge levied for Inter / Intra usage shall be equivalent to the charge that is levied if the material service (regulated and unregulated) were an External sale rather than an Inter / Intra transaction;

- Where there is no equivalent charge the nearest equivalent charge should be used which would be the price / prices which most closely represent(s) the technical capabilities of the Inter / Intra transaction as if it were an External sale; and,
- Finally, where there is neither an equivalent or nearest equivalent charge then a cost based transfer should be used.

8.200 For nearest equivalent and the cost based transfers, any differences in Inter / Intra charges when compared to charges for similar External services, should be fully explained and reconciled.

Balance sheets

8.201 ComReg requires RTÉNL to produce a balance sheet at the end of each financial period. However, the balance sheets will be prepared on the basis of MCE and not in a format similar to that used in RTÉNL's statutory reporting process. This is because it is important, from a regulatory viewpoint, to assess whether returns being made are appropriate compared to the weighted average cost of capital ('WACC'). In arriving at the statement of MCE, adjustments are required to the results which are reported in RTÉNL's statutory financial statements. This is because RTÉNL produces one set of statutory financial statements. These adjustments can be considered as follows:

- The first is the exclusion of items not relevant in assessing the rate of returns (i.e. long term debt, taxation creditors). The exclusion of these items can be seen in the separated accounts of other regulated entities using MCE (e.g. Eircom). Long term debt is considered when calculating a WACC. Therefore, to include long term debt in the statement of MCE would result in double counting. Taxation creditors are not relevant for assessing the returns made by a regulated entity.
- The second relates to how RTÉNL accounts for assets associated with RTÉ's multiplexes. Multiplex licences are held by RTÉ not RTÉNL. RTÉ's PSB DTT multiplex licences and thereby the associated assets relate to Market B. ComReg understands that RTÉNL operates and manages RTÉ's PSB DTT multiplexes on behalf of RTÉ. In doing so RTÉNL has invested in assets related to Market B and these are recorded as fixed assets in the books and records and in the statutory financial statements of RTÉNL. For reporting under the accounting separation obligations ComReg requires RTÉNL to separately identify assets for Market A and for Market B. Market A assets will appear in the statement of MCE of RTÉNL. Market B assets held by RTÉNL will be excluded when preparing a statement of MCE for RTÉNL. Instead, subject to accounting separation obligations in Market B, as will be discussed in section 14 of this Decision, Market B

assets will be included in a statement of MCE by RTÉ in Market B.

- 8.202 As a result of both of these adjustments, an assessment of the returns made on the MCE in Market A and Market B can be made against their respective WACC(s), as appropriate.

Definition of services for reporting purposes

- 8.203 ComReg requires RTÉNL to be able to distinguish between the various Market A services (radio, DTT and non-regulated) it offers. In the interests of transparency, ComReg is of the view that such services should be reported according to the users of those services. ComReg understands that service users include:

- Purchasers of regulated Market A services (i.e. national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators); and,
- Purchasers of non-regulated Market A services (i.e. telecommunication companies, and local / regional Downstream Radio Broadcasters).

- 8.204 Should other regulated services be offered by RTÉNL in the future or should a service which is currently regulated become a non-regulated service, the above should be amended to reflect this.

- 8.205 RTÉNL should also be able to produce further financial information to a more granular level (i.e. individual national analogue terrestrial Downstream Radio Broadcasters and Multiplex Operators) if necessary and this would fall within the confidential AFD provided to ComReg. ComReg will advise RTÉNL in a timely basis should such information be required.

Timing of the imposition of the remedy

- 8.206 ComReg notes RTÉNL's concerns that changes will have to be made to its accounting systems and processes as a result of these obligations. While ComReg acknowledges that a certain level of cost, time and disruption may be incurred by RTÉNL in order to implement the accounting separation obligations, ComReg does not consider that the level of changes required should result in significant burden on RTÉNL. This is because much of the data necessary for the implementation of these accounting separation obligations should already be capable of being generated from RTÉNL's current financial systems.

- 8.207 However, ComReg considers that there are changes to current practices required of RTÉNL which include (a) the drafting of appropriate templates for reporting its financial position and (b) the development of appropriate cost drivers to allocate costs to services.

- 8.208 ComReg is of the view that on an ongoing basis it will be necessary for RTÉNL to publish its regulated accounts on its publicly available

website no more than four months after the end of its financial period, unless there are valid reasons for not doing so and RTÉNL submits an application for derogation to ComReg to which ComReg agrees. Where ComReg considers that derogation should be granted, it may publish an information notice to this effect explaining the basis for the derogation. The publication of financial information will enable the users of the separated accounts to assess the financial data within them as soon as possible after the year end thereby ensuring that the data contained within them is timely and relevant.

8.209 ComReg also notes RTÉNL's concerns regarding the timing of the sign off of its accounts. However, ComReg considers that in order that timely and relevant information is made available, separated accounts are required as soon as possible after its financial year end. Therefore, ComReg requires RTÉNL to publish its Regulated Accounts on its publicly available website no later than four months after the end of the financial period (or otherwise as or when required by ComReg).

8.210 ComReg remains of the view that the appropriate first financial period for implementation of the accounting separation obligations should be the year commencing 1 January 2013, otherwise information would not be available for a period of almost two years. However, for the first year of implementation ComReg considers that, in light of the work required to prepare accounts initially, it is reasonable to allow RTÉNL additional time to produce its first set of regulatory accounts for the year 2013. ComReg will require the submission of the initial set of Regulatory Accounts by 30 June 2014, and thereafter it will be required within four months of RTÉNL's financial year end.

Functional cost categories

8.211 In the BTS Consultation ComReg proposed that RTÉNL's costs should be reported under functional cost categories. These included:

- Employee costs;
 - Wages and salaries;
 - Social Welfare costs;
 - Pension costs and Life Assurance.
- Other Personnel related operating costs.

8.212 Having considered this further, and in light of Respondents' views, ComReg considers that the cost categories outlined in paragraph 8.211 above should be amalgamated into one functional cost category termed "Employee and personnel related costs". ComReg considers that there is unlikely to be any additional transparency benefit of reporting at the level of granularity originally specified in the BTS Consultation. However, ComReg may request further

information on these costs from RTÉNL, if required, as part of the AFD or during any pricing reviews. All other functional cost categories as proposed in the BTS Consultation remain unchanged. This list may be amended by ComReg, if and when considered necessary.

ComReg's Position

- 8.213 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing accounting separation obligations in Market A.
- 8.214 Having regard to the analysis set out in the BTS Consultation²⁸⁵, the consideration of Respondents' views above, and the minor amendments detailed above, ComReg largely maintains its position with respect to the imposition of accounting separation obligations which are now presented in section 11 of the Decision Instrument for Market A in Appendix D of this Decision (having also considered Respondents' views concerning the draft Decision Instrument in Market A, later, in section 10 of this Decision).

Imposition of Price Control and Cost Accounting Remedies

Position set out in the BTS Consultation

- 8.215 In the BTS Consultation ComReg set out its preliminary view that **price control and cost accounting obligations**²⁸⁶ should be imposed on RTÉNL to, amongst other things, minimise the risk of excessive and / or discriminatory pricing and / or margin squeeze.
- 8.216 ComReg's main proposals with respect to the price control and cost accounting obligations included that:
- Cost orientation²⁸⁷; and,
 - Fully distributed costs ('FDC') based on historical accounts ('HCA') using a top down ('TD') approach²⁸⁸.

BTS Consultation Question(s)

- 8.217 Having proposed the imposition of price control and cost accounting obligations on RTÉNL in Market A, ComReg then asked the following questions²⁸⁹.

²⁸⁵ See section 8 - competition problems and paragraphs 9.82 to 9.145, 10.44 to 10.47, 10.65 to 10.66 and 10.84 to 10.87 of the BTS Consultation.

²⁸⁶ See paragraphs 9.146 to 9.238 of the BTS Consultation.

²⁸⁷ See paragraphs 9.177 to 9.200 of the BTS Consultation.

²⁸⁸ See paragraphs 9.201 to 9.235 of the BTS Consultation.

²⁸⁹ See Questions 19 to 21, page 155 of the BTS Consultation.

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

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

Question 21. Are there any additional issues or factors in relation to this cost accounting and price control obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Respondents’ Views

- 8.218 **Three Respondents generally agreed** (TG4, the BAI, and TV3) with ComReg’s imposition of price control and cost accounting obligations in Market A. However, TG4 and TV3 disagreed with the proposed approach to the implementation of the price control and cost accounting obligations. Both of these Respondents suggested that, in their view, Long Run Incremental Cost (‘**LRIC**’) is the most appropriate approach to cost orientation of Market A BTS.
- 8.219 **One Respondent disagreed** (RTÉ) with ComReg’s preliminary proposals on the basis of its view that price control obligations are not warranted in Market A.
- 8.220 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 19 to Question 21 above. However, these Respondents stated that, overall, they agreed with ComReg’s preliminary view in the BTS Consultation regarding the need for *ex ante* regulation of Market A.
- 8.221 ComReg is of the view that Respondents’ views are mainly focused on issues which can be generally captured under the following themes.
- The relevance of price control and cost accounting obligations in Market A;
 - The approach to the price control and cost accounting obligations; and,
 - The timings for the implementation of the price control and cost accounting obligations.

The relevance of price control and cost accounting obligations in Market A

- 8.222 RTÉ did not agree with ComReg’s proposals on price control obligations in Market A principally because it considered that the

Minister had the power to effectively regulate its charges under the 2009 Act.

- 8.223 RTÉ also submitted that if a commercial multiplex were to be licensed within the next three years, it would be more proportionate and sufficient that RTÉNL would only be subject to non-discrimination obligations, including with respect to its tariffs.

The approach to the price control and cost accounting obligations

- 8.224 TG4 stated that ComReg should consider LRIC based pricing as the most appropriate cost orientation methodology for setting wholesale prices in Market A.

- 8.225 TV3 stated that:

- An FDC approach is not appropriate because it makes no allowance for inefficiencies;
- The use of a TD model will result in inefficiencies being accounted for in RTÉNL charges to its customers and the proposed approach to cost orientation does not encourage investment decisions for new market entrants;
- A TD model would not completely eradicate the potential for RTÉNL to cross subsidise;
- If a TD model is used, an efficiency factor should be applied to RTÉNL's statutory operating cost base;
- As RTÉNL's network can be state funded, TV3 believed that LRIC was the most appropriate cost accounting mechanism to use. It said that RTÉ had to invest in the transmission and distribution network for its own use and to carry state broadcasters and so other broadcasters and new services should only be charged on the basis of the incremental costs of adding their services to the existing network. TV3 stated that it believes that this is in line with other infrastructure companies designated with SMP such as Eircom;
- A bottom up LRIC model should be used to determine the RTÉNL cost base and its tariffs;
- Benchmarking and making comparisons to other EU countries is important to ensure that RTÉNL's cost base is similar to efficient operators; and,
- The rate of return should be set by ComReg and disclosed in RTÉ's financial statements, which should be consistent with that of other utility companies currently regulated in Ireland.

- 8.226 RTÉ made the following comments:

- RTÉ noted the comments in paragraph 9.157 of the BTS Consultation about ComReg's on-going review of RTÉNL's

tariff models (under section 130 of the 2009 Act) and stated that ComReg will be aware that the way in which the costs are allocated in these models does not follow the hierarchy in paragraph 4.2 of Appendix C of the BTS Consultation (the draft Decision Instrument). RTÉ stated that RTÉNL was then in the process of finalising the new tariff model for post ASO, using the same cost allocation process as applied in previous models and is surprised to learn that it is not in line with ComReg's expectations and, stated that effort and expense had been expended to develop the model which may have been wasted. RTÉ stated that it would welcome clarification on this matter from ComReg;

- It has concern that in situations where the services being provided are not capital intensive a WACC approach would yield negligible returns (referring to paragraph 9.184 of the BTS Consultation) and that customers' seeking access may request services that fall into this category. One option would be for RTÉNL to be able to set its charges for such services in line with the prevailing market rate, but in any event RTÉNL should be allowed to charge a mark-up on efficient operating costs which allows it to make a reasonable profit;
- Paragraph 9.185 of the BTS Consultation discussing returns on operating costs required clarification;
- RTÉ has not recently re-valued land assets but stated that the introduction of regulated tariffs represents a sensible time to do so. Subject to this, RTÉ agreed with ComReg's reasoning that historical cost valuation is appropriate and that a TD model, FDC approach is preferable;
- The issue of how variations in costs are to be reflected in changes to prices during the price control period needed to be addressed. RTÉ stated that its preference would be for costs which fall outside its direct control to be subject to automatic pass through on a yearly basis. With regard to operating costs which are more within RTÉNL's control, it would expect that any controls over tariffs which extend for more than one year would allow for an annual inflation adjustment mechanism;
- The price control mechanism needs to be explicit about how volume related changes are dealt with during the price control period;
- The price control mechanism will need to be explicit about how recovery of RTÉNL's investment in fixed assets through depreciation and the return it earns on this investment is accounted for in the level of tariffs charged and when; and,
- It is also important to consider whether RTÉNL (or other parties) should be able to request or alternatively trigger an interim review and it should be determined whether there

should be a clause which would allow for a re-determination of tariffs, for example, if RTÉNL faced significant financial distress.

The timings for the implementation of the price control and cost accounting obligations

- 8.227 TG4 was of the view that ComReg should set an interim cost related price at the time the SMP decision is made until such time as the price control and cost accounting obligations are set in place. TG4 was of the view that the interim price should then be replaced with a final cost price for access, with retrospection of tariffs.
- 8.228 The BAI considered that a time frame of no less than five years is appropriate for these obligations (with certainty regarding the circumstances in which reviews would be scheduled) which should have regard to a range of matters such as duration of term of broadcasting / multiplex licences (10+ years), level of investment and period for return on investment desirability for a degree of certainty for business planning purposes etc.
- 8.229 TV3 made the following comments:
- Tariffs should be set for a minimum of three years with an annual review after which tariffs are adjusted downward, if RTÉNL achieves some efficiency savings in that period; and,
 - It considered that a separate subsequent consultation process regarding the determination of cost orientated tariffs was unacceptable as this would delay setting reasonable and regulated DTT tariffs.
- 8.230 Notwithstanding its view that price control obligations are not warranted in Market A, RTÉ stated the following:
- ComReg should define an overall timetable for the finalisation of the Decision Instrument, the development of the framework for setting regulated cost oriented tariffs and the introduction of new accounting and reporting obligations;
 - It is willing to enter into long term agreements subject to terms which result in an appropriate allocation of risk and return between parties and is willing to have its charges regulated for periods of more than one year but the duration of the control should be linked to the construction of the price control which takes into account the form and structure of the control, clarity as to what charges can be made during the period of price control, in what circumstances and what the mechanism for making those changes is to be;
 - A period of 3 to 5 years is most common in other regulated sectors in Ireland and elsewhere, and having regard to ComReg's obligation to re-asses its market reviews every

three years under the Framework Regulations, RTÉ suggested a price control period of three years is adequate;

- The maximum duration over which tariffs can be set should not be longer than that over which the capital base can be predicted with a reasonable degree of certainty; and,
- The form and structure of the price control must be considered alongside the issue of the duration.

ComReg's Assessment of Respondents' Views

8.231 ComReg assess Respondents' views on the price control and cost accounting obligations under the themes which were identified above.

The relevance of price control and cost accounting obligations in Market A

8.232 In section 5 of this Decision²⁹⁰, ComReg previously discussed its reasoning as to why it was of the view that the provisions of the 2009 Act are insufficient to obviate the need for *ex ante* obligations including price control. ComReg does not repeat its analysis here again but maintains its view that price control and cost accounting obligations are warranted.

8.233 In sections 8 to 10 of the BTS Consultation and sections 7 to 9 (as discussed later) of this Decision, ComReg also discussed the potential for price related competition problems to arise in Market A owing to RTÉNL's ability and incentives arising from its position of SMP in Market A. ComReg noted that the possibility of excessive and / or discriminatory pricing, among others, could effectively foreclose entry into downstream wholesale and retail markets.

8.234 The price control obligations should help to address the risk of such market failures arising and, therefore, encourage entry and expansion in downstream wholesale and retail markets. These obligations should also facilitate the conditions for entry of commercial DTT Multiplex Operators (into Market B) should the BAI enter into a multiplex contract awards process during the timeframe of this BTS Review²⁹¹.

The approach to the price control and cost accounting obligations

8.235 When considering the appropriate cost orientation methodology to adopt it is important to consider the objectives of the *ex ante* regulatory regime. As noted in paragraph 9.16 of the BTS

²⁹⁰ See paragraphs 5.46 to 5.67 of this Decision.

²⁹¹ ComReg notes the BAI has (as of Q2 2013) appointed a consultant to conduct a review of the potential for commercial DTT in Ireland and the BAI are due to consider the outcomes at a meeting in late 2013.

Consultation, in determining the proportionality of remedies ComReg is mindful of facilitating effective competition without compromising investment and the need for recovery on efficiently incurred costs.

- 8.236 RTÉNL will be required to comply with its cost orientation obligation following the effective date of this Decision. If RTÉNL tariffs are found not to be compliant with its cost orientation obligations ComReg may require RTÉNL to make adjustments to its tariffs as appropriate. ComReg would note that the WACC will be the subject of a separate pricing consultation, and ComReg may consult on related matters, at a later date once this Decision becomes effective.
- 8.237 There are a number of cost methodologies which may be considered for determining the most appropriate approach to price control and cost accounting in this market. In this respect, ComReg must decide the appropriate cost recovery mechanism having regard to the particulars of the network and services in Market A. ComReg has previously published many consultations on the appropriate methods for cost recovery in different telecoms markets.
- 8.238 In determining which methodology is most appropriate ComReg has considered the following:
- Top Down ('TD') or Bottom Up ('BU');
 - Annualisation of capital costs; and,
 - Joint and Common Costs.
- 8.239 These are further discussed below and were discussed in section 9 of the BTS Consultation.

Top Down or Bottom Up

- 8.240 An initial consideration is to determine whether or not to use a TD approach or a BU approach.
- 8.241 When determining price control regimes ComReg assesses efficiencies in both capital and operating costs irrespective of whether a TD approach or a BU approach is used.
- 8.242 A BU approach is often used where the network being modelled has been deployed over many years with piecemeal capital investment. In the case of RTÉNL, while some of the infrastructure has been in place for many years, significant investment in its core infrastructure was made in recent years, primarily to cater for DTT. For example, new masts have been deployed on four of its main BTS sites.
- 8.243 Many of RTÉNL's buildings at its main sites were built over 20 years ago. However, upon the incorporation of RTÉNL in 2003 these buildings (and other transmission and distribution assets) were transferred to the company at replacement cost. This resulted in buildings (and some other assets) being revalued.

- 8.244 ComReg believes that a simple BU model based on a hypothetical green field network (as required under a BU approach) would be likely to miscalculate the efficient level of costs given that many of the costs have been incurred or revalued in recent years and that a significant part of the network is new. Implementing a model using past investment decisions based on the information available at the time would also be complex and this in itself would limit the accuracy of the model.
- 8.245 When assessing capital costs for efficiencies (in both TD and BU models) ComReg often adopts a “scorched node” approach²⁹². For example, the scorched node approach was used when determining prices for Local Loop Unbundling (‘LLU’)²⁹³ in Eircom’s network. Under the scorched node approach, where applied to RTÉNL, the current location of RTÉNL BTS sites would be used as opposed to assessing where the deployment of RTÉNL’s network should be in the first instance. However, the cost of deploying assets on these existing sites would be reviewed for efficiencies and inefficient capital expenditure would be excluded.
- 8.246 It is also necessary to include projected future investment when determining tariffs. This is not only to incentivise RTÉNL to maintain its network efficiently but also to ensure tariffs are consistent from period to period. If at the end of a price control period it is noted that the level of capital expenditure is different to that envisaged, an adjustment to future rates would be necessary.
- 8.247 This, therefore, ensures that RTÉNL earns a return only for efficient investment in its network. ComReg would also, through a review of efficiently incurred capital expenditure, ensure that there is no double counting of assets in the derivation of tariffs. However, where there are stranded assets (e.g. assets for analogue terrestrial TV which are no longer in use and the cost of which RTÉNL has not yet fully recovered) the means by which the costs of these are recovered would also be assessed.
- 8.248 In assessing operating costs, ComReg often uses TD information which reflects the costs of operating and maintaining networks. However, this, if required, would be adjusted to ensure that RTÉNL is only allowed recover its efficiently incurred costs. ComReg also implemented this approach for operating costs when setting prices for LLU²⁹⁴. The operating costs would also reflect the efficient costs

²⁹² See <http://www.ictregulationtoolkit.org/en/Section.3568.html>

²⁹³ “Local Loop Unbundling (“LLU”) and Sub Loop Unbundling (“SLU”) Maximum Monthly Rental Charges”, paragraph 3.6, ComReg Doc. 10/10. See <http://www.comreg.ie/fileupload/publications/ComReg1010.pdf>

²⁹⁴ See ComReg document No. 10/10 – “Local Loop Unbundling (“LLU”) and Sub Loop Unbundling (“SLU”) Maximum Monthly Rental Charges”, paragraph 4.150, ComReg Doc. 10/10. See <http://www.comreg.ie/fileupload/publications/ComReg1010.pdf>

of operating and maintaining the network as deployed under the scorched node approach.

- 8.249 In order to calculate forward looking costs for the price control year the following three calculation steps are carried out:
- An appropriate cost driver for each element of operating costs is identified;
 - The level of costs is assumed to move in line with the identified driver; and,
 - Adjustments are made to take account of forecast inflation and expected future efficiency gains.
- 8.250 ComReg would note that in recent years RTÉNL has introduced various cost saving measures including a reduction in head count. However, during any proposed price review, ComReg may examine the level of headcount as well as other operating costs for further efficiencies.
- 8.251 ComReg considers that the use of TD information is most appropriate for assessing both capital and operating expenditure in Market A.
- 8.252 When determining the capital base and operating costs to be included in the determination of tariffs (either TD or BU) ComReg often:
- Conducts initial field trips to understand the network being modelled;
 - Requests data (under its data gathering powers) from interested parties with the majority of the data coming from the incumbent;
 - Analyses and queries the data to ensure it is robust and properly representative of the network to be modelled;
 - Compares modelled data to actual data to ensure that the modelled data is efficient;
 - Engages external consultants with specific expertise to assist it with its reviews;
 - Considers similar networks in other jurisdictions; and,
 - Subject to constraints due to confidentiality reasons, publically consults on the data provided.
- 8.253 From regulating other electronic communications markets ComReg has significant experience of implementing price control remedies for SMP designated entities. ComReg is of the view that its price control proposals in the BTS Consultation remain appropriate and conform to international best practice.

Annualisation of capital costs

- 8.254 In order to set tariffs, an estimate of the appropriate level of costs to be included in each year must be determined in order to recover the costs of the corresponding investment and to allow for a reasonable return on the capital employed in the business.
- 8.255 The four main annualisation methods that have been used to set regulated prices in telecommunication networks are:
- Historic Cost Accounting ('HCA');
 - Current Cost Accounting ('CCA');
 - Annuities; or
 - Economic depreciation.
- 8.256 These approaches are further discussed below as they can also be considered for setting regulated prices in Market A.

HCA

- 8.257 HCA means that the assets are valued with respect to the cost of the asset when it is recognised (typically at the date it is acquired). Straight line depreciation is one of the means of assessing depreciation under HCA. Straight line depreciation means that the depreciation charge remains the same over the accounting life of the assets and hence the net book value of the assets declines in a straight line over its lifetime. For RTÉNL the date of acquisition of many of its more material assets is 2003 or sooner.
- 8.258 The chief advantages of an HCA approach for regulatory purposes are consistency with the statutory accounts and predictability. The relationship with the statutory accounts and, in the case of RTÉNL, with its regulatory accounts, means that cost information used in setting prices can be reconciled back to audited data.
- 8.259 In an accounting context, where the cost of capital is ignored, straight line depreciation provides a constant capital charge. When used in regulatory cost accounting, as the net asset value is falling in a straight line over time but the depreciation charge is fixed, the capital charges also fall linearly. This higher recovery of costs when the asset is recently purchased is likely to be a problem applied to assets for which demand is likely to increase significantly over time as it results in higher unit costs initially for individual assets. For many asset classes where network elements are installed and replaced on a relatively continuous basis, the aggregate charge across all assets may be smooth over time, as the relatively high charges for recently installed assets are offset by lower capital charges for assets reaching the end of their assumed life. In addition, the zero capital charges for assets which remain in operation past their assumed asset life are offset by charges for retirements for assets which are removed from service before the end of the assumed life.

- 8.260 ComReg can, however, when setting tariffs, adopt different approaches to cost recover thereby ensuring that while RTÉNL recovers its costs and is provided with the appropriate signals to continue investing (efficiently) in its network, the users of the network are charged tariffs that are affordable, enable them to also compete with RTÉ and to provide greater choice to consumers.
- 8.261 Where HCA is that based on acquisition cost, rather than current or replacement cost, it may not provide the correct signals for entry or build and buy decisions for competitors who are considering forward looking investment. However, in the case of RTÉNL the majority of its assets have either been recently acquired or revalued on their acquisition from RTÉ thereby resulting in the HCA cost of assets being largely reflective of current prices.

CCA

- 8.262 Under a CCA approach, assets are re-valued each period to take account of unit cost changes such that the valuation of the asset reflects the current replacement cost of the asset. Typically the depreciation profile is assumed to be the same as in the statutory accounts (e.g. straight line depreciation). Depreciation charges are calculated on the basis of the replacement cost of the assets in each year and so move in line with price changes over time.
- 8.263 Under CCA, the difference between the opening and closing valuation of an asset differs from the depreciation charge in the year due to holding gains or losses from the revaluation. In order to ensure financial capital maintenance, this holding gain / loss also results in a capital charge (negative in the case of a holding gain).
- 8.264 The impact of CCA is to decrease capital charges compared to HCA in the early years of the asset life if prices are increasing (in nominal terms), with this being offset with higher capital charges in the final years of the asset life. If prices are decreasing (in nominal terms) capital charges are higher with CCA than HCA in early years, and lower at the end of the asset life.
- 8.265 In theory, CCA should result in better pricing signals to potential entrants than HCA where there are significant differences between HCA and CCA values of the capital base. However, the accounting basis of straight line depreciation and the resulting higher costs at the beginning of the asset life once a charge related to the cost of capital is included. Thus, the profile of capital charges may not reflect available cash flows during the growth phase of the product life-cycle. Furthermore, ComReg does not consider that there are significant differences between the HCA and CCA values of RTÉNL's capital base.

Annuity

- 8.266 An annuity approach sets the capital charges to be constant over the expected lifetime of the asset. Rather than setting separate depreciation charges and cost of capital, the annuity is simply set at

a level such that the Net Present Value ('NPV') of capital charges equals the asset acquisition cost. Where both demand and unit costs are likely to be relatively stable over the life of the asset, this may prove a reasonable profile of the capital charges.

- 8.267 If prices are assumed to be changing at a constant rate but demand is assumed to be relatively stable, a tilted annuity can be used. This sets the capital charges to increase in line with prices again such that the NPV of capital charges equals the asset acquisition cost.
- 8.268 Tilted annuities of this form have the useful property that the capital charge for an asset (within its economic lifetime) in each year can be assumed to be independent of the acquisition date of the asset. This makes calculation significantly easier in BU models as there is no need to estimate the date when assets are acquired.
- 8.269 If demand, and hence capital charges, is assumed to increase at a constant rate then the tilted annuity can be modified such that unit costs change in line with costs.

Economic depreciation

- 8.270 Economic depreciation can be broadly used to mean non-accounting based forms of depreciation. This can include annuities and tilted annuities. Economic depreciation is usually understood to be any form of depreciation that attempts to set capital charges to reflect the cash flows generated by the asset.
- 8.271 In some models, more complex annualisation rules have been used, particularly where the assumption that demand or prices change constantly over time may not be realistic. For example, in the UK, for mobile networks, which also have this characteristic as investment is concentrated in the period when each generation of network is being rolled out, the NRA, Ofcom, chose to use economic depreciation which attempted to ensure unit capital charge movements reflected underlying movements in the replacement cost of assets. As the utilisation of the assets varied over time an economic depreciation calculation was used to ensure that the profile of capital charges reflected both utilisation and movements in replacement costs in order to ensure a smooth profile of unit capital charges.
- 8.272 The disadvantage of complex economic depreciation calculations is that current capital charges become dependent on projections of demand and capital expenditure assumptions into the future.
- 8.273 There a number of linked criteria that can be used to assess the most appropriate potential annualisation (or depreciation) method to use, including whether:
- The method leads to a profile of end-user prices that is consistent with efficiency;
 - It is practical to implement, providing predictable results which are not overly sensitive to input assumptions;

- It gives RTÉNL the expectation that it can make a reasonable return on efficiently incurred costs; and,
 - It provides potential competitors with the appropriate price signals when making investment decisions.
- 8.274 ComReg is of the view that HCA (adjusted for efficiencies) is the most appropriate cost base to be used in determining tariffs in Market A. This enables a reconciliation of assets to the statutory accounts of RTÉNL. At the outset of determining tariffs ComReg would ensure that the assets to be recovered reflect those recorded in the statutory financial statements of RTÉNL (adjusted for efficiencies). Therefore, RTÉNL's returns would relate to its actual investment. Where regulated tariffs are set over an extended period, projected investment must also be considered. This projected investment is included where it is based on substantiated information such as approved capital expenditure programmes.
- 8.275 However, in order to develop appropriate forward looking tariffs either annuities or economic depreciation could be applied to these HCA costs so as to incentivise investment while at the same time meeting consumer needs. Where ComReg conducts a pricing consultation, at a later date, following the effective date of this Decision, the most appropriate method to use may be consulted on.

Joint and Common Costs

- 8.276 ComReg considers that any price control must be based on assumptions about the suitable recovery of fixed and common costs.
- 8.277 Regulated prices are generally set at a level that includes a proportion of fixed and common costs in order to give the SMP operator the ability of recovering efficiently incurred costs.
- 8.278 Recovery of common costs from regulated products has been carried out by attribution of fixed and common costs to products on the basis of convention, either fully distributed costs ('FDC'²⁹⁵) or a form of long run incremental costs.
- 8.279 The use of FDC takes the costs of operating and maintaining RTÉNL's network (including depreciation) and proportionally allocates it to the various services RTÉNL provides via its network. Under this method of allocation all services receive a share of all costs (adjusted for efficiencies) including fixed and common costs. Fixed and common costs in the context of Market A would include the depreciation costs of towers, masts and buildings (fixed costs) as well as many of the central costs incurred such as finance and administrative functions (common costs).

²⁹⁵ Also known as Fully Allocated Costs ('FAC')

- 8.280 Other possible methods of allocating costs (which were discussed in the BTS Consultation²⁹⁶) included LRIC and its variants:
- Long Run Incremental Cost ('**LRIC**');
 - Long Run Average Incremental Cost ('**LRAIC**'); and,
 - Long Run Average Incremental Cost plus ('**LRAIC plus**').
- 8.281 ComReg considers that taking a pure LRIC approach, which does not allow for the recovery of the fixed and common costs of RTÉNL's investment in its network, is not appropriate as, in Market A, it would not allow for full recovery of costs (joint and common costs) and therefore, would likely hamper investment in Market A and the operation of RTÉNL services to third parties. Therefore, ComReg considers that pure LRIC is not likely to be a proportionate approach to cost oriented price control as it would be contrary to Regulation 12(4) of the Access Regulations.
- 8.282 LRAIC is essentially the same as LRIC; however, it derives an average incremental cost per unit of traffic over the totality of the output of the relevant service. The economic argument for applying this method would be that RTÉNL's network and business do not rely on other common facilities (i.e. overheads) within its corporate structure. This may be appropriate if the cost control is applied to an operator that only delivers one service, but it does not apply to RTÉNL, as it delivers other services such as radio and non-broadcast services.
- 8.283 LRAIC plus includes all costs of LRAIC plus a mark-up to allow for the recovery of (some proportion of) common costs. The economic rationale for this method is that the increment incurs costs that are common to the business and that a proportion of these costs should be attributed to, and recovered from, the provision of the specific service.
- 8.284 FDC modelling is the same as LRAIC plus but FDC divides up all the common costs between business units such that they sum to the total of existing costs.
- 8.285 ComReg considers that a TD costing model based on HCA accounts using FDC is the most appropriate approach for determining regulated tariffs in Market A.
- 8.286 If DTT was considered to be a new service and therefore be charged solely on an incremental basis (i.e. LRIC) RTÉNL would then have to recover the costs of its network build and maintenance from its existing customers such as analogue Downstream Radio Broadcasters and other third parties such as telecommunication companies. This would mean that these users would be required to incur a large share of the costs of RTÉNL's network.

²⁹⁶ See paragraphs 9.177 to 9.238 of the BTS Consultation.

- 8.287 However, ComReg is of the view that as DTT is the means of delivering TV services in light of the move from analogue terrestrial TV transmission, DTT is therefore the introduction of a new technology and not the introduction of a new service *per se*.
- 8.288 If it were to be considered that RTÉNL's network was deployed to accommodate RTÉ services in the first instance and that the inclusion of other customers were incremental to this, RTÉ would be required to absorb substantial costs of RTÉNL's network investment and operations. This would not adhere to the principles of cost causality where a service which consumes assets incurs an appropriate share of the cost of those assets.
- 8.289 As noted in the BTS Consultation²⁹⁷ LRAIC provides for an allocation of variable and fixed costs that are directly attributable to the activity concerned over the long-run. However, LRAIC does not allow for an allocation of common costs. Therefore the use of LRAIC would only allow for the recovery variable costs attributable to the operation of the DTT multiplexes (i.e. engineering time) and the fixed costs associated with the operation of the DTT multiplexes (i.e. Market B capital expenditure). It would not allow for the recovery of common costs (such as the cost associated with towers and masts or general administration).
- 8.290 LRAIC plus (as noted in the BTS Consultation²⁹⁸) is more commonly used in the telecoms industry where there is a high level of indirect (such as duct and cables) and common costs (exchange buildings) which are allocated to multiple services (such as line rental, broadband, voice calls). For example, the LRAIC plus approach was used by ComReg in its determination of regulated prices for leased lines²⁹⁹.
- 8.291 In this BTS Review, ComReg considered that the allocation of costs by FDC is similar to the allocation of costs using LRAIC plus because under both methods all costs are being allocated.
- 8.292 As part of its price control review ComReg would seek to ensure that the cost allocation methods being used for its service is reflective of its fair share of costs. This is will ensure that costs are allocated using the following principles:
- Cost causality – services which incur costs attract costs;
 - Objectivity – there is an objective basis for allocating costs;

²⁹⁷ See paragraph 9.225 of the BTS Consultation.

²⁹⁸ See paragraph 9.227 of the BTS Consultation.

²⁹⁹ "A final decision further specifying the price control obligation in the market for wholesale terminating segments of leased lines", paragraph 2.12, ComReg Doc. 12/03. See <http://www.comreg.ie/fileupload/publications/ComReg1203.pdf>

- Consistency – costs are allocated on a consistent basis from one period to the next and also between services; and,
- Transparency – the means by which costs are allocated are transparent.

8.293 It should also be noted that following the effective date of this Decision RTÉNL will be required to ensure that its tariffs are cost oriented. ComReg would note that under Article 13(4) of the Access Regulations “[...] *the burden of proof that charges are derived from costs, including a reasonable rate of return on investment shall lie with the operator concerned*”. On foot of this Decision ComReg will not approve tariffs nor will ComReg state that RTÉNL’s tariffs are cost oriented. ComReg, through its regulatory review will determine whether RTÉNL tariffs appear reasonable on the basis of cost orientation based upon information provided to ComReg from RTÉNL. If ComReg were to subsequently determine that RTÉNL’s tariffs were not cost oriented ComReg would require that RTÉNL make adjustments to its tariffs having regard to any over or under recovery of costs. Failure to ensure cost orientation could lead to compliance action being initiated by ComReg against RTÉNL.

8.294 ComReg agrees with RTÉ that an appropriate value for land be included in the determination of regulated tariffs, and this should reflect a reasonable market rate. ComReg is of the view that RTÉNL should be allowed a period of up to three months to determine an appropriate rental value for the land it owns for inclusion in the determination of tariffs. If after a period of three months it has not achieved this ComReg may intervene and determine the appropriate value.

8.295 ComReg would also note that as of July 2010 the Minister has initiated work to consider whether he should exercise his discretion under section 130 of the 2009 Act to direct that payments be made to RTÉ and, in doing so, has been in consultation with ComReg³⁰⁰. As part of this consultation ComReg has, at the request of the Minister, been engaged in carrying out a detailed review of RTÉNL’s costs associated with provision of DTT broadcasting services and RTÉ’s DTT tariffs with a view to assessing whether or not they are fair and reasonable. This as a consequence, may not necessarily be akin to what might be an SMP related cost oriented price under an appropriate cost recovery mechanism which serves to promote efficiency and sustainable competition and maximises consumer benefits having regard to Regulation 13 of the Access Regulations. As part of this work, ComReg has also engaged the assistance of Deloitte and Touche.

³⁰⁰ As provided for under section 130 of the Broadcasting Act 2009 ComReg has been requested to consult with the Minister on the payments of the DTT broadcasting services provided under section 130 (2), (4), (6), (8), and (11). A detailed review in relation to this is currently ongoing.

- 8.296 In the context of this section 130 review, ComReg has provided a number of reports to the Minister (which has also been shared with RTÉ / RTÉNL), in particular:
- Guiding principles for the setting of digital terrestrial television tariffs (November 2010);
 - Review of the RTÉ and RTÉNL DTT tariff models (May 2012); and,
 - In the near future, ComReg expects to issue a further report to the Minister.
- 8.297 While ComReg's work to assist the Minister's section 130 review has many synergies with the establishment of an *ex ante* SMP cost oriented price control, it has, for example, not considered an appropriate WACC³⁰¹ for RTÉNL's / RTÉ's operations in Market A and Market B respectively.
- 8.298 Having regard to ComReg's work under the section 130 review to date, RTÉNL has made a number of changes to its DTT network cost model.
- 8.299 ComReg is mindful that an effective SMP price control should allow an appropriate rate of return on capital employed and ensure that only efficiently incurred costs are recovered. This can, having regard to the need to promote efficiency, sustainable competition and maximise consumer benefits, also involve adjustment to depreciation profiles.
- 8.300 Noting the above, ComReg has already initiated work to examine appropriate WACC(s) for RTÉNL's regulated businesses and expects to consult on these, and, may consult on related matters, at a later date once this Decision becomes effective. Nevertheless, ComReg considers that RTÉNL's DTT network cost model and RTÉ's tariff model broadly represent an appropriate starting point from which charges for the regulated services can be appropriately derived. However, ComReg would also note that, in accordance with Regulation 13(4) of the Access Regulations, the burden of proof for demonstrating that charges are cost-oriented rests at all times with RTÉ / RTÉNL. In this respect, having regard to the above mentioned work being carried out by ComReg (or indeed any other work), ComReg reserves its right to require that adjustments be made to RTÉNL / RTÉ charges in light of its SMP price control obligations in Market A and Market B (as discussed later in this Decision).
- 8.301 For clarity, ComReg has not, to date, undertaken a review of RTÉNL / RTÉ's tariffs in the context of *ex ante* regulation (given that

³⁰¹ Having regard to Regulation 13(2) of the Access Regulations, ComReg's approach to imposing *ex ante* regulation is based on principles that, among others, allow a reasonable rate of return to be earned on adequate capital employed, taking into account any risks involved.

RTÉNL / RTÉ have not been subject to price control obligations). However, following the effective date of this Decision, RTÉNL / RTÉ will be subject to price control obligations of cost orientation. In this regard, ComReg would note that, if RTÉNL / RTÉ were to notify ComReg of its intention to adjust its regulated tariffs following the effective date of this Decision, having regard to such cost orientation obligations, any adjustment of tariffs would need to be notified to ComReg (and market participants) and be subject to ComReg's review, including public consultation if appropriate. Noting ComReg's intention to undertake a review of the WACC (and potentially other related matters), such tariff adjustments by RTÉNL / RTÉ would therefore likely apply on an interim basis and, following the completion of ComReg's aforementioned review of the WACC and other related matters, may be adjusted (either upwards or downwards) as appropriate.

- 8.302 ComReg is of the view that a WACC should be applied to the regulated tariffs of RTÉNL. This is consistent with the approach ComReg has adopted with other regulated entities³⁰² and is in line with international best practice. A WACC is required for capital intensive projects. Where projects are not capital intensive prevailing market rates are appropriate so long as they reflect cost and a reasonable rate of return. Costs that have already been recovered elsewhere should not be recovered again.
- 8.303 Paragraph 9.185 of the BTS Consultation refers to capital intensive work where the application of a WACC is considered more appropriate than say the use of a return on operating costs. Where work is not capital intensive an appropriate return on efficiently incurred OPEX may be considered reasonable.
- 8.304 ComReg considers that RTÉNL's BTS customers should only pay for the services that they use. ComReg does not consider it appropriate to insert clauses into the price control decision dealing with the occurrence of exceptional items. In general, prices will be set on a forward looking basis based on the best available information. If a major change takes place during the price control period this can be revised during the annual / periodic reviews. This should provide greater assurance and stability for customers reliant on RTÉNL's regulated network services.
- 8.305 The calculation of volumes and recovery of fixed assets may be discussed in a separate price control consultation by ComReg. However, in general price controls are set on the basis of the best available information.
- 8.306 As has already been discussed, ComReg would note the nature and level of costs to be included in RTÉNL's tariffs may be subject to a

³⁰² Response to Consultation and Decision Notice, "Eircom's Cost of Capital", ComReg Doc. 08/35.

See <http://www.comreg.ie/fileupload/publications/ComReg0835.pdf>

separate price control consultation. However, ComReg would note that as input into such a pricing model, CAPEX would likely be determined on the basis of a scorched node approach where the costs would then be assessed for efficiency. The scorched node approach would use the location of RTÉNL's existing infrastructure but deploy it in the most efficient manner³⁰³. OPEX would also be considered on the basis of efficiency.

- 8.307 Overall, ComReg is of the position that regulated tariffs should be based upon the calculation of TD, HCA, FDCs. ComReg is also of the position that a scorched node approach should be considered for determining capital expenditure and all costs (both capital and operating) should be adjusted to reflect efficiently incurred costs.
- 8.308 As RTÉNL will be required, as part of its regulatory obligations, to treat its customers on an arm's length basis, the possibility of cross charging will be removed. The price control remedy will be supported by the provision of the accounting separation regime.
- 8.309 Further to TV3's comment in paragraph 8.225 above, ComReg understands that RTÉNL operates solely as a commercial entity. In this regard ComReg notes the requirements of sections 108 and 109 of the 2009 Act. Section 108 provides that all transactions entered into by a corporation, as between the activities arising from (a) its public service objectives, and (b) its exploitation of commercial opportunities, shall be made at arms length and on commercial terms. Furthermore, section 109 of the 2009 Act sets out the general accounting procedures for 'a corporation', defined in the 2009 Act as meaning RTE or TG4 or both, as the case may be. In particular, section 109(9)(b) provides that a corporation shall, after the end of each financial year, send to the Minister a statement in respect of the total revenue and costs derived by the corporation in that financial year. That statement to the Minister shall distinguish between monies received or expended on (a) activities in pursuance of its public service objectives, and (b) activities in pursuance of its exploitation of commercial opportunities objective.
- 8.310 Furthermore, in reply to RTÉ's comment in section 4.2 of Appendix C of the BTS consultation, ComReg considers that its cost allocation and apportionment principles in section 4.2, Appendix C of the BTS Consultation are relevant components of the price control remedy. It is important that RTÉNL allocate its costs in an appropriate manner that reflects cost causality.
- 8.311 ComReg also considers that the imposition of the price control and cost obligation is consistent with its objectives as set out in the Communications Regulation Acts, 2002 - 2011. These objectives include:

³⁰³ See <http://www.ictregulationtoolkit.org/en/Section.3568.html>

- Through the promotion of competition ComReg considers that the imposition of these obligations will maximise choice, price and quality for end-users. These obligations will provide for transparent and affordable pricing of services which should enable existing Downstream Broadcasters to expand their offerings and which entice new Downstream Broadcasters into the market;
- These obligations should also remove the possibility of distortion or restrictions on competition as users of the regulated services will be charged on similar bases regardless of whether they are RTÉ or non-RTÉ users of the services; and,
- Efficient investment and the promotion of innovation will also be encouraged through these obligations. While RTÉNL will be rewarded for efficient investment, users of its services will be charged prices that are reflective of their cost thereby providing certainty to market participants.

The timings for the implementation of the price control and cost accounting obligations

- 8.312 While RTÉ states that it is prepared to enter into long term contracts, ComReg is of the position that the price control should remain in place for a period of between three and five years but with annual / periodic reviews for exceptional events. This is consistent with approaches ComReg has taken for other regulated entities³⁰⁴. During the period of any price control ComReg would conduct a review (most likely annually) for exceptional items. The price control will include the most up-to-date cost information as well as assumptions regarding the possible evolution of costs through inflationary changes or possible capital expenditure. This will provide certainty over tariffs to all stakeholders and will ensure that costs are neither under nor over recovered.
- 8.313 Under Article 27(6) of the Framework Regulations ComReg is required to conduct its market reviews every three years which may be exceptionally extended following a reasoned notification to the EU Commission. Therefore, having regard to the timeframes involved in a market review process, and the need to provide certainty and predictability to market participants, ComReg believes that a timeframe of up to five years is the most appropriate approach to take.

³⁰⁴ “Local Loop Unbundling (“LLU”) and Sub Loop Unbundling (“SLU”) Maximum Monthly Rental Charges”, paragraph 5.151, ComReg Doc. 10/10. See <http://www.comreg.ie/fileupload/publications/ComReg1010.pdf>

ComReg's Position

- 8.314 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing price control and cost accounting obligations in Market A.
- 8.315 Having regard to the analysis set out in the BTS Consultation³⁰⁵, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of price control and cost accounting obligations as now presented in section 12 of the Decision Instrument to Market A in Appendix D of this Decision (having also considered Respondents' views concerning the draft Decision Instrument in Market A, later, in section 10 of this Decision).

Other Remedy Issues

Respondents' Views

- 8.316 In addition to the comments raised by Respondents on each of the *ex ante* obligations above, RTÉ also raised matters concerning remedies under previous Questions, as noted in paragraphs 4.43 and 6.18 of this Decision which ComReg considers more applicable for consideration here.
- 8.317 These issues can be generally captured under the following themes.
- A lack of consideration of the effect of current SMP regulatory obligations imposed on RTÉNL in Market A;
 - The proportionality of SMP regulation having regard to customer demand and the impact of regulation under the 2009 Act; and,
 - The relevance of (the lack of) economies of scale in Market A and the effect this has on the nature of the remedies that may be considered to be appropriate.

A lack of consideration of the effect of current regulatory obligations imposed on RTÉNL in Market A

- 8.318 As noted in paragraph 4.43 of this Decision, RTÉ stated that in terms of the proposed regulation of the provision of national BTS, the current level of *ex ante* SMP regulation is appropriate and, if regulation is to be left in place, then it should not go beyond what is currently imposed under RTÉNL's current obligations.
- 8.319 RTÉ also stated that there is no consideration of whether the current obligations imposed on RTÉNL have been sufficient to address perceived issues of market power. RTÉ stated that, in its view, there have been no difficulties in operation of the market since

³⁰⁵ See section 8 - competition problems and paragraphs 9.146 to 9.238, 10.46 to 10.47, 10.67 to 10.70 and 10.88 to 10.91 of the BTS Consultation.

2004 and obligations of non-discrimination and transparency are sufficient in this respect.

The proportionality of SMP regulation having regard to customer demand and the impact of regulation under the 2009 Act

8.320 As noted in paragraph 4.43 of this Decision, RTÉ stated that in the BTS Consultation it was not foreseen that a licence for the operation of commercial multiplex(es) will be awarded during the time of the BTS Review. In this circumstance, RTÉ submitted that ComReg's *ex ante* obligations in Market A are disproportionate and unwarranted, having regard to the existing level of non SMP regulation under the 2009 Act.

The relevance of (the lack of) economies of scale in the market and the effect this has on the nature of the remedies that may be considered to be appropriate

8.321 As noted in paragraph 6.18 of this Decision, RTÉ raised an issue which ComReg considers more appropriate for discussion here. RTÉ referred to ComReg's statement at paragraph 7.46 of the BTS Consultation that there may only be room for one network provider to fully exploit economies of scale in light of the finite spectrum availability in bands allocated to broadcasting of terrestrial services and RTÉ stated that this is relevant to the determination of the remedies that may be considered to be appropriate.

ComReg's Assessment of Respondents' Views

8.322 ComReg assesses Respondents' views under the themes identified.

A lack of consideration of the effect of current SMP regulatory obligations imposed on RTÉNL in Market A

8.323 ComReg has outlined, in sections 8 to 10 of the BTS Consultation and in sections 7 to 9 of this Decision, its reasoning for the need for *ex ante* regulatory obligations in Market A. ComReg has undertaken a detailed assessment of a range of possible regulatory options for addressing the competition problems identified, and has taken an incremental approach to its assessment of regulatory options by first considering the lightest potential form of *ex ante* regulatory obligations. As noted above, in the BTS Consultation and this Decision³⁰⁶, ComReg carried out a competition analysis which concluded that RTÉNL has SMP in Market A. Further to 27(4) the Framework Regulations, following a finding of SMP, ComReg is obliged to impose at least one regulatory obligation upon an undertaking designated with SMP.

8.324 In the BTS Consultation³⁰⁷, ComReg highlighted that, since ComReg's 2004 Broadcasting Analysis, a number of additional

³⁰⁶ See section 7 of this Decision.

³⁰⁷ See paragraphs 10.15 to 10.27 of the BTS Consultation.

considerations need to be taken into account and to ameliorate competition concerns related to these matters ComReg now considers that the introduction of these remedies is required.

- 8.325 RTÉNL is currently subject to obligations of transparency and non-discrimination and these obligations were considered to be appropriate at that time. However, ComReg considers that such obligations are no longer sufficient, in themselves, to address the competition problems identified and therefore more appropriate *ex ante* regulation is required.
- 8.326 It is therefore important to ensure that access to RTÉNL's BTS infrastructure (upon which RTÉ also relies in competing downstream) is not effectively denied or limited and that such access is also appropriately priced. Given the absence of any credible and effective alternative sources of transmission and distribution supply to downstream market participants ComReg considers that effective commercial negotiation of access charges is less likely.
- 8.327 Sections 8 and 9 of the BTS Consultation and 7 and 8 of this Decision identified that RTÉNL had the ability and incentive to engage in a range of exclusionary and exploitative behaviours in Market A which could give rise to competition problems and associated negative competition / consumer impacts.
- 8.328 While the move to DTT should mean that there is capacity to broadcast more content on the terrestrial network, the potential competition problems may be exacerbated as well. In this respect, ComReg notes that over time, potential competition problems associated with the previous regime of analogue terrestrial transmission have now broadened in scope given the move to digital transmission and the new relationship between Market A and the downstream Market B (which relies on wholesale inputs from Market A). It remains ComReg's view that more appropriate *ex ante* regulation that targets the ability and incentives for RTÉNL to engage in the identified competition problems is therefore required in Market A.
- 8.329 As discussed in paragraph 5.66 of this Decision, ComReg notes that concerns have been expressed to it from some terrestrial Downstream Broadcasters regarding the pricing of RTÉNL's BTS and at a perceived lack of transparency in the tariffs charged by RTÉNL.
- 8.330 The remedies set out in section 9 of the BTS Consultation and section 8 of this Decision are considered a justified and proportionate approach to mitigating the potential for competition problems to occur in Market A. The ability and incentive of RTÉNL to engage in such behaviour derives from the structure and characteristics of Market A, giving rise to RTÉNL's SMP position within it. Given the high and non-transitory barriers to entry to Market A, the likelihood of investment leading to the establishment

of an alternative infrastructure and a competitor to RTÉNL within the life-time of this BTS Review is unlikely. ComReg considers that a range of remedies, including access, is therefore warranted. In particular, given the fact that RTÉNL's national network infrastructure footprint is considered to be largely non-replicable, access to Market A wholesale inputs is warranted in order to promote the development of effective competition in downstream wholesale and retail markets.

- 8.331 It is therefore necessary, and appropriate, to impose proportionate regulatory obligation(s) including access on RTÉNL in order to ultimately facilitate greater choice and quality to end-users and to ensure a level playing field for national terrestrial analogue Downstream Radio Broadcasters and Multiplex Operators to compete with RTÉ at the downstream level.

The proportionality of SMP regulation having regard to customer demand and the impact of regulation under the 2009 Act

- 8.332 In this Decision³⁰⁸ ComReg noted that since the BAI's previous commercial DTT multiplex contract awards process between 2008 and 2010 no express demand has been made by potential DTT Multiplex Operators for commercial DTT contracts and that it was unclear when any new commercial DTT multiplex tender process will be initiated by the BAI. In this respect, ComReg's position is that it does not seem likely that effective commercial DTT entry will be established in the timeframe of this review. ComReg is not aware of any substantial representations made for commercial DTT since the BAI's last multiplex negotiation process a number of years ago.³⁰⁹
- 8.333 ComReg notes that the BAI has (as of Q2 2013) appointed a consultant to conduct a review of the potential for commercial DTT in Ireland and the BAI are due to consider the outcomes at a meeting in late 2013. The outcome of this process is uncertain until such time as the process is complete. Nonetheless, ComReg proposes to keep the situation under review.
- 8.334 Nevertheless, the purpose of *ex ante* regulation is to facilitate the development of effective competition and ComReg considers that the establishment of an effective *ex ante* regulatory regime backed by appropriate regulatory remedies should provide legal and regulatory certainty in the market such that it should facilitate downstream entry in Market B arising from any future BAI commercial multiplex contract awards process. This sentiment has also been echoed by the BAI in its response to the BTS Consultation.

³⁰⁸ See paragraph 6.33 of this Decision.

³⁰⁹ As part of this market review ComReg has consulted with the BAI in this regard.

- 8.335 As part of ComReg's assessment, ComReg has undertaken detailed analysis of the competition problems which may arise in Market A, and ComReg has taken an incremental approach to determining what remedies are appropriate, including a RIA. This is discussed in detail in sections 8 to 10 of the BTS Consultation.
- 8.336 Furthermore, in the context of the provisions of the 2009 Act which are relevant to Market A, ComReg has discussed its view on the matter in section 5 of this Decision and for the reasons set out therein, having regard to ComReg's statutory functions and obligations³¹⁰, ComReg does not agree that the provisions of the 2009 Act are sufficient to effectively address the potential SMP related competition problems in Market A.

The relevance of (the lack of) economies of scale in the market and the effect this has on the nature of the remedies that may be considered to be appropriate

- 8.337 In the BTS Consultation³¹¹, ComReg considered economies of scale as part of its assessment of its analysis of the competitive conditions in Market A and its position that RTÉNL should be designated with SMP. ComReg expressed its view that given barriers to entry to Market A and given that the minimum efficient scale may be large relative to the market as a whole, there may be room for only one network provider to fully exploit economies of scale.
- 8.338 Taken in this context, ComReg viewed this as another reason why potential effective competitive constraints on RTÉNL are unlikely to materialise in the timeframe of this BTS Review and, therefore, this contributes to the finding not only of SMP in Market A, but also to RTÉNL's ability and incentive to impact downstream competition.
- 8.339 ComReg has undertaken an assessment of the potential competition problems that may arise in Market A and using an incremental approach to the imposition of *ex ante* regulatory obligations (beginning with the lightest remedy) has determined the remedies which ComReg believes to be justified and proportionate in Market A. The impact of such proposals is also discussed in the RIA both in the BTS Consultation³¹² and in section 9 and Appendix F of this Decision.

ComReg's Position

- 8.340 Having regard to the BTS Consultation and the consideration of Respondents' views above, taking account of the impact the proposed remedies on stakeholders, competition and end-users, it is ComReg's position that the remedies in this Decision are

³¹⁰ See paragraphs 1.12 to 1.19 of this Decision.

³¹¹ See paragraphs 7.44 to 7.50 of the BTS Consultation.

³¹² See section 10 of the BTS Consultation.

proportionate and justified. In this respect, ComReg has taken an incremental approach to determining the appropriate remedies starting with the least onerous form of *ex ante* regulation.

Overall Conclusions on Remedies in Market A

Position set out in the BTS Consultation

8.341 Having regard to the discussion of competition problems and remedies in sections 8 and 9 of the BTS Consultation, ComReg proposed to impose access, non-discrimination, transparency, accounting separation and price control remedies on RTÉNL in Market A.

Respondents' Views

8.342 Of the **six responses received**, four responded specifically to the Questions on the proposed remedies.

8.343 **Three Respondents generally agreed** (TV3, TG4 and the BAI) with the imposition of the proposed remedies, but in some cases disagreed with aspects of or approaches on the proposed remedies.

8.344 **One Respondent** (RTÉ) **disagreed** with ComReg's proposed remedies generally on the basis of a lack of demand and due to the presence of other legislation (2009 Act) which it considered sufficient to deal with competition problems such as denial of access or excessive / discriminatory pricing. Furthermore, RTÉ was of the view that if *ex ante* regulation was warranted it should be limited to obligations of non-discrimination and transparency.

8.345 **Two Respondents** (Eircom and the Individual Respondent) did not comment specifically on all of the Questions but were of the view that *ex ante* regulation is required in Market A.

ComReg's Assessment of Respondents' Views

8.346 The issues raised by Respondents above have been considered by ComReg in this Decision and for the reasons set out there in, ComReg largely maintains its position on remedies as set out in the BTS Consultation, subject to the clarifications discussed in this Decision.

ComReg's Position

8.347 In section 8 above, ComReg has considered Respondents' views regarding its approach to imposing each the regulatory obligations it proposed (in the BTS Consultation) in Market A.

8.348 Having regard to the analysis set out in the BTS Consultation³¹³ and the consideration of Respondents' views above, ComReg largely maintains its position with respect to the imposition of the regulatory

³¹³ See competition problems, remedies, and RIA (sections 8, 9 and 10) of the BTS Consultation.

obligations (subject to the changes / clarifications discussed in this Decision) as presented in the final Decision Instrument to Market A, now presented in Appendix D of this Decision (having also considered Respondents' views concerning the draft Decision Instrument in Market A, later, in section 10 of this Decision).

9 Regulatory Impact Assessment – Market A

- 9.1 In section 10 of the BTS Consultation, ComReg set out its preliminary Regulatory Impact Assessment ('RIA') for Market A. In so doing, ComReg noted that the purpose of a RIA is to help identify regulatory options and whether proposed regulation is likely to have the desired impact.
- 9.2 Below, ComReg considers the issues raised by Respondents and sets out its final position on the matter.

Position set out in the BTS Consultation

Overview

- 9.3 ComReg set out its approach to conducting the RIA according to the five steps outlined below:
- (a) Describe the policy issue and identify the objectives;
 - (b) Identify and describe the regulatory options;
 - (c) Determine the impacts on stakeholders;
 - (d) Determine the impacts on competition; and,
 - (e) Assess the impacts and choose the best option.

Description of the policy issue at hand and identified the objectives³¹⁴

- 9.4 ComReg noted that having designated RTÉNL with SMP in Market A, as per Regulation 27(4) of the Framework Regulations, ComReg is obliged to impose at least one remedy on the SMP undertaking.
- 9.5 ComReg also noted that there are a number of considerations to take into account since ComReg's previous 2004 Broadcasting Review including:
- The 2009 Act and ASO³¹⁵;
 - Investment by RTÉNL in infrastructure³¹⁶; and,
 - Concerns expressed by Downstream Broadcasters³¹⁷.

³¹⁴ See paragraphs 10.8 to 10.27 of the BTS Consultation.

³¹⁵ See paragraphs 10.16 to 10.21 of the BTS Consultation.

³¹⁶ See paragraphs 10.22 to 10.24 of the BTS Consultation.

³¹⁷ See paragraphs 10.25 to 10.27 of the BTS Consultation.

Identify and describe the potential regulatory obligations³¹⁸

- 9.6 In the BTS Consultation, ComReg recognised that regulatory measures should be kept to the minimum necessary to address the identified competition problems in an effective, efficient and proportionate manner. A range of potential incremental regulatory options were assessed by ComReg in order to address the identified potential competition problems in Market A. As part of this, the question of regulatory forbearance and the incremental imposition of one or more of the obligations set out in Regulation (9) to (13)³¹⁹ of the Access Regulations were examined.
- 9.7 Thereafter, ComReg set out its preliminary views as to why regulatory forbearance was not appropriate and then, following an incremental assessment (starting from the lightest of remedies to the most intrusive) of the appropriateness of individual remedies, considered that transparency, non-discrimination, access, accounting separation and price control remedies were appropriate for imposition on RTÉNL as the SMP undertaking in Market A.
- 9.8 ComReg then proceeded to determine the impact of its proposed regulatory approach on stakeholders.

Determine the Impact on Stakeholders and Competition³²⁰

- 9.9 In determining the impact on stakeholders and competition, ComReg considered the impact of each of the proposed regulatory obligations on RTÉNL, the effect on competition in the market and ultimately on end-users.

Assess the likely impacts and choose the best option³²¹

- 9.10 Having considered its obligations under Regulation 8(6) of the Access Regulations and Section 12(1)(a) of the Communications Regulations Acts 2002 to 2011 and, having considered the impacts on stakeholders and competition, ComReg's preliminary view was that the imposition of the full suite of remedies (transparency, non-discrimination, access, accounting separation, price control and cost accounting) is justified and proportionate.
- 9.11 ComReg stated that, although the regulatory obligations chosen may impose some costs on RTÉNL in terms of the time and resources dedicated to complying with these proposed regulatory obligations, it was of the preliminary view that these regulatory obligations would promote competition in the market to the benefit

³¹⁸ See paragraphs 10.28 to 10.47 of the BTS Consultation.

³¹⁹ These include obligations of (a) access (b) transparency (c) non-discrimination (d) accounting separation and (e) price control and cost accounting.

³²⁰ See paragraphs 10.48 to 10.95 of the BTS Consultation.

³²¹ See paragraphs 10.96 to 10.99 of the BTS Consultation.

of end-users, exceeding the costs associated with their implementation.

BTS Consultation Question(s)

9.12 Having undertaken the RIA in Market A ComReg then asked the following question³²².

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

Respondents' Views

9.13 **Three Respondents broadly agreed** (TG4, the BAI and TV3) with ComReg's RIA, and in some cases offered views. **One Respondent** (RTÉ) **disagreed** on a number of aspects of ComReg's RIA. **Two Respondents did not express specific views** (the Individual Respondent and Eircom) although both were broadly supportive of ComReg's overall preliminary conclusions.

9.14 ComReg considers that Respondents' views are mainly focused on issues which can generally be captured under the themes identified below.

- The monitoring and enforcement of remedies;
- The recovery of costs and proportionality of the proposed remedies; and,
- A lack of quantitative analysis of the costs and benefits of the proposed access remedies.

The monitoring and enforcement of remedies

9.15 In terms of the proposed access obligations, TV3 stated that all of RTÉ's activities must be fully monitored.

9.16 In relation to the non-discrimination obligations, TV3 asked that ComReg clearly detail how non-discrimination obligations would be monitored and enforced. TV3 was of the view that the only effective means of monitoring and enforcing the non-discrimination obligations is for RTÉ to publish (or ComReg to publish in a quarterly monitor) the actual charges imposed by RTÉ itself.

9.17 In terms of the accounting separation obligations, TV3 asked how ComReg intended to review and monitor this obligation.

³²² See Question 22, page 171 of the BTS Consultation.

The recovery of costs and proportionality of the proposed access remedies

- 9.18 RTÉ highlighted a number of areas where it stated that it will incur costs (however, RTÉ did not quantify such costs) associated with ComReg's proposed obligations (for example, in terms of developing a reference offer, keeping SLAs up to date, upfront costs associated with meeting requests for access, and operating access agreements) which it stated will be wasted in the event no access is sought or agreement reached.
- 9.19 RTÉ also stated that ComReg does not comment on how RTÉNL should recover its costs of developing the proposed access regime nor for how long RTÉNL might be expected to carry such costs if there is a delay between costs incurred and the granting of access.
- 9.20 RTÉ was of the view that the access obligation in its proposed form is unjustified and inappropriate as well as costly.

A lack of quantitative analysis of the costs and benefits of the proposed remedies

- 9.21 RTÉ stated that the text in paragraph 10.98 of the BTS Consultation did not appear to be supported by quantitative analysis of the likely costs and benefits of the proposed remedies, and, in the absence of this, it is not possible to determine whether the proposed regulatory obligations are proportionate to the assessment of the perceived risks.

ComReg's Assessment of Respondents' Views

- 9.22 ComReg assesses Respondents' views under the themes identified, before providing its final position on the issues raised.

The monitoring and enforcement of remedies

- 9.23 In terms of TV3's comments that access obligations should be fully monitored, ComReg would note that visibility and observance of compliance with ComReg's proposed remedies will be mainly achieved through two of the proposed remedies which aim to provide greater visibility on price and non price activity to ComReg and industry players (i.e. through the transparency and accounting separation regulatory obligations).
- 9.24 The transparency and accounting separation obligations include the publication of a reference offer, publication of information about services to be provided, publication of SLAs, as well as the publication of non-confidential accounting information relating to RTÉNL's Market A activity. ComReg will also receive confidential accounting information from RTÉNL as appropriate. ComReg is of the view that the level of detail in these remedies should provide sufficient assurance to industry players regarding RTÉNL's activities. However, in the event of any allegations of anti-

competitive behaviour by RTÉNL in Market A this will be investigated by ComReg.

- 9.25 TV3 also raised the question as to how ComReg intends to review and monitor the proposed accounting separation obligation. In the BTS Consultation³²³, ComReg detailed the manner in which it proposes to observe the accounting separation remedy. This is further clarified in the final Market A Decision Instrument in Appendix D of this Decision. In this respect, the accounting separation obligations will be reviewed by ComReg through a combination of:
- Published Separated Accounts which can be audited;
 - The submission of more granular Additional Financial Data to ComReg;
 - The provision of Detailed Accounting Documentation; and,
 - Comparisons between RTÉNL's network cost model outputs and its Separate Accounts. This will require RTÉNL to compare its turnover as reported in the Separated Accounts to the cost per service as calculated by the network cost model. Where there are material differences RTÉNL will be required to explain these differences to ComReg.
- 9.26 ComReg has implemented similar accounting separation obligations with other SMP regulated entities (Eircom and An Post).
- 9.27 TV3 also raised the question as to how the non-discrimination obligation will be monitored and enforced. Non-discrimination will be monitored through information submitted to ComReg pursuant to RTÉNL's regulatory obligations and dispute resolution proceedings / complaints raised by third parties.
- 9.28 For clarity, ComReg provides an explanation of its approach to disputes below.
- 9.29 In the event of a dispute arising between two undertakings in connection with obligations under Section 31 of the Framework Regulations, Section 28 of the USO Regulations or Section 57 of the Communications Regulation Act, ComReg at the request of either party will initiate an investigation of the dispute.
- 9.30 The aim of such investigation would be to make a determination ensuring compliance with a specific regulation and to resolve the dispute. Section 31 of the Framework Regulations, requires that ComReg publish dispute resolution procedures and, apart from exceptional circumstances, investigate and make a determination

³²³ See paragraphs 9.82 to 9.145 of the BTS Consultation.

within 4 months. ComReg Decision Notice D03/10³²⁴ sets out ComReg's dispute resolution procedures.

- 9.31 ComReg's enforcement powers in are provided for in both the Communications Regulation Acts 2002 - 2011 and the Access Regulations.

The recovery of costs and proportionality of the proposed access remedies

- 9.32 In sections 8 - 10 of the BTS Consultation and sections 7 and 8 of this Decision, ComReg provided its reasoning as to why it is of the position that the proposed regulatory obligations are required in Market A as well as in their proposed form. ComReg considers these remedies to be proportionate and justified in light of the potential price and non-price related competition problems that could arise in Market A having regard to RTÉNL's ability and incentive to do so.
- 9.33 The purpose of the obligations attached to the remedies, such as reference offers and SLAs, is to facilitate access to Market A inputs required for downstream entry and expansion, where absent such obligations potential downstream entry or expansion may be effectively deterred. Such obligations should also provide regulatory certainty and predictability and assist in ComReg's monitoring of non-discrimination obligations.
- 9.34 As noted by ComReg in the BTS Consultation³²⁵, the obligation to publish a reference offer gives potential entrants detail on the supply characteristics, terms and conditions and prices for access, before they approach RTÉNL for access. This means that third parties will have an understanding of the type of services and the characteristics and prices of these services on offer before availing of such services from RTÉNL thereby facilitating more effective and timely consumption of services than would otherwise be the case absent such information.
- 9.35 ComReg considers that the publication of SLAs will provide more transparency and assurance to ComReg and industry in demonstrating non-discrimination and the supply of access in a timely and efficient manner. Further, ComReg would note that SLAs are usually a normal commercial practice between parties.
- 9.36 ComReg acknowledges that there are likely to be initial costs associated with implementing the regulatory obligations to be imposed under this Decision.

³²⁴ Response to Consultation and Decision Notice, Dispute Resolution Procedures, ComReg Document 10/18 R, D03/10, 29 March 2010.

See <http://www.comreg.ie/fileupload/publications/ComReg1018R.pdf>

³²⁵ See paragraphs 9.64 to 9.76 of the BTS Consultation.

- 9.37 Notwithstanding, as noted in the BTS Consultation³²⁶, RTÉNL should be able to recover its efficiently incurred costs associated with its *ex ante* regulatory obligations. ComReg's approach to imposing access remedies in Market A is based on principles that, among others, allow a reasonable rate of return taking into account the risks involved.
- 9.38 ComReg is mindful of facilitating the emergence of effective competition without compromising desirable efficient network investments as well as the need to ensure that RTÉNL recovers its efficiently incurred costs. However, ComReg is also mindful to ensure effective competition is maintained and that remedies seek to balance these considerations.

A lack of quantitative analysis of the costs and benefits of the proposed remedies

- 9.39 ComReg notes RTÉ's comment on the suggested lack of quantification and thereby its purported inability to appraise paragraph 10.98 of the BTS Consultation which stated that:
- "While these obligations may impose costs on RTÉNL in terms of time and resources dedicated to complying with these proposed obligations, it is ComReg's view that such obligations will promote competition in the market to the benefit of end-users, thereby exceeding any cost associated with their implementation".*
- 9.40 The purpose of the RIA is to aid decision-making through identifying regulatory options and analysing the impact of those options in a structured manner.
- 9.41 The BTS Consultation and this Decision both explore the suitability of different regulatory approaches for Market A. As such, the overall analysis considered the likely and potential impacts of various regulatory options taking account of the specific characteristics of Market A. The RIA forms part of a broader analysis which extends throughout a number of sections in the BTS Consultation and this Decision.
- 9.42 In particular, ComReg's assessment of potential competition problems (in section 8 of the BTS Consultation) considered the ability and incentives for exploitative behaviour and / or exclusionary strategies to arise as a consequence of SMP in the Market A. ComReg demonstrated that, in the absence of appropriate *ex ante* regulation, an SMP operator would have the ability and incentive to engage in anti-competitive behaviour to the detriment of end-users.
- 9.43 In ComReg's remedies assessment (in section 9 of the BTS Consultation), ComReg undertook a detailed assessment of a range

³²⁶ See paragraphs 9.16 and 9.151 to 9.152 of the BTS Consultation.

of possible regulatory options for addressing the competition problems identified. In this regard, ComReg took an incremental approach to its assessment of regulatory options by first considering the lightest potential form of remedial action and the likely resulting impacts on competition and consumers. ComReg then incrementally considered additional remedial action with a view to revealing the appropriate mix of regulatory obligations to address the specific competition problems of concern and the consequential impacts were identified.

- 9.44 The BTS Consultation and this Decision therefore incorporate a full and objective assessment of the various regulatory options available for the Market A. As part of this assessment, ComReg has undertaken detailed analysis of the specific structure and characteristics of Market A and a graduated impact assessment of potential regulatory options for addressing each of the specific competition problems identified (a formal cost benefit analysis is not necessary for this purpose). The RIA should, therefore, be read in conjunction with the BTS Consultation and this Decision as a whole.

ComReg's Position

- 9.45 Having regard to the BTS Consultation and considered Respondents' views, taking account of the impact the proposed remedies on stakeholders, competition and end-users, ComReg presents its final RIA for Market A in Appendix F of this Decision. This remains largely unchanged from the RIA set out in the BTS Consultation, apart from some minor textual edits.
- 9.46 It is ComReg's position that the imposition of the full suite of remedies on RTÉNL as detailed in this Decision is justified and proportionate to the potential concerns arising from its ability and incentive to engage in anti-competitive behaviour in Market A. ComReg's position is that the imposition of Access, Transparency, Non-discrimination, Accounting Separation and Price Control obligations on RTÉNL as set out in Appendix D of this Decision is warranted.

10 Decision Instrument – Market A

- 10.1 Following an analysis of remedies and conducting a RIA in sections 9 and 10 of the BTS Consultation respectively, ComReg set out a draft Decision Instrument for Market A in section 11 of the BTS Consultation which detailed each of the regulatory obligations ComReg proposed to impose on RTÉNL as the proposed SMP undertaking in Market A.
- 10.2 Below, ComReg considers the issues raised by Respondents and sets out its final position on the matter.

Position set out in the BTS Consultation

- 10.3 Having regard to the proposed remedies set out in the BTS Consultation ComReg set out a draft Decision Instrument which specified in legal form the proposed regulatory obligations to be imposed on RTÉNL including:
- Access Obligations³²⁷;
 - Non-Discrimination Obligations³²⁸;
 - Transparency Obligations³²⁹;
 - Accounting Separation Obligations³³⁰; and,
 - Price Control and Cost Accounting Obligations³³¹.

BTS Consultation Question(s)

- 10.4 Having presented the draft Decision Instrument for Market A in section 11 of the BTS Consultation, ComReg then asked the following question³³².

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

³²⁷ See paragraphs 9.17 to 9.45 of the BTS Consultation.

³²⁸ See paragraphs 9.46 to 9.54 of the BTS Consultation.

³²⁹ See paragraphs 9.55 to 9.81 of the BTS Consultation.

³³⁰ See paragraphs 9.82 to 9.145 of the BTS Consultation.

³³¹ See paragraphs 9.146 to 9.238 of the BTS Consultation.

³³² See Question 23, page 182 of the BTS Consultation.

Respondents' Views

- 10.5 **Three Respondents broadly agreed** (TG4, the BAI and TV3) with ComReg's draft Decision Instrument. **One Respondent had a number of disagreements** (RTÉ) on aspects of ComReg's draft Decision Instrument.
- 10.6 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 23 above (although both were broadly supportive of ComReg's overall preliminary conclusions).
- 10.7 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall approach to remedies.
- 10.8 ComReg is of the view that Respondents' views are mainly focused on issues which can generally be captured under the themes identified below.
- Comments on the proposed access obligations;
 - Comments on the proposed non-discrimination obligations;
 - Comments on the proposed transparency obligations;
 - Comments on the proposed accounting separation obligations;
 - Comments on the proposed price control and cost accounting obligations; and,
 - Comments on Appendix C of the BTS Consultation.

Comments on the proposed access obligations

- 10.9 The BAI commented that in relation to section 7 of the draft Decision Instrument concerning obligations to provide access, ComReg should consider whether it is necessary or appropriate for section 12(2) (g) of the Access Regulations to be included, in order to fulfil potential interoperability requirements between the transmission infrastructure and the requirements of Multiplex Operators and various Downstream Radio Broadcasters.
- 10.10 TV3 stated that a specific definition of what negotiate in good faith means should be included in section 7.3(ii) of the Decision Instrument and that a process document for dispute resolution should also be put in place.
- 10.11 TV3 was also of the view that in relation to section 8.2(ii) of the Decision Instrument a time frame / process for involvement of ComReg in resolving of service credit issues needs to be identified.
- 10.12 RTÉ contended that any obligation to provide access should be limited to the provision of fully managed terrestrial BTS and that it is inappropriate and disproportionate to regulate the provision of access to individual elements of RTÉNL's BTS network

infrastructure and in this regard the draft Decision Instrument needs to be amended, and in particular section 7.2.

Comments on the proposed non-discrimination obligations

10.13 RTÉ stated that the wording and scope of the non-discrimination obligation is not clear.

Comments on the proposed transparency obligations

10.14 In relation to paragraph 10.3 of the draft Decision Instrument, TV3 stated that a timeframe for notification of changes to the reference offer should be 12 months.

10.15 RTÉ stated that having regard to the manner in which prices are derived and the fact that price levels are highly dependent on the number of users of the BTS network an obligation to notify changes in advance should not apply.

Comments on the proposed accounting separation obligations

10.16 TV3 stated that it is imperative that secondary accounting documentation can be reviewed and not used by RTÉNL to keep certain relevant cost allocation or network information private.

Comments on the proposed price control and cost accounting obligations

10.17 TV3 stated that it believes that a LRIC model should be used for price control.

Comments on Appendix C of the BTS Consultation

10.18 TV3 was of the view that there is no requirement in Appendix C (which related to details of the proposed accounting separation obligation) for excluding inefficient operating costs or capital investment, excess network capacity and any other non-relevant costs from tariff calculations. TV3 was of the view that such a requirement should be included.

10.19 TV3 also stated that there is no requirement in Appendix C for an allowable rate of return, how it is to be calculated, reviewed and how any changes are dealt with. TV3 stated that such a requirement should be included and that the rate of return should be publicly disclosed in RTÉ's financial accounts.

10.20 RTÉ made the following comments on the draft Decision Instrument:

- Paragraph 1.1 should refer to 'RTÉNL Network Limited' and not 'RTÉNL Transmission Limited'.
- The timeline in paragraph 3.2.5 of the draft Decision Instrument does not appear consistent with the proposed Decision Instrument itself in section 11 of the BTS Consultation and section 9 (remedies) of the BTS Consultation;

- In relation to paragraph 3.3.2, RTÉNL's accounting records do not distinguish between internal and external costs in relation to all of the items listed in paragraph 4.3.2 and this is not reasonable or proportionate;
- Regarding paragraph 4.2.1, the cost allocation hierarchy should be consistent with the tariff model currently under development (relating to the review of DTT tariffs pursuant section 130 of the 2009 Act);
- Any requirement for regular updates of surveys should be reasonably applied and not impose a disproportionate or excessive burden on RTÉ; and,
- It is unclear what 'following ComReg's approval' means in paragraph 5.3.2 of Appendix C, in particular, whether it concerns the policies and approaches or the way in which they are described. Any specific timelines should be specified more clearly.

10.21 RTÉ also stated that it is unclear what purpose is served by the requirements set out in paragraph 6.3 of Appendix C and that the requirements themselves were unclear.

ComReg's Assessment of Respondents' Views

10.22 ComReg assesses Respondents' views under the themes identified below before providing its final position on the issues raised.

Comments on the proposed access obligations

10.23 In reference to the BAI's comment on including section 12(g) of the Access Regulations, ComReg considers that issues of interoperability are adequately captured under the obligation imposed in section 7.4(iv) of the Decision Instrument in Appendix D of this Decision pursuant to Regulation 12(e) of the Access Regulations, namely that RTÉNL shall have an obligation to grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services.

10.24 ComReg notes TV3's request for the inclusion of a definition of 'negotiate in good faith' in the Decision Instrument. ComReg confirms that this expression should be interpreted as the expression generally understood in the context of commercial negotiations. If customers of RTÉNL are concerned that such negotiations were not being conducted in good faith, then they could raise such issues with ComReg having regard to RTÉNL's obligations set out in the Decision Instrument.

10.25 In this respect, and further to TV3's comment on the timeframe / process for the resolution of any service credit issues or disagreements, ComReg would note that ComReg has clarified its existing complaints and dispute processes and procedures in

sections 8 and 9 of this Decision and these provide a means for parties to engage with ComReg in the event of a complaint or dispute.

- 10.26 In terms of RTÉ's comments on the nature of the access remedy and its proportionality, ComReg has already discussed and clarified its position on the scope of the access obligations in paragraphs 8.33 to 8.43 of this Decision and therefore does not repeat its analysis here.

Comments on the proposed non-discrimination obligations

- 10.27 ComReg notes RTÉ's comment on the suggested lack of clarity of the wording and scope of the non-discrimination obligation. ComReg has, having regard to Respondents' views, clarified its position regarding the non-discrimination obligation in paragraphs 8.79 to 8.96 of this Decision and does not repeat its analysis here.

Comments on the proposed transparency obligations

- 10.28 In terms of TV3's comments on the advance notification timeframe for changes to the reference offer, and RTÉ's comment on the requirement to notify changes to its wholesale prices, ComReg notes that, in paragraphs 8.130 to 8.133 of this Decision, it has set out its reasoning as to why the notice periods and the scope of the reference offer itself are appropriate and, therefore, does not repeat its reasoning here.

Comments on the proposed accounting separation obligations

- 10.29 ComReg would note that it has already discussed TV3's comment on the nature of the accounting separation obligations, including issues relating to the publication of confidential material, in paragraphs 8.171 to 8.214 of this Decision and therefore does not repeat its analysis here.

Comments on the proposed price control and cost accounting obligations

- 10.30 ComReg has discussed the price control methodology in paragraphs 8.215 to 8.315 of this Decision and for the reasoning outlined therein remains of the view that a TD, HCA, FDC methodology is the most appropriate cost orientation methodology to use in Market A.

Comments on Appendix C of the BTS Consultation

- 10.31 ComReg notes TV3's comment on the need for efficiency to be built into regulated costs and clarity on the allowable rate of return. ComReg has discussed such issues in section 8 of this Decision insofar as they relate to pricing. Therein, ComReg has noted that having regard to ComReg's work under the section 130 (of the 2009 Act) review to date, ComReg has already initiated work to examine appropriate WACC's for RTÉ / RTÉNL's regulated businesses and

will consult on these, and, may consult on related matters, at a later date following the effective date of this Decision.

- 10.32 ComReg notes RTÉ's comments on Appendix C of the BTS Consultation, as set out in paragraph 10.20 above.
- 10.33 ComReg notes that Company Registration Office records show 'RTÉNL Transmission Network Limited' as the company's registered name and, therefore, is the appropriate wording for the Decision Instrument.
- 10.34 To clarify the timing requirements on publication of RTÉNL's Regulated Accounts on its website, ComReg requires that RTÉNL publish its Regulated Accounts on its publicly available website no later than four months after the end of RTÉNL's financial period (or otherwise as or when required by ComReg). ComReg has discussed the timing requirements of the accounting separation obligations in paragraphs 8.206 to 8.210 of this Decision. Therein, ComReg has noted that the appropriate first financial period for implementation of the accounting separation obligations should be the year commencing 1 January 2013. However, for the first year of implementation ComReg will require the submission of the initial set of Regulatory Accounts by 30 June 2014, and thereafter it will be required within four months of RTÉNL's financial year end.
- 10.35 In terms of RTÉNL's comment that its accounting records do not distinguish between internal and external costs in relation to all of the items listed in paragraph 4.3.2 and that this is not reasonable or proportionate, ComReg has further clarified its position on the functional cost categories to be included, in paragraphs 8.211 and 8.212 of this Decision. In order to provide transparency on charges it is necessary to be able to allocate costs to the relevant services provided. These cost categories are derived from RTÉNL's statutory financial statements. Appropriate cost drivers are necessary to allocate these costs. The application of appropriate cost drivers is also considered to be proportionate so that all of RTÉNL's customers and, the services it provides, receive their appropriate share of costs.
- 10.36 Noting RTÉ's comment that it is important that the cost allocation hierarchy is consistent with the DTT tariff model currently under development, ComReg is of the view that separated accounts must be able to show returns by service and, therefore, the cost allocation and apportionment principles outlined in paragraph 4.2.1 of Appendix C of the DI in the BTS Consultation are entirely necessary. In this regard, while ComReg's review conducted under section 130 is separate to an *ex ante* SMP price control of cost orientation, ComReg is of the view that the approach being adopted in both is broadly consistent with each other in a number of respects, albeit noting the difference highlighted previously in sections 5 and 8 of this Decision. At the outset, both reviews consider the adequacy and appropriateness of cost drivers.

- 10.37 In terms of RTÉ's comment on survey updates, ComReg is of the position that, in line with paragraph 4.5.1 of Appendix C of the BTS Consultation and section 4.5 of Annex 1 of the Decision Instrument in Appendix D of this Decision, survey data should be collected and updated annually. ComReg would also note that it will be for RTÉNL to determine when amendments or updates to the structures of surveys are required having regard to its obligation that they remain up to date. Any such amendments will require ComReg approval before implementation.
- 10.38 RTÉ stated that is unclear what 'following ComReg's approval' meant in paragraph 5.3.2 of Appendix C of the Decision Instrument in the BTS Consultation. To clarify, ComReg requires RTÉNL to provide it with a copy of its Primary Accounting Documentation prior to its publication for ComReg's consideration. Sufficient time (having particular regard to substantial changes) prior to the publication of the Primary Accounting Documentation should be given to ComReg to review the document and, if necessary, recommend changes. Where changes are being made from one year to the next these changes should also be submitted to ComReg in advance of publication.
- 10.39 RTÉ also commented that the purpose of paragraph 6.3 of Appendix C of the Decision Instrument in the BTS Consultation was unclear. To clarify, as ComReg will require RTÉNL to develop templates for the preparation of its separated accounts, RTÉNL is required to submit, in draft format, a full set of Regulated Accounts templates and AFD templates to ComReg within four months of the effective date of this Decision for ComReg's consideration. These templates will demonstrate how RTÉNL intends to report its financial information in accordance with the requirements of this Decision. Once approved by ComReg, RTÉNL will then be obliged to prepare annual Regulated Accounts and AFD within four months of the end of its financial period or otherwise, as required by ComReg.

ComReg's Position

- 10.40 Having regard to the BTS Consultation and having considered the responses to the BTS Consultation, taking account of the impact of the proposed remedies on stakeholders, competition and end-users, it is ComReg's position that the regulatory obligations as set out in the draft Decision Instrument for Market A remain justified and proportionate.

Changes to the Market A Decision Instrument

- 10.41 As noted in paragraph 1.24 of this Decision, having considered Respondents' Submissions, ComReg has made a number of structural and textual changes in the final Decisions Instruments. These have been made with a view to improving the clarity of the Decision Instruments and do not notionally affect the substance of

the proposed regulatory obligations as published in draft form in the BTS Consultation. The main changes, including the reasons for such changes, are discussed below.

Access obligations

10.42 ComReg has amended the text of the access obligations in Market A in order to clarify the scope of the access obligations. In the BTS Consultation ComReg had indicated that RTÉNL's access obligations would include, but not be limited to:

- The installation and maintenance of broadcast transmission and / or distribution and related equipment (including provision of access to permit installation by third parties);
- The use of common building accommodation; and,
- The use of shared or shareable broadcast equipment comprising, but not limited to RF combiners, feeders.

10.43 This has been clarified in the Decision Instrument to include, but not be limited to:

- The provision of co-location space for the transmitter equipment;
- The provision of power and the backup power supply for the transmitter and associated equipment;
- The provision of telemetry services;
- The provision of access to the antenna combiner and Feeder to enable the connection of the transmitter equipment to the combiner;
- The provision of access to the microwave distribution system; and,
- The provision of support services.

Accounting separation obligations

10.44 As noted in section 8 of this Decision, ComReg has clarified the reporting requirements of the accounting separation obligations in Market A. In this respect, ComReg has edited the accounting separation Annex 1 to the Decision Instrument for Market A based on the following:

- RTÉNL will be required to distinguish between External, Inter and Intra transfer charges;
- Balance sheets will be conducted on the basis of MCE;
- RTÉNL will report on the services it offers as outlined in the Decision Instrument;
- RTÉNL will comply with timelines of the obligations outlined in the Decision Instrument; and,

- Some of the functional cost categories have been amalgamated.

Price control and cost accounting obligations

10.45 In the BTS Consultation, the draft Decision Instrument for Market A proposed that a cost orientation obligation would be imposed on RTÉNL, and ComReg discussed the proposed approach to the cost orientation obligation in the body of the BTS Consultation itself. Having considered Respondents' views, as discussed in section 8 of this Decision, in the Decision Instrument, ComReg has now specified the detailed nature of the cost orientation methodology that RTÉNL will have to comply with. That is, RTÉNL shall ensure that the cost orientation obligation shall be based on a Fully Distributed Costs, Historical Cost Accounting methodology, adjusted, where appropriate, for efficiencies.

Definitions

10.46 To provide greater clarity and avoid duplication, where relevant, ComReg has streamlined the definitions in the Decision Instrument.

10.47 ComReg has clarified that the definition of 'Broadcast Operator' in the Market A Decision Instrument includes, for the avoidance of doubt, RTÉ. That is, 'Broadcast Operator' means, for the purposes of the Decision Instrument, a Multiplex Contractor, a national Sound Broadcasting Contractor and RTÉ.

10.48 For clarity, ComReg has also included the description of a Reference Offer in the definition section of the Decision Instrument.

10.49 A number of other formatting and minor amendments have also been made, but given that they do not materially alter the form or nature of the wording of the Decision Instrument, they are not highlighted here.

11 Three Criteria Test – Market B

- 11.1 In section 12 of the BTS Consultation³³³, ComReg conducted the Three Criteria Test in respect of Market B.
- 11.2 As in section 6 of the BTS Consultation, ComReg again noted that in the Explanatory Note to the 2007 Recommendation, the European Commission highlighted that it is necessary to consider whether potential market power problems can be addressed by non SMP regulatory / legislative measures in place. ComReg, therefore, identified and reviewed relevant non SMP regulation / legislation insofar as it might have an impact on the analysis of Market B.
- 11.3 In addition, ComReg noted that given the relationship between Market A and Market B, the competitive dynamics of Market A can be expected to influence the competitive conditions of Market B³³⁴. Therefore, ComReg’s assessment of Market B assumed, in the context of the modified greenfield approach, the presence of the suite of regulatory obligations that it was proposed to be imposed in Market A and sought to identify whether such Market A obligations were likely to be sufficient to facilitate the development of effective competition (through the value chain) into Market B, and, if not, whether additional SMP related obligations in Market B may be required³³⁵.
- 11.4 Below, ComReg considers the issues raised by Respondents and sets out its final position on the matter.

Position set out in the BTS Consultation

Provisions of Other Legislation

- 11.5 In the BTS Consultation, ComReg considered all relevant legislation which may have an impact on its analysis of the Relevant BTS Markets in Ireland (such as the Universal Service Directive, the Access Directive, the Framework Directive, and the 2009 Act).
- 11.6 Having regard to this analysis, ComReg considered that there are specific provisions of the 2009 Act which are most relevant to this BTS Review. In particular, section 130 of the 2009 Act, which relates to terms of access and payments for DTT broadcasting. However, ComReg expressed the view that this would not necessarily result in effective regulation such as that which would

³³³ See paragraphs 12.1 to 12.48 of the BTS Consultation.

³³⁴ See paragraph 12.3 of the BTS Consultation.

³³⁵ RTÉNL was designated with SMP following ComReg’s 2004 Broadcasting Review. However, the obligations of transparency and non-discrimination set out therein applied to national analogue radio and analogue TV services and therefore do not have impact on Market B as defined in this Decision. Although the proposed access obligation in Market A would be expected to more easily facilitate commercial DTT supply in Market B, ComReg was of the view that effective competition is unlikely to materialise in Market B in the timeframe of this BTS Review for the reasons ComReg discussed as part of the Three Criteria Test and SMP analysis of Market B in sections 12 and 13 of the BTS Consultation.

arise in an SMP regulatory context. Section 130 of the 2009 Act would not provide for access in a fair, reasonable and non-discriminatory manner or result in a price control that would sufficiently address concerns of anti-competitive pricing in Market B.

- 11.7 ComReg noted that given the particular issue of vertical integration in Market B, the provision relating to payments under section 130 of the 2009 Act would not be supported by appropriate cost accounting obligations nor would transparency and non-discrimination issues be addressed by the 2009 Act.
- 11.8 ComReg also stated that the general accounting procedures for RTÉ, which are provided for under section 109 of the 2009 Act, would not necessarily result in transparent internal transfer pricing as per accounting separation obligations in an *ex ante* regulation context.
- 11.9 Therefore, ComReg was of the preliminary view that, given the vertical integration in this market, the provisions of such legislation do not remove the need for consideration of *ex ante* regulation in Market B as it would not sufficiently address potential problems associated with the potential exercise of market power in an anti-competitive manner.

High and Non-Transitory Barriers to Entry³³⁶

- 11.10 ComReg's preliminary view was that there are a number of related issues which result in there being high and non-transitory barriers to entry in Market B and these are of both a legal / regulatory and structural nature.
- 11.11 A DTT multiplex (spectrum) licence is required under section 132 of the 2009 Act in order to operate as a wholesale supplier in Market B. ComReg issues such DTT multiplex licence(s) on request directly to RTÉ, and separately, directly to the BAI who, in turn, typically following the conduct of a competitive tender process, issues a multiplex contract to a commercial DTT Multiplex Operator. A DTT Multiplex Operator then has to separately negotiate with RTÉNL for access to its terrestrial BTS network, being those BTS services provided in Market A (in the absence of any effective alternative suppliers). It was noted in section 4 of this Decision that, although the BCI / BAI previously ran a tendering process for commercial DTT Multiplex Operator contracts, commercial DTT entry failed to materialise.
- 11.12 Based on experience to date and, having regard to BAI licensing requirements and the likely timeframe associated with the conduct of any new tendering process, ComReg's preliminary view was that it seemed unlikely that effective commercial DTT Multiplex Operator entry into Market B will happen within the timeframe of this BTS

³³⁶ See paragraphs 12.17 to 12.29 of the BTS Consultation.

Review. ComReg had regard to, in particular, likely time delays (associated with the preparations involved in submitting a bid for commercial DTT multiplex licences which could require a partnership / consortium based approach) and commercial uncertainties (such as the conduciveness of the economic operating environment to commercial DTT Multiplex Operator entry). ComReg stated that it was not aware of any recent expressed demand from potential commercial DTT Multiplex Operators and it was unclear when a new commercial DTT tender would be initiated.

- 11.13 While the costs of entry to Market B are not fully sunk, ComReg noted that costs may be a consideration for potential entrants, taking into account the size of the market, i.e. whether they could achieve the MES following entry, within a reasonable period of time having regard to the potential revenue / profit opportunities from such entry. Some of the costs of such entry would likely be partially sunk, such as marketing / advertising costs. These could be significant over the lifetime of a commercial DTT multiplex contract. By way of illustration, the Boxer consortium (one of the commercial DTT Multiplex Operator consortia who failed to agree access with RTÉNL in the previous BCI / BAI tender process) was proposing to spend €20 million on marketing alone over a four year period³³⁷.
- 11.14 ComReg noted that RTÉ would be likely to continue self-supply of DTT multiplexing services (as it holds the licences for the two existing PSB DTT multiplexes). ComReg also noted that, existing Downstream DTT Broadcasters such as TG4 and TV3 would be likely to have already contracted with RTÉ for the supply of DTT multiplexing services prior to any potential entry from commercial DTT Multiplex Operator. Therefore, the market size available to prospective commercial DTT Multiplex Operators would likely be reduced if its future business case was dependent on securing revenues from these existing (non RTÉ) Downstream DTT Broadcasters.
- 11.15 ComReg noted that given the statutory / licensing coverage and FTA commitments of TG4 and TV3, potential new entrant commercial DTT Multiplex Operators would need to be able to provide for similar coverage and FTA transmission conditions as supplied by RTÉ. A commercial DTT Multiplex Operator that has less coverage or offers the Downstream DTT Broadcasters programme services it carries on a pay TV service to end-users in downstream retail markets would not likely be an effective demand-side substitute.
- 11.16 In this respect, ComReg stated that it is unclear whether commercial DTT Multiplex Operator(s) would wish to offer broadcast services from all of the same transmission sites which RTÉ operates

³³⁷ See Boxer consortium detail on BAI website http://www.bai.ie/?page_id=3254

from (i.e. they may offer less coverage), and it is also unclear whether a commercial DTT Multiplex Operator would supply wholesale services for FTA Downstream DTT Broadcasters (i.e. it may just self supply or supply to end-users on a paid for subscription basis).

- 11.17 ComReg also noted that in the context of self-supply by an existing Downstream DTT Broadcaster, the business case of TV3 and TG4 and a DTT Multiplex Operator will likely be different, as noted in paragraph 4.94 of this Decision.
- 11.18 These Downstream DTT Broadcasters would likely need to form partnerships with other parties in order to successfully tender for any commercial DTT multiplex contract offered by the BAI, all of which adds further complexity.
- 11.19 ComReg was of the preliminary view that the barriers to entry above are high and non-transitory, meaning that any entry, including self-supplied entry, is unlikely to manifest itself effectively in the timeframe of this BTS Review.

No Tendency Towards Effective Competition over the Relevant Time Horizon³³⁸

- 11.20 ComReg's preliminary position was that Market B is not a market that could be expected to tend towards effective competition over time, unless there is the launch of commercial DTT multiplexing services and where such a launch results in effective alternative wholesale DTT multiplexing services, being made available.
- 11.21 For the reasons set out in paragraphs 11.10 to 11.19 above, ComReg did not consider that effective commercial DTT Multiplex Operator entry is credible, such that, it is likely to be capable of effectively constraining RTÉ's pricing behaviour in Market B within in the timeframe of this BTS Review. However, ComReg stated that it intends to keep this matter under review and, should such entry occur, ComReg would review its position as appropriate.
- 11.22 Absent regulation, ComReg also considered that RTÉ has the ability and incentive to minimise the number of other Downstream DTT Broadcasters on its PSB DTT multiplexes in order to reduce the potential loss by RTÉ of downstream advertising revenues owing to actual or potential competition from Downstream DTT Broadcasters' programme services (such as TV3 and TG4). This could occur through constructive denial of access, and / or discrimination of pricing and non pricing behaviour for example.

³³⁸ See paragraphs 12.30 to 12.43 of the BTS Consultation.

Insufficiency of Competition Law Alone³³⁹

- 11.23 ComReg did not view competition law as being sufficient in itself to deal with the potential competition problems that may arise in Market B for similar reasons to those noted in paragraphs 5.25 and 5.26 of this Decision.
- 11.24 ComReg proposed that, should commercial DTT Multiplex Operators become established in the timeframe of this BTS Review ComReg would re-assess Market B to determine if the Three Criteria Test remains satisfied or to amend / withdraw regulatory obligations where appropriate.

Proposed Conclusion on the Three Criteria Test³⁴⁰

- 11.25 Having regard to the analysis in the BTS Consultation, ComReg's preliminary view was that that Market B satisfies the Three Criteria Test.

BTS Consultation Question(s)

- 11.26 Having outlined the above assessment on Market B, ComReg then asked the following question³⁴¹.

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

Respondents' Views

- 11.27 **Four Respondents agreed** (TG4, the BAI, TV3 and Eircom) with ComReg's Three Criteria Test findings. However, **One Respondent disagreed** (RTÉ), stating that, in light of the provisions of the 2009 Act, capacity constraints on its PSB DTT multiplexes and existing SMP regulation of Market A, SMP regulation is not necessary in Market B.
- 11.28 **One Respondent did not express specific views** (the Individual Respondent) on Question 24 above (although it was broadly supportive of ComReg's overall preliminary conclusions).
- 11.29 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall assessment.
- 11.30 ComReg considers that Respondents' views are mainly focused on issues which can generally be captured under the following themes.

³³⁹ See paragraphs 12.44 to 12.46 of the BTS Consultation.

³⁴⁰ See paragraphs 12.47 to 12.48 of the BTS Consultation.

³⁴¹ See Question 24, page 193, of the BTS Consultation.

- The relevance and proportionality of SMP regulation in light of the provisions of the 2009 Act and existing / proposed SMP regulation in Market A;
- The depth of ComReg's analysis; and,
- Whether barriers to entry for a commercial DTT Multiplex Operator are a relevant factor to be assessed.

11.31 ComReg also noted in paragraphs 4.43 and 5.36 of this Decision, that RTÉ raised a number of issues in its response to earlier Questions which ComReg considers more appropriate for discussion here, and, are captured under the first bullet in paragraph 11.30 above.

The relevance and proportionality of SMP regulation in light of the provisions of the 2009 Act and existing / proposed SMP regulation in Market A

11.32 The BAI agreed with ComReg's preliminary views and stated that there is uncertainty as to whether a commercial DTT Multiplex Operator could be established during the three year time horizon of this BTS Review given the steps involved in such a process. Further to this, the BAI stated that it is unlikely that any business model for commercial DTT Multiplex Operators including Downstream DTT Broadcasters self-provision could be considered until there is regulatory certainty and, in respect of Market A, *ex ante* regulation is adopted and tariffs are published. The BAI further noted that potential commercial DTT Multiplex Operator entry may also be influenced by the World Radio Communications ('WRC') decision³⁴² in relation to further digital dividend capacity³⁴³.

11.33 RTÉ stated that the provisions of the 2009 Act more than adequately address the issues ComReg identifies as justification for proposed *ex ante* SMP regulatory intervention. RTÉ implied that it could not deny access to its PSB DTT multiplex(es) in light of the provisions in the 2009 Act whereby the BAI recommends to the Minister the types of services which should be considered for inclusion on its second PSB DTT multiplex. In this respect, RTÉ stated that the 2009 Act prescribes the TV programme services to be included on its PSB DTT multiplexes, as well as the amount of capacity that must be provided to a Downstream DTT Broadcaster.

³⁴² The WRC-12 made a decision to allocate part of the UHF band 694 – 790 MHz (the '700 MHz band') to International Mobile Telecommunications ('IMT'), co-primary with DTT. This decision will come into effect at the end of WRC-15. This means that at the end of WRC-15 part of the 700 MHz band can be used by both IMT and DTT. If, or when, a decision is made in Ireland (by DCENR) around the timing of the implementation of such an allocation post WRC-15, then there would likely be some impact on current and any future DTT multiplex operations as the frequencies used by the DTT multiplexes would have to be re-farmed out of and below the 700 MHz band, i.e. below 694 MHz to accommodate the implementation of this allocation. See <http://www.itu.int/ITU-R/index.asp?category=conferences&rlink=wrc-12&lang=en>

³⁴³ See <http://ec.europa.eu/digital-agenda/en/wrc-setting-worlds-radio-spectrum-rules>

RTÉ also stated that a price control exists under the 2009 Act whereby the Minister can direct the appropriate payments to be made by Downstream DTT Broadcasters to RTÉ. RTÉ viewed ComReg's proposed regulation as being disproportionate and unnecessary, and noted that any capacity available on its second PSB DTT multiplex will be quickly filled under section 130(1) (a) (iii) of the 2009 Act and the consumption of additional capacity arising from the potential carriage of TV3 and TG4 in high definition ('HD')³⁴⁴.

- 11.34 Furthermore, RTÉ stated that no consideration is given to what competition issues, if any, may arise in relation to the provision of DTT multiplexing services (Market B services) in the presence of SMP regulation of Market A and its associated downstream impact on the supply of DTT multiplexing services in Market B.
- 11.35 As noted earlier in paragraph 11.31 of this Decision, RTÉ also commented on issues that ComReg views as being more relevant for consideration here. Such comments mirror those outlined in paragraphs 11.33 and 11.34 above.

The depth of ComReg's analysis

- 11.36 RTÉ stated that ComReg's arguments tended to be speculative and lacked detailed analysis. RTÉ stated that some specific weaknesses included:

Regulatory barriers

- There was no explanation as to why ComReg considered that there would be delays in obtaining a multiplex contract from the BAI and what impact this would have; and,
- The relevant issue does not seem to be so much the regulatory process (for a commercial DTT multiplex contract) and its impact, but rather, the current lack of demand for additional DTT multiplex supply and consequent lack of commercial competitors to RTÉ.

Sunk costs

- ComReg had not quantified the costs of entry nor assessed what proportion of entry costs would be sunk, or how significant these would be, relative to the size of the market and potential profit opportunities; and,

³⁴⁴ Section 130 of the 2009 Act lists the programme services to be carried on RTÉ's PSB DTT multiplex(es). Under Section 130(a)(iii), where required by the Minister, RTÉ must carry the 'The Houses of the Oireachtas Channel' and 'The Irish Film Channel' on its PSB DTT multiplex(es). Furthermore, in accordance with the terms of Statutory Instrument No. 67 of 2011, the BAI has recommended to the Minister that a number of programme services merit consideration by the Minister for inclusion on RTÉ's PSB DTT multiplex(es) including more programme services of TV3 and TG4.

See http://www.bai.ie/wordpress/wp-content/uploads/20110815_BAIDTTEOI_FINAL.pdf

- ComReg did not quantify the impact of costs of entry or its significance for a commercial DTT Multiplex Operator that wishes to supply Market B services to TV3 and TG4, given their statutory / licence coverage requirements.

Constraints from commercial DTT Multiplex Operators

- RTÉ noted that it has the obligation to include TV3 and TG4 in its DTT offerings but their requirements in terms of coverage would not preclude them from being available on other DTT multiplexes.

Vertical Integration

- ComReg did not analyse the impact of the relevant contractual terms, or quantify switching costs that TV3 and / or TG4 would face or analyse whether these would prevent them from switching to a competitor, in response to potential exploitation by RTÉ; and,
- ComReg seemed uncertain as to whether or not customers have entered into long term contracts but assumes that they have (in paragraphs 12.39 and 13.17 of the BTS Consultation).

Lack of demand and uncertainty of demand

- ComReg had concluded that it is unlikely that a commercial DTT Multiplex Operator would enter Market B to constrain RTÉ due to the lack of and / or uncertainty over the level of future demand for a multiplex contract from commercial DTT Multiplex Operators (in paragraph 12.32 of the BTS Consultation). This analysis is speculative as no forecasts of demand for these services or comparisons were made with how these services have developed in other countries.

Whether barriers to entry for a commercial DTT Multiplex Operator are a relevant factor to be assessed

- RTÉ stated that the relevance of ComReg's consideration of barriers to entry for a commercial DTT Multiplex Operator is not clear in the context of where, in RTÉ's view³⁴⁵, ComReg had defined a market that was limited to public interest channels, and that ComReg had also ignored the fact that the DTT platform is a nascent platform that has to be established.

ComReg's Assessment of Respondents' Views

11.37 ComReg assesses Respondents' views under the themes identified below before providing its final position on the issues raised.

³⁴⁵ See paragraph 24.6, page 43 of RTÉ's Submission.

The relevance and proportionality of SMP regulation in light of the provisions of the 2009 Act and existing / proposed SMP regulation in Market A

- 11.38 In paragraph 11.33 above ComReg noted RTÉ's view that, in light of the provisions of the 2009 Act, *ex ante* SMP regulatory intervention is not justified.
- 11.39 The sections of the 2009 Act that ComReg considers to be of most relevance to the analysis of Market B are:
- **Section 108**, as described in paragraph 5.50 of this Decision, is of relevance to the analysis of Market B;
 - **Section 109**, as described in paragraph 5.50 of this Decision, is of relevance to the analysis of Market B; and,
 - **Section 130** is also of relevance to the analysis of Market B and provides that the following TV programme services are carried on RTÉ's PSB DTT multiplex(es):
 - RTÉ One and RTÉ Two;
 - TG4;
 - The Houses of the Oireachtas Channel (where required by the Minister);
 - The Irish Film Channel (where required by the Minister);
 - Other TV services having the character of a public service as may be designated by the Minister; and
 - The TV programme service provided under the TV programme service contract by the TV programme service contractor (this applies to TV3)³⁴⁶.
- 11.40 Insofar as section 130 of the 2009 Act is concerned, this provides that the Minister, after consultation with ComReg, RTÉ and the TV programme services listed in paragraph 11.39 above, may also direct that payments be made by the aforementioned TV programme services (other than RTÉ One and RTÉ Two) to RTÉ for the broadcasting of their programme services on the national PSB DTT multiplexes established, maintained and operated by RTÉ.
- 11.41 These TV programme services may request an increase in capacity for the carriage of their programme services if they do not consider that the digital capacity employed by RTÉ on its PSB DTT multiplex(es) is adequate and the Minister may, on request, direct RTÉ to employ a specific amount of digital capacity.
- 11.42 ComReg's view, in particular in light of its experience and knowledge of regulating other electronic communications markets, is that the provisions of 2009 Act, in particular sections 108, 109

³⁴⁶ At the direction of the Minister following the request of the BAI and after consultation with RTÉ.

and 130, do not adequately address the potential competition problems which, absent SMP regulation, could arise in Market B.

11.43 Insofar as sections 108 and 109 are concerned, the discussion in paragraph 5.55 in this Decision (in the context of the relevance of sections to Market A) are equally relevant to Market B and hence, ComReg does not repeat this analysis here.

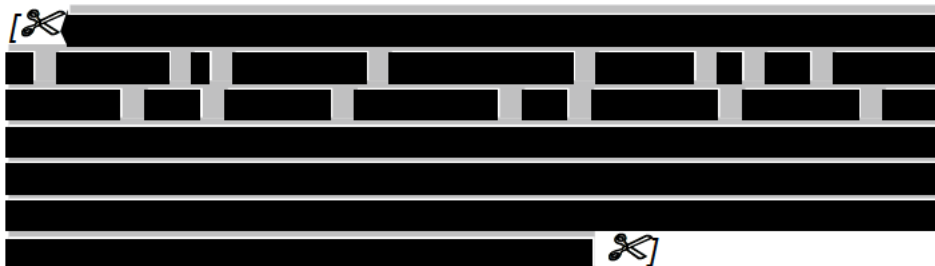
11.44 ComReg's views in paragraphs 5.57 to 5.66 of this Decision with respect to section 115 of the Broadcasting Act 2009 equally apply to section 130 insofar as they relate to access and pricing. As such, ComReg's position is that:

- The 2009 Act does not generally adequately address SMP related competition problems in an effective or efficient manner or would not likely provide sufficient regulatory certainty and predictability to market participants;
- Section 130 of the 2009 Act does not necessarily imply a cost-oriented (and efficient) price control could be put in place and, as such, would not necessarily resolve potential excessive pricing problems;
- [REDACTED]
- ComReg also has experience and knowledge of regulating other electronic communications markets to address SMP related competition problems (such as price control decisions and disputes), such that *ex ante* SMP regulation is likely to be more effective and efficient in addressing, in a timely manner, competition concerns (related to pricing for example) than would otherwise be the case under section 130 of the 2009 Act;
- In terms of access, the provisions of the 2009 Act do not adequately address the identified SMP related competition problems in an effective manner which would provide necessary regulatory certainty or counter potential constructive refusals of access such as granting access in a fair, reasonable and timely manner and to negotiate in good faith for example; and,
- The provisions of the 2009 Act relevant to Market B are more akin to *ex post* intervention and as such may not provide sufficient predictability to market participants in a manner

³⁴⁷ [REDACTED]

which would promote efficiency, sustainable competition and maximise consumer benefits.

- 11.45 As noted in section 8 of this Decision, the Minister has initiated work to consider whether he should exercise his discretion under section 130 of the 2009 Act to direct that payments be made to RTÉ and, in doing so, has been in consultation with ComReg³⁴⁸. As part of this consultation ComReg has, at the request of the Minister, been engaged in carrying out a detailed review of RTÉNL's costs associated with provision of DTT broadcasting services and RTÉ's DTT tariffs with a view to assessing whether or not they are fair and reasonable. This as a consequence, may not necessarily be akin to what might be an SMP related cost oriented price under an appropriate cost recovery mechanism which serves to promote efficiency and sustainable competition and maximises consumer benefits having regard to Regulation 13 of the Access Regulations. As part of this work, ComReg has also engaged the assistance of Deloitte and Touche.
- 11.46 While ComReg's work to assist the Minister's section 130 review has many synergies with the establishment of an *ex ante* SMP cost oriented price control, it has, for example, not considered an appropriate WACC³⁴⁹ for RTÉNL's / RTÉ's operations in Market A and Market B respectively.
- 11.47 ComReg also notes that in a response³⁵⁰ (circulated to stakeholders) to the section 130 consultation process being undertaken by the Minister, the Minister has welcomed ComReg's market analysis initiative and has stated:



- 11.48 ComReg further notes that in recent correspondence³⁵¹ between the Department of Communications, Energy and Natural Resources (DCENR) to TV3, the DCENR noted ComReg's proposal to regulate the broadcasting markets and set out its view that, [redacted]

³⁴⁸ As provided for under section 130 of the Broadcasting Act 2009 ComReg has been requested to consult with the Minister on the payments of the DTT broadcasting services provided under section 130 (2), (4), (6), (8), and (11). A detailed review in relation to this is currently ongoing.

³⁴⁹ Having regard to Regulation 13(2) of the Access Regulations, ComReg's approach to imposing *ex ante* regulation is based on principles that, among others, allow a reasonable rate of return to be earned on adequate capital employed, taking into account any risks involved.

³⁵⁰ Letter from DCENR to ComReg of 1 October 2012 and attached report dated September 2012.

³⁵¹ Letter from DCENR to TV3 of 13 November 2012.



- 11.49 Given the above, ComReg does not consider the provisions of the 2009 Act to be sufficient to address SMP related competition problems.
- 11.50 If, and to the extent, that the Minister were to exercise his discretion under section 130 of the 2009 Act to direct digital broadcasters to make payments to RTÉ, ComReg would revisit its approach to price control in Market B, as appropriate.
- 11.51 Furthermore, ComReg does not agree with RTÉ's view that no consideration is given as to what competition issues, if any, may arise in the presence of existing or proposed SMP regulation under Market A.
- 11.52 As part of the Three Criteria Test assessment in the BTS Consultation³⁵², ComReg noted the distinct legal and structural characteristics of entry conditions to Market B, assuming the presence of ComReg's proposed Market A SMP regulation. Having regard to the nature of barriers to entry and the competitive dynamics of Market B, ComReg has noted³⁵³ that irrespective of whether *ex ante* regulatory obligations are applied to upstream Market A, the competitive conditions of Market B would not necessarily evolve towards effective competition in the timeframe of this BTS Review.
- 11.53 Further, in this regard, ComReg would also note that existing *ex ante* SMP regulation of RTÉNL is no longer directly relevant given the move to DTT following ASO.

The depth of ComReg's analysis

- 11.54 ComReg notes that RTÉ suggested that ComReg's analysis is speculative and lacks detail. In paragraph 11.36 above RTÉ highlighted the particular areas where it believes this is the case. These are addressed under the following headings:
- Regulatory barriers to entry;
 - Sunk costs;
 - Constraints from commercial DTT Multiplex Operators;

³⁵² See paragraphs 12.17 to 12.48 of the BTS Consultation.

³⁵³ See paragraphs 10.71 to 10.74 and 12.41 of the BTS Consultation.

- Vertical integration; and,
- Lack of demand and uncertainty of demand.

Regulatory barriers

- 11.55 In its Submission RTÉ stated that³⁵⁴:
- “ComReg asserts the need to obtain a contract from the BAI would entail delays and commercial uncertainties (paragraph 12.22 and 13.26) but does not explain why delays would occur, how significant they would be or what commercial impact they would have”.*
- 11.56 In the BTS Consultation³⁵⁵ ComReg stated that it would appear that there are legal and regulatory barriers to entry to Market B. ComReg also noted³⁵⁶ that, taking account of the regulatory and other barriers to entry, it does not seem likely that commercial DTT Multiplex Operator entry capable of constraining RTÉ will be established in the timeframe of this BTS Review.
- 11.57 In the BTS Consultation³⁵⁷, ComReg also noted that RTÉ receives its PSB DTT multiplex licences directly from ComReg on request. However, potential commercial DTT Multiplex Operators must receive a DTT multiplex contract from the BAI who, in turn, receives DTT multiplex (spectrum) licences directly from ComReg on request. Based on experience to date, such commercial DTT multiplex contracts may be likely to be only issued following a successful tendering process by the BAI.
- 11.58 In the BTS Consultation³⁵⁸ ComReg noted that no material representations have been made to the BAI for commercial DTT³⁵⁹ multiplex contracts following its previous commercial DTT tendering process between 2008 and 2010. While ComReg is of the view that it’s proposed *ex ante* regulation of Market A should more easily facilitate the entry of commercial DTT Multiplex Operators in Market B, this may not necessarily materialise in effective entry in Market B within the timeframe of this BTS Review having regard to the barriers to entry identified in the BTS Consultation³⁶⁰.
- 11.59 ComReg notes that in page 11 of the BAI’s Submission it stated that:

³⁵⁴ See paragraph 24.5, page 42 of RTÉ’s Submission.

³⁵⁵ See paragraph 12.17 and 12.22 of the BTS Consultation.

³⁵⁶ See paragraph 13.26 of the BTS Consultation.

³⁵⁷ See paragraph 4.42 of the BTS Consultation.

³⁵⁸ See paragraphs 12.22 and 12.32 of the BTS Consultation.

³⁵⁹ ComReg notes the BAI has (as of Q2 2013) appointed a consultant to conduct a review of the potential for commercial DTT in Ireland and the BAI are due to consider the outcomes at a meeting in late 2013.

³⁶⁰ See paragraphs 12.17 to 12.29 of the BTS Consultation.

“There is currently uncertainty as to whether a commercial DTT operator could be established during the three year timeline of this market review given the steps involved from a BAI decision to seek applicants through to conclusion of contracts for the provision of a DTT multiplex system”.

- 11.60 The BAI further stated that:
- “It is unlikely that a business model for commercial DTT could be considered until the Market A review is finalised, decision adopted and tariffs are published”.*
- 11.61 In this regard ComReg noted the failed commercial DTT entry attempts following a BAI commercial DTT contract negotiation process between 2008 and 2010³⁶¹. ComReg is of the view that in the absence of a definitive timeline for the initiation of a new commercial DTT tender process, effective entry by commercial DTT Multiplex Operators capable of constraining RTÉ, based on the evidence to date, is unlikely to emerge in the period of this BTS Review.
- 11.62 Notwithstanding the above, in the BTS Consultation³⁶² ComReg noted that for commercial DTT Multiplex Operator entry to be effectively competitive and therefore capable of constraining RTÉ, given existing Downstream DTT Broadcasters’ statutory / licence obligations, commercial DTT Multiplex Operator entry would have to provide for similar supply conditions as those which are available via RTÉ’s PSB DTT multiplexes. This is uncertain as potential commercial DTT Multiplex Operators may not wish to transmit on a FTA basis or to the same coverage levels as RTÉ.
- 11.63 In the BTS Consultation³⁶³ ComReg also noted that potential commercial DTT Multiplex Operators may not participate in the supply of existing Irish Downstream DTT Broadcasters in any event. Commercial DTT Multiplex Operators could offer their DTT services to end-users in addition to those made available via RTÉ’s DTT multiplexes through the same end-user receiver equipment (e.g. set top boxes) and therefore perhaps provide a more attractive option for end-user viewing which would be in the commercial interest of the commercial DTT Multiplex Operator (whether it is a supplier of FTA or pay TV services or a combination of both).
- 11.64 ComReg also notes the BAI’s point³⁶⁴, that is, entry to Market B may be influenced by the WRC decision³⁶⁵ in relation to further digital dividend capacity. Any potential investors would need to be

³⁶¹ See paragraph 4.43 of the BTS Consultation.

³⁶² See paragraph 12.25 of the BTS Consultation.

³⁶³ See paragraph 12.26 and 12.37 of the BTS Consultation.

³⁶⁴ See page 11 of the BAI’s Submission to the BTS Consultation.

³⁶⁵ See footnote 342 above.

cognisant of additional costs involved arising from any frequency changes from a technical and end-user perspective. Such issues could further undermine effective entry of potential commercial DTT Multiplex Operators.

- 11.65 In light of the above, ComReg does not therefore; agree with RTE's view that it has not clearly explained its assessment of barriers to entry in the BTS Consultation.
- 11.66 In its submission, RTE also stated that³⁶⁶:
- "It is surprising that ComReg concludes that regulatory barriers to entry are high enough to require ex ante regulation as the preferred solution in this situation would normally be to reform the regulatory process and the underlying issue here seems to be not the regulatory process and its impact but the current lack of demand for additional supply and consequent lack of commercial competitors to RTE".*
- 11.67 As part of its assessment of barriers to entry ComReg must be cognisant of barriers of a regulatory / legal and / or structural nature. In the BTS Consultation³⁶⁷ ComReg detailed a range of regulatory / legal and structural factors which it believed combined to form high non-transitory barriers to entry to Market B and ComReg's assertion that barriers to entry are high and non-transitory, therefore, does not rest on legal barriers alone.
- 11.68 In paragraph 11.57 above, ComReg also noted that until a commercial DTT tendering process is completed by the BAI, the possibility of competing supply to RTE cannot occur. As noted by the BAI in its Submission to the BTS Consultation³⁶⁸, it is not considered likely that such a process could be commenced, let alone finalised, until ComReg's Market A decisions are adopted and *ex ante* regulation implemented.
- 11.69 ComReg also noted that, since the previous attempts for commercial DTT entry, it is not aware of any express demand from potential commercial DTT operators. The possibility of such demand materialising is unlikely to occur until such time as a decision in relation to Market A is finalised.
- 11.70 ComReg notes that the BAI has (as of Q2 2013) appointed a consultant to conduct a review of the potential for commercial DTT in Ireland and the BAI are due to consider the outcomes at a meeting in late 2013. While the outcome of this process is uncertain until such time as the process is complete, having regard to the analysis in the preceding paragraphs of this Decision, ComReg maintains its view that it is unlikely that effective entry will

³⁶⁶ See paragraph 24.5, page 42 of RTE's Submission.

³⁶⁷ See paragraph 12.17 to 12.29 of the BTS Consultation.

³⁶⁸ See page 11 of the BAI's Submission to the BTS Consultation.

materialise in the timeframe of this BTS Review. Nonetheless, ComReg proposes to keep the situation under review.

- 11.71 In section 12 of the BTS Consultation, ComReg also noted that there are a number of structural barriers to entry which may further limit the possibility of effective entry. These include costs of entry, particularly in the context of possible self-supply for existing Downstream DTT Broadcasters, the ability to switch between PSB DTT multiplexes and commercial DTT multiplexes given existing Downstream DTT Broadcasters FTA and coverage requirements, and the nature of the business models adopted by commercial DTT Multiplex Operators (if any).
- 11.72 Therefore, in ComReg's view, it is the range of regulatory and structural factors discussed above which form high and non-transitory barriers to entry in Market B. RTÉ is the sole DTT Multiplex Operator in Market B and therefore existing Downstream DTT Broadcasters have no alternative source of DTT supply. As discussed in the BTS Consultation³⁶⁹ and later in this Decision, among others, a lack of effective commercial DTT supply provides a vertically integrated entity such as RTÉ with the potential ability and incentive to engage in anti-competitive behaviour towards its wholesale customers / downstream competitors. A lack of commercial DTT Multiplex Operator entry owing to a lack of demand for additional DTT supply, as suggested by RTÉ, also means that RTÉ would remain the sole source of supply of DTT multiplexing services for Downstream DTT Broadcasters.
- 11.73 As noted above, the possibility of alternative commercial DTT supply materialising is unlikely to occur until such time as a decision in relation to Market A is finalised. ComReg considers that *ex ante* regulation in Market A should more easily facilitate commercial DTT Multiplex Operator entry in Market B but, nonetheless, based on evidence to date, it is ComReg's position that effective competition will not be established in Market B in the timeframe of this BTS Review.

Sunk costs

- 11.74 RTÉ stated that³⁷⁰:

[In RTÉ's consideration] "ComReg does not quantify the costs of entry and it does not assess what proportion of entry costs would be sunk or how significant these would be relative to the size of the market and potential profit opportunities".

- 11.75 On the contrary, in the BTS Consultation³⁷¹ ComReg noted that the costs associated with building and maintaining the necessary

³⁶⁹ See sections 12 to 14 of the BTS Consultation.

³⁷⁰ See paragraph 24.5 of RTÉ's Submission.

³⁷¹ See paragraph 12.23 of the BTS Consultation.

infrastructure and other costs associated with providing a commercial DTT multiplexing service, while not fully sunk, would still be a consideration for potential entrants, in particular, taking account of the size of the market and the MES. ComReg further noted that a number of costs of entry would likely be sunk on market exit such as marketing costs.

- 11.76 In addition, ComReg also notes that such costs would be of particular consideration in the context of self-supply for existing Downstream DTT Broadcasters. For example, TG4's annual report showed that in 2011³⁷² it earned €35.86 million in revenues of which €32.75 million was grant aid with the rest being commercial income. Its operating costs were €35.88 million. TV3 earned €54.43 million in 2011 and had operating expenses of €51.32, with a profit of €3.56 million for the year³⁷³. Given these margins between revenues and operating costs, this suggests to ComReg that, it would be difficult for such Downstream DTT Broadcasters, on their own, to fund their engagement in self-supply of DTT multiplexing services.
- 11.77 The costs of entry into Market B are dependent on a wide range of factors at the wholesale level, including coverage area, capacity, technology employed, the nature of the business plan which could include self-supply only, supply to other Downstream DTT Broadcasters only or both, and which could be provided on a FTA or pay TV basis only or a combination of both, among others.
- 11.78 In this context, it is ComReg's position that it is not reasonably necessary to detail the minute quantification of costs of entry, given the various ways in which commercial DTT Multiplex Operator entry could occur. Furthermore, the potential return from such entry is also difficult to quantify and depends on a myriad of factors including the ability to attract customers to the platform, among others. For example, in its submission to the BCI / BAI as part of its DTT multiplex tender process in 2008, the Boxer consortium estimated that it would break even by year five based on its forecast of attaining 215,000 customers by year three. Boxer's proposed approach was for a pay TV service³⁷⁴.
- 11.79 In the context of the emergence of a decline in the general economic climate since 2008 and the associated impact on the broadcasting market in terms of declining commercial revenues (e.g. according to the European Audio Visual Observatory TV ad-spend declined from €363 million to €286 million in Ireland between

³⁷² TG4 Annual report 2011. See <http://www.tg4.ie/ie/corporate/background.html>

³⁷³ TV3 network Ltd. registered company accounts.

³⁷⁴ See http://www.bai.ie/?page_id=3254

2008 and 2011³⁷⁵), potential commercial returns from market entry are likely to be even more difficult to achieve.

- 11.80 In the BTS Consultation³⁷⁶, ComReg noted that although not directly comparable to the likely costs in Ireland, according to a report commissioned by the BCI in 2007, the BBC's investment in freeview was estimated at around €16 million a year, largely to cover transmission, coding and multiplexing and marketing costs³⁷⁷.
- 11.81 The business case for entry to Market B would therefore require detailed consideration by potential commercial DTT entrants themselves. As part of its previous commercial DTT tendering process, the BCI (and subsequently the BAI) requested information from commercial DTT bidders on likely assessment of start up costs and capital expenditures required over the duration of the DTT multiplex licence³⁷⁸.
- 11.82 The Boxer consortium stated that the costs of applying to the multiplex contract itself were expected to total €3 million and it expected start up fees in first year (2008) to reach €3.4 million. The total marketing budget for the licence period was estimated at €20 million. Significant capital expenditures were not budgeted for, as it was envisaged that a full end to end BTS would be provided by RTÉNL or BT or a combination of both. The majority of capital expenditures were recognised for office development and logistics estimated at €2.2 million over the duration of the licence³⁷⁹.
- 11.83 OneVision estimated that marketing expenditure of €5 million would be required over the first three years, and start up and capital expenditure of €4.5 million, €1.5 million of which capital expenditure relates to the licence period³⁸⁰.
- 11.84 Finally, Easy TV anticipated capital expenditure of €32.8 million over the licence period with additional spend of €16.3 million on marketing, branding etc.³⁸¹
- 11.85 Therefore, it is evident that costs of entry to Market B are not inconsequential and are dependent on business plans that will vary, including depending on any terms and conditions that may be stipulated as part of a BAI commercial DTT tendering process.

³⁷⁵ "Television, cinema, video and on-demand audiovisual services in 38 European States, 2012 Yearbook, Volume 1", European Audiovisual Observatory.

³⁷⁶ See paragraph 12.23, footnote 179 of the BTS Consultation.

³⁷⁷ See http://www.bai.ie/?page_id=3254

³⁷⁸ See http://www.bai.ie/?page_id=3254

³⁷⁹ See http://www.bai.ie/?page_id=3254

³⁸⁰ See http://www.bai.ie/?page_id=3254

³⁸¹ See http://www.bai.ie/?page_id=3254

- 11.86 ComReg’s position is that the costs of entry together with other structural and legal / regulatory issues create barriers to entry which ComReg considers to be high and non-transitory.
- 11.87 In its Submission RTÉ also stated that³⁸²:
- “ComReg notes that the costs of entry are higher for an entrant that wishes to supply TG4 and TV3 given coverage needs but does not quantify the impact of this on the costs of entry, the proportion that would be sunk or their significance in this market”.*
- 11.88 In the BTS Consultation³⁸³ ComReg noted that the potential incremental costs of broadcasting from all the transmission sites from which RTÉ itself broadcasts in order to satisfy Irish Downstream DTT Broadcasters’ coverage obligations may outweigh the benefits for potential commercial DTT Multiplex Operators for doing so. This would be dependent on a commercial DTT Multiplex Operator’s business case as it may wish to limit its service to a coverage area less than that of RTÉ.
- 11.89 Depending on the terms and conditions of any BAI DTT multiplex contract award, the minimum level of coverage required may differ to that of RTÉ. Should a commercial DTT Multiplex Operator wish to supply from all the sites from which RTÉ broadcasts, its costs of transmission would rise incrementally in such a situation. In addition, given the propagation characteristics of the spectrum used for broadcasting, such costs would also be likely to rise exponentially due to the lower coverage of RTÉNL’s infill transmission sites (outside of RTÉNL’s main high tower / high power transmission sites).
- 11.90 ComReg notes that the BAI’s DTT licensing policy³⁸⁴ in 2008 stated that each commercial DTT Multiplex Operator shall be required to provide a minimum of 90% population coverage and proposals exceeding this may be viewed favourably. As such, the Boxer consortium stated its intentions to reach 92% of the population, and OneVision and Easy TV stated that they planned to reach 93% population coverage. Such coverage might satisfy TV3’s contracted coverage requirements, but this may not be the case for TG4 whose coverage requirements are, to be made available, as it is reasonable practicable, to the whole community of Ireland, as is detailed in section 118 of the 2009 Act³⁸⁵.
- 11.91 ComReg notes that RTÉ did not express differing views on such issues and instead commented on the lack of quantification of such costs. ComReg’s position is that the range of legal / structural

³⁸² See paragraph 24.5 of RTÉ’s Submission.

³⁸³ See paragraph 12.25 of the BTS Consultation.

³⁸⁴ See http://www.bai.ie/wordpress/wp-content/uploads/BCI_dtt_licensing_policy_08_revised_edition.pdf

³⁸⁵ See section 118 of <http://www.irishstatutebook.ie/2009/en/act/pub/0018/>.

issues discussed in section 12 of the BTS Consultation combine to form high and non-transitory barriers to entry to Market B and such analysis does not rely on an examination of the costs of entry alone.

- 11.92 Furthermore, the question as to whether or not commercial DTT Multiplex Operator entry offers effective competition to RTÉ is more relevant for detailed consideration should the actual establishment of commercial DTT multiplexes occur in the market. In section 12 of the BTS Consultation ComReg has set out its reasoning as to why it does not believe effective entry is likely in the timeframe of this BTS Review. In this context ComReg is not of the view that detailed quantification of such costs, which are dependent on a myriad of potential hypothetical entry scenarios, can be reasonably computed nor is it vitally necessary to do so for the purpose of this BTS Review.

Constraints from commercial DTT Multiplex Operators

- 11.93 In its Submission RTÉ stated that³⁸⁶:
- “RTÉ has the obligation to include TV3 and TG4 in its offerings and their requirements in terms of coverage do not need to prevent them being available on other multiplexes”.*
- 11.94 In the BTS Consultation³⁸⁷ ComReg noted that TG4 and TV3 have FTA national coverage commitments that must be satisfied under their statutory / licence obligations. In section 4 of this Decision and in section 5 of the BTS Consultation ComReg discussed the reasons why it is of the view that Market B is not constrained by other BTS platforms.
- 11.95 In the BTS Consultation ComReg had noted that although provisions in legislation (section 130 of the 2009 Act) are made relating to the carriage of TV3 and TG4 on RTÉ’s PSB DTT multiplexes, so long as TV3 and TG4 can meet their statutory / licence obligations they are not specifically required to be broadcast via RTÉ’s PSB DTT multiplexes. If commercial DTT Multiplex Operators entered the market then, depending on the nature of commercial DTT supply, such Downstream DTT Broadcasters could potentially switch all or some of their programme services from RTÉ’s PSB DTT multiplexes.
- 11.96 ComReg does not consider that such Downstream DTT Broadcasters would wish to have the same programme services broadcasted from both RTÉ’s PSB multiplexes and commercial DTT multiplexes as it would not make economic sense to do so, as it would likely result in the more costs for the Downstream DTT Broadcasters with likely little additional gain in target audience.

³⁸⁶ See paragraph 24.5 of RTÉ’s Submission.

³⁸⁷ See paragraph 4.18 of the BTS Consultation.

- 11.97 However, as RTÉ is the sole Multiplex Operator in Market B and there are no alternative sources of DTT multiplexing supply capable of meeting the needs of these Downstream DTT Broadcasters, they are nonetheless dependent on RTÉ for their DTT multiplexing supply.
- 11.98 In section 12 of the BTS Consultation, and as will be discussed later in section 14 of this Decision, ComReg discussed why it is of the position that effective competition is unlikely to develop in Market B over the timeframe of this BTS Review.
- 11.99 However, ComReg has indicated that should commercial DTT Multiplex Operators become established and operational in the timeframe of this BTS Review ComReg would assess the competitive conditions of Market B in light of this, to determine whether any effective constraint arises on RTÉ.
- 11.100 Therefore, ComReg's position is that constraints from effective competition are unlikely to arise on RTÉ in Market B in the timeframe of this BTS Review.

Vertical Integration

- 11.101 In its Submission RTÉ commented that³⁸⁸:
- “ComReg does not analyze the impact of the relevant contractual terms, quantify switching costs that TV3 and / or TG4 would face or analyze whether these would prevent them from switching to a competitor in response to potential exploitation by RTÉ”.*
- 11.102 In the BTS Consultation³⁸⁹, ComReg noted that, in the past, RTÉNL's analogue TV customers (such as TG4 and TV3 for example) have had long term contracts of up to 10 years. If similar long term contracts were put in place between RTÉ and its Downstream DTT Broadcaster customers before commercial DTT Multiplex Operator entry occurred, it is possible that switching costs might arise, depending on contractual terms and conditions (e.g. possible penalties for termination of contract agreements). If this was the case, this may therefore, act as a deterrent to switching. As far as ComReg is aware, DTT contracts have yet to be concluded between RTÉ and TV3 / TG4.
- 11.103 In the BTS Consultation, ComReg did not quantify such costs. RTÉ is currently the sole PSB DTT Multiplex Operator in Market B (and for the reasons discussed elsewhere in this Decision, ComReg considers that this is unlikely to change in the medium term). Given the theoretical nature of the possibility of switching, ComReg does not consider it necessary or appropriate to put a precise cost on such potential switching. Equally, consideration of the detail of such agreements, as part of an assessment of the state of competition in

³⁸⁸ See paragraph 24.5 of RTÉ's Submission.

³⁸⁹ See paragraph 12.39 of the BTS Consultation.

Market B, would be more relevant were actual effective competitive supply to become established in Market B (which is not currently the case).

- 11.104 Further to this, in the BTS Consultation³⁹⁰, ComReg stated that should commercial DTT Multiplex Operators become established in the timeframe of this BTS review then it will assess the competitive conditions in Market B to determine whether the Three Criteria Test (and / or SMP assessment, as appropriate) remains satisfied.
- 11.105 In its Submission RTÉ further stated that³⁹¹:
- “The argument is speculative as ComReg seems uncertain as to whether or not customers have entered into long term contracts but assumes that they have (paragraphs 12.39 and 13.17)”.*
- 11.106 ComReg, through correspondence³⁹² with national terrestrial Downstream Broadcasters, is aware that long term contracts have, in the past, been signed with RTÉNL for their analogue BTS and ComReg understands that contracts with RTÉ for the provision of DTT multiplexing services have yet to be completed. As per ComReg’s comment in paragraph 11.103 above, it is not necessary for ComReg to definitively detail the actual contractual arrangements between RTÉ and its terrestrial broadcast customers for the purposes of this BTS Review. This would be more applicable for ComReg’s consideration in the event of a need to revisit its findings, should effectively competing DTT Multiplex Operator(s) emerge in Market B in the timeframe of this BTS Review.

Lack of demand and uncertainty of demand

- 11.107 In its submission RTÉ also stated that³⁹³:
- “ComReg concludes that it is unlikely that a commercial DTT multiplex operator would enter the market to constrain RTÉ due to the lack of and / or uncertainty over the level of future demand (12.32) which is speculative as no forecasts of demand for these services is made and no comparison with how these services have developed in other countries is made”.*
- 11.108 In section 12 (including paragraph 12.32) of the BTS Consultation and in paragraphs 11.55 to 11.73 above, ComReg stated that it seems unlikely that effective commercial DTT Multiplex Operator entry will be established in the timeframe of this BTS Review.
- 11.109 ComReg notes that RTÉ did not suggest it was aware of potential commercial DTT Multiplex Operator entry in Market B or expression of interest.

³⁹⁰ See paragraphs 12.29 and 12.43 of the BTS Consultation.

³⁹¹ See paragraph 24.5 of RTÉ’s Submission.

³⁹² In response to ComReg broadcasting questionnaires dated May 2010 and April 2011.

³⁹³ See paragraph 24.5 of RTÉ’s Submission.

- 11.110 Following the previous failure of commercial DTT to materialise, the BAI noted that potential commercial DTT Multiplex Operators highlighted the prevailing economic conditions in addition to the failure to negotiate successfully with RTÉNL as the main contributing factors to the failure to achieve a successful outcome³⁹⁴.
- 11.111 As noted previously, in its Submission the BAI stated that:
“It is unlikely that a business model for commercial DTT could be considered until the Market A review is finalised, decision adopted and tariffs are published”.
- 11.112 ComReg notes the BAI has (as of Q2 2013) appointed a consultant to conduct a review of the potential for commercial DTT in Ireland and the BAI are due to consider the outcomes in late 2013.
- 11.113 Notwithstanding the above, it is ComReg’s position that effective commercial DTT Multiplex Operator entry is unlikely to be established in Market B in the timeframe of this BTS Review. However, as noted in paragraph 11.104 above, in such a case, ComReg will assess the competitive conditions in Market B to determine whether the Three Criteria Test (and / or SMP assessment, as appropriate) remains satisfied.

Whether barriers to entry for a commercial DTT Multiplex Operator are a relevant factor to be assessed

- 11.114 In terms of the nascence of DTT in Ireland, ComReg would note that DTT was officially launched in May 2011, and that DTT testing was publicly accessible prior to this in 2010. Furthermore, a commercial DTT tendering process was engaged by the BCI / BAI between 2008 and 2010. Therefore, the DTT landscape has been in place in Ireland for a number of years and there has remained one DTT Multiplex Operator in Market B over that time.
- 11.115 In the BTS Consultation³⁹⁵, ComReg defined Market B as a market for wholesale access to DTT multiplexing services. This does not limit Market B public interest channels, and to RTÉ’s PSB DTT multiplexes alone; rather ComReg has indicated that for a commercial DTT Multiplex Operator to be capable of providing an effective substitutable service to existing Irish Downstream DTT Broadcasters, it would need to satisfy RTE’s current customers’ (TV3 and TG4) statutory / licence obligations (FTA and national coverage).
- 11.116 In order to assess the second criterion of the Three Criteria Test, i.e. the tendency towards competition overtime in Market B, it is important to consider the likelihood of effective commercial DTT Multiplex Operator entry over the timeframe of this BTS Review.

³⁹⁴ See <http://www.bai.ie/?p=1469>

³⁹⁵ See paragraphs 5.117 to 5.143 of the BTS Consultation.

The extent to which any such entry is likely to exert a materially effective competitive constraint on RTE would need to be assessed were such entry to become established.

- 11.117 As noted in paragraphs 12.18 to 12.29 of the BTS Consultation and paragraphs 11.55 to 11.113 above, based on market developments to date, ComReg does not expect that effective constraints arising from Market B entry are likely to arise in the timeframe of this BTS Review. Notwithstanding, *ex ante* SMP regulation of Market A should provide the conditions to more easily facilitate the establishment of commercial DTT Multiplex Operator entry in Market B.
- 11.118 Nonetheless, ComReg proposes to keep this market under review and reassess the Three Criteria Test in Market B should effective competition from commercial DTT Multiplex Operators materialise within the timeframe of this BTS Review.

ComReg's Position

- 11.119 Having regard to the analysis set out in the BTS Consultation³⁹⁶ and the consideration of Respondents' views above, ComReg's position is that Market B satisfies the Three Criteria Test such that Market B is susceptible to *ex ante* regulation. In this regard:
- Market B is characterised by high and non-transitory entry barriers;
 - Market B exhibits characteristics such that it will not tend towards effective competition overtime; and,
 - Competition law, while complimentary, in and of itself is inadequate to address potential market power problems in Market B.
- 11.120 In addition, ComReg is also of the position that other regulatory measures / legislation in place (particularly noting the relevant provisions of the 2009 Act) are not effective in addressing potential market power problems.
- 11.121 ComReg will monitor Market B over the timeframe of this BTS Review to determine whether the Three Criteria Test (and / or SMP assessment, as appropriate) in Market B remains satisfied.

³⁹⁶ See paragraphs 12.1 to 12.48 of the BTS Consultation.

12 Competition Analysis and Assessment of SMP – Market B

12.1 Following its preliminary finding, in section 13 of the BTS Consultation, that Market B satisfies the Three Criteria Test, ComReg undertook a competition analysis and an assessment of SMP in Market B.

12.2 Below, ComReg considers the issues raised by Respondents and sets out its final position on the SMP assessment.

Position set out in the BTS Consultation

12.3 ComReg examined the level of existing competition³⁹⁷, the potential for competition to develop³⁹⁸ and whether countervailing buying power³⁹⁹ in Market B is effective.

12.4 The criteria considered by ComReg to be most relevant for the SMP assessment in Market B, were:

- Market shares;
- Overall size of the undertaking;
- Relevant strength of existing competitors;
- Control of infrastructure not easily duplicated;
- Financial costs;
- Vertical integration; and,
- Countervailing buying power.

12.5 ComReg also considered other criteria identified in the SMP Guidelines⁴⁰⁰, but these were considered by ComReg to be of no or less relevance for the purpose of the assessment of SMP in Market B.

12.6 ComReg identified that RTÉ has 100% market share in Market B.

12.7 ComReg noted that RTÉ has acquired licences for the operation of two PSB DTT multiplexes and there are currently no alternative commercial DTT Multiplex Operators in Market B capable of effectively constraining RTÉ. On the basis of evidence to date, ComReg was of the preliminary view that this seemed unlikely to materially change during the period covered by this BTS Review.

12.8 ComReg also noted that RTÉ, as a vertically integrated monopoly entity, could influence the state of competition in Market B where

³⁹⁷ See paragraphs 13.6 to 13.11 of the BTS Consultation.

³⁹⁸ See paragraphs 13.7 to 13.27 of the BTS Consultation.

³⁹⁹ See paragraphs 13.28 to 13.32 of the BTS Consultation.

⁴⁰⁰ See paragraph 13.5 of the BTS Consultation.

access may be constructively limited / foreclosed and / or there may be the potential for charging excessive and / or discriminatory fees to actual or potential customers in order to limit competitive threats to RTÉ in downstream retail markets.

- 12.9 ComReg considered that insufficient countervailing buying power exists in Market B, as Downstream DTT Broadcasters do not appear to have the ability to exert significant constraints on the cost or other terms and conditions of supply offered by RTÉ.
- 12.10 ComReg acknowledged that the potential for competition to develop in Market B is, in theory, greater than in Market A, but ComReg was of the preliminary view that the competitive conditions in Market B were unlikely to materially change in the timeframe of this BTS Review.

Proposed Conclusions on the Competition and SMP Assessment in Market B

- 12.11 Having regard to the analysis in section 13 of the BTS Consultation (and as summarised in paragraphs 12.3 to 12.10 above), ComReg's preliminary view was that RTÉ should be designated as having SMP in Market B.
- 12.12 ComReg proposed to closely monitor relevant developments in Market B during the timeframe of this BTS Review and to review its position, if appropriate.

BTS Consultation Question(s)

- 12.13 Having outlined the above assessment on the current and likely future state of competition in Market B over the timeframe of this BTS Review, ComReg then asked the following question⁴⁰¹.

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

Respondents' Views

- 12.14 **Four Respondents agreed** (TG4, the BAI, TV3 and Eircom) with ComReg's overall preliminary SMP assessment.
- 12.15 **One Respondent disagreed** (RTÉ) with ComReg's preliminary conclusions on the basis that, in its own view, the provisions under section 130 of the 2009 Act adequately address the potential competition issues identified (of access and pricing), as the justification for proposed *ex ante* SMP regulation, thereby preventing RTÉ from acting to an appreciable extent independently

⁴⁰¹ See Question 25, page 202 of the BTS Consultation.

of competitors, customers and consumers. Furthermore, RTÉ stated that, based on capacity limits alone (having regard to the provisions of section 130 under the 2009 Act relating to access) there is no case for RTÉ to be designated with SMP.

- 12.16 **One Respondent did not express specific views** (the Individual Respondent) on Question 25 above (although it was broadly supportive of ComReg's overall preliminary conclusions).
- 12.17 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall assessment.
- 12.18 ComReg is of the view that Respondents' views are mainly focused on issues which can generally be captured under the themes identified below.
- The SMP assessment having regard to the purported constraints placed on RTÉ under the 2009 Act and due to capacity limitations; and,
 - A lack of consideration of 'sponsored' commercial DTT entry.
- 12.19 Furthermore, ComReg notes that RTÉ raised another issue (its ability to discriminate in the quality of transmission services) under Question 25 above. ComReg considers that this is more appropriately dealt with elsewhere in this Decision⁴⁰².

The SMP assessment having regard to the purported constraints placed on RTÉ under the 2009 Act and due to capacity limitations

- 12.20 RTÉ disagreed with ComReg's purported finding of SMP and stated that access to its PSB DTT multiplexes is not in the gift of RTÉ (in that it is controlled by the provisions under section 130 of the 2009 Act). It also considered that it was unclear that regulatory intervention is warranted or proportionate to the limited capacity available on its second PSB DTT multiplex, on the assumption that HD versions of TV3 and TG4 programme services will be carried on its second PSB DTT multiplex. RTÉ, therefore, stated that on the basis of capacity limits alone there is no case for SMP.
- 12.21 RTÉ stated that ComReg ignored that Downstream DTT Broadcasters have 'must carry status' and that the payments that may be required by RTÉ are potentially subject to directions which can be made by the Minister under section 130 of the 2009 Act and RTÉ noted that this is also the case in terms of the capacity that must be made available to Downstream DTT Broadcasters.

⁴⁰² See paragraph 13.11 of this Decision.

A lack of consideration of ‘sponsored’ commercial DTT entry

12.22 RTÉ was of the view that, in ComReg’s assessment of countervailing buying power, ComReg did not consider the alternative possibility that TV3 and TG4 could sponsor the entry of a commercial DTT Multiplex Operator in competition to RTÉ. RTÉ provided its view that they could form an alliance to fill a commercial DTT multiplex and, thereby, that such supply-side substitutability was a possibility in Market B.

ComReg’s Assessment of Respondents’ Views

12.23 ComReg assesses Respondents’ views under the themes identified, before providing its final position on the issues raised.

The SMP assessment having regard to the purported constraints placed on RTÉ under the 2009 Act and due to capacity limitations

12.24 ComReg notes that RTÉ previously raised similar issues to those set out in paragraphs 12.20 to 12.21 above in its comments on ComReg’s Three Criteria Assessment⁴⁰³. In response, ComReg refers to its reasoning as to why it does not believe that the provisions of the 2009 Act sufficiently constrain RTÉ’s behaviour in Market B in paragraphs 11.38 to 11.52 of this Decision. This includes, among others that section 130 of the 2009 Act does not necessarily imply a cost-oriented (and efficient) price control could be put in place. In terms of access, the provisions of the 2009 Act do not adequately address the identified SMP related competition problems in an effective manner which would provide necessary regulatory certainty or counter potential constructive refusals of access. Therefore, ComReg does not propose to repeat all of its analysis here again.

12.25 ComReg notes that RTÉ also submitted that, based on a lack of capacity, there is no case for SMP designation. However, ComReg understands that RTÉ currently has spare capacity on its second PSB DTT multiplex, for carriage of more TV programme services.

12.26 Such capacity would be subject to the provisions under section 130 of the 2009 Act⁴⁰⁴. However, ComReg is of the view that notwithstanding the provisions under the 2009 Act, RTÉ could effectively deny access through constructive means of denial, and capacity constraints, to the extent that there are any, do not impact on this assessment. For example, ComReg notes that the BAI suggested to the Minister that the proposed cost structure for

⁴⁰³ See paragraphs 11.32 to 11.35 of this Decision.

⁴⁰⁴ Furthermore, ComReg has had regard to the appropriateness and proportionality of its proposed *ex ante* regulatory obligations including the access obligations in sections 14 and 15 of the BTS Consultation. ComReg will discuss its proposed remedies in section 14 of this Decision.

carriage envisaged by RTÉ was of concern and should this continue it is the BAI's view that it is unlikely that any new services, other than those proposed by RTÉ, will be in a position to be carried on the platform⁴⁰⁵.

- 12.27 ComReg would note that the competition problems identified in the BTS Consultation are equally relevant to existing Downstream DTT Broadcasters who consume Market B wholesale services as well to potential purchasers of Market B wholesale services. As such, even if capacity constraints existed, this would not negate the need for *ex ante* obligations to address the identified competition problems for existing Downstream DTT Broadcasters with a view to promoting downstream competition to the benefit of end-users.
- 12.28 ComReg provided its objective reasoning as to why it is of the preliminary view that SMP designation is warranted in Market B in section 13 of the BTS Consultation. Having considered that the provisions under the 2009 Act are insufficiently effective in addressing competition related market power problems, and therefore does not constrain RTÉ's behaviour in Market B, ComReg remains of the position that RTÉ should be designated with SMP in Market B as:
- There is no competition in Market B as RTÉ is the sole undertaking in Market B⁴⁰⁶;
 - Effective competition is unlikely to materialise in Market B in the timeframe of this BTS Review⁴⁰⁷;
 - No effective countervailing buying power exists in Market B⁴⁰⁸; and,
 - Noting the above, as a vertically integrated entity, RTÉ has the ability and incentive to behave to an appreciable extent independently of its competitors, customers and end-users⁴⁰⁹.

A lack of consideration of 'sponsored' commercial DTT entry

- 12.29 In its assessment of countervailing buyer power in section 13, paragraph 13.30, of the BTS Consultation, ComReg noted that RTÉ is the sole supplier of Market B services in Ireland and that it is unclear when potential future entry can / will occur (while also having regard to Irish Downstream DTT Broadcasters statutory / licence FTA coverage requirements). In view of this ComReg

⁴⁰⁵ "Report and Recommendations by the Broadcasting Authority of Ireland on the exercise of its functions under Statutory Instrument No.67 of 2011", the BAI, dated August 2011. See http://www.bai.ie/wordpress/wp-content/uploads/20110815_BAIDTTEOI_FINAL.pdf

⁴⁰⁶ See paragraphs 13.7 to 13.10 of the BTS Consultation.

⁴⁰⁷ See paragraphs 13.7 to 13.27 of the BTS Consultation.

⁴⁰⁸ See paragraphs 13.28 to 13.32 of the BTS Consultation.

⁴⁰⁹ See paragraphs 13.24 to 13.27 of the BTS Consultation.

considers that RTÉ's customers cannot credibly exert influence on their terms and conditions of supply due to the unavailability of alternative options for supply. As there are no alternative sources of supply, RTÉ's customers cannot credibly refuse to purchase RTÉ's Market B DTT multiplexing services.

- 12.30 ComReg discussed its reasoning for the likely lack of effective competition developing in Market B in the timeframe of this BTS Review in the BTS Consultation⁴¹⁰ as part of the Three Criteria Test and competition and SMP assessment.
- 12.31 In the BTS Consultation, ComReg noted that it had examined the potential for self-supply in Market B but due to structural and legal / regulatory barriers to entry, effective commercial DTT Multiplex Operator entry is unlikely to materialise in the timeframe of this BTS Review.
- 12.32 ComReg notes that the conditions for commercial DTT entry would be the same for all potential commercial DTT Multiplex Operator entrants including any TV3 / TG4 sponsored commercial DTT Multiplex Operator entry. All potential commercial DTT Multiplex Operators would equally be subject to the same considerations and conditions of entry, as previously outlined in section 11 of this Decision, which ComReg considers to lead to high and non transitory barriers to entry in Market B.
- 12.33 ComReg is of the position that the competitive conditions of Market B are unlikely to materially change in the timeframe of this BTS Review. In this respect, ComReg proposes to closely monitor market conditions as appropriate.

ComReg's Position

- 12.34 Having regard to the assessment of actual and potential competition in Market B and the assessment of SMP criteria in the BTS Consultation⁴¹¹, and having considered Respondents' views, ComReg's position is that it is appropriate to designate RTÉ with SMP in Market B.

SMP Designation(s)

- 12.35 Having regard to Regulation 25 of the Framework Regulations, ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that Market B identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive.
- 12.36 In accordance with Regulation 27(4) of the Framework Regulations, ComReg hereby designates **Raidió Teilifís Éireann** as having SMP within Market B.

⁴¹⁰ See paragraphs 12.18 to 12.43 and 13.7 to 13.32 of the BTS Consultation.

⁴¹¹ See paragraphs 13.6 to 13.39 of the BTS Consultation.

13 Competition Problems – Market B

13.1 Following the proposed designation of SMP on RTÉ in section 13 of the BTS Consultation, ComReg assessed the potential for competition problems to arise in Market B⁴¹².

13.2 Below, ComReg considers the issues raised by Respondents and sets out its final position on the matter.

Position set out in the BTS Consultation

13.3 In section 14 of the BTS Consultation, ComReg explained that, further to Regulation 27(4) of the Framework Regulations, it is obliged to impose at least one remedy once it has designated an undertaking with SMP.

13.4 ComReg also noted that it is not necessary to point to actual examples of anti-competitive activity, but that a finding of SMP indicates the potential for competition problems to arise and this is sufficient, alongside a consideration of RTÉNL's incentives to engage in anti-competitive behaviour, to justify imposition of proportionate *ex ante* regulation.

13.5 ComReg expressed its view that three broad types of competition problems may arise in Market B. These are:

- **Exploitative behaviour⁴¹³:** In the absence of *ex ante* regulation, ComReg was of the view that RTÉ has the potential ability and incentive to engage in excessive pricing in Market B to reduce the competitive threat from downstream competitors. ComReg also stated that due to a lack of effective competitive pressure on RTÉ in Market B, there may be less pressure on RTÉ to provide an efficient service than may otherwise be the case, such that RTÉ's costs may not be at an efficient level, which could, via a pass through into its charges, negatively impact on existing and potential downstream competition and, thereby, choice and quality for end-users.
- **Vertical leverage⁴¹⁴:** ComReg noted that there is the potential ability and incentive, for a vertically integrated SMP undertaking in Market B, to leverage its market power into vertically related markets. For example, this could include constructive denial of access to Market B inputs to

⁴¹² See paragraphs 14.6 to 14.25 of the BTS Consultation.

⁴¹³ See paragraphs 14.6 to 14.11 of the BTS Consultation.

⁴¹⁴ See paragraphs 14.12 to 14.21 of the BTS Consultation.

Downstream Broadcasters through the application of discriminatory charges⁴¹⁵.

- **Exclusionary practices⁴¹⁶**: ComReg also noted that RTÉ competes with Downstream Broadcasters for retail audience market share (and related advertising revenues). In this context, as a vertically integrated monopoly with SMP, RTÉ has the ability and incentive to engage in behaviour aimed at foreclosing or limiting access to competitors through delaying in its provision of Market B services and / or the imposition of unreasonable terms and conditions for access to such.

Proposed Conclusions on Competition Problems in Market B

13.6 In summary, having regard to the analysis in section 14 of the BTS Consultation, ComReg was of the preliminary view that RTÉ has the ability, and incentive, to engage in exploitative and exclusionary behaviour in Market B to favour its own downstream operations.

BTS Consultation Question(s)

13.7 Having considered the potential for the types of competition problems that could arise in Market B, ComReg then asked the following questions⁴¹⁷.

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

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

Respondents' Views

13.8 **Three Respondents agreed** (TG4, the BAI and TV3) with ComReg's preliminary findings that the potential exists for the competition problems identified in the BTS Consultation to arise in Market B. **One Respondent disagreed** (RTÉ) with ComReg's preliminary conclusions.

⁴¹⁵ For example, the BAI submitted a report to the Minister with recommendations regarding the carriage of broadcasting content on RTÉ's PSB DTT multiplexes which highlighted that the proposed cost structure for carriage envisaged by RTÉ / RTÉNL is of concern and should this continue, it was the BAI's view that it is unlikely that any new services, other than those proposed by RTÉ, would be carried on the platform. See paragraph 6.33 of this Decision.

⁴¹⁶ See paragraphs 14.22 and 14.23 of the BTS Consultation.

⁴¹⁷ See Questions 26 and 27, page 206 of the BTS Consultation.

- 13.9 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 26 and Question 27 above. However, these Respondents stated that, overall, they agreed with ComReg's preliminary views of the need for *ex ante* regulation in Market B.
- 13.10 Respondents' views are mainly focused on issues which can generally be captured under the themes identified below:
- ComReg's analysis of competition problems was theoretical;
 - Insufficient analysis by ComReg of RTÉ incentives to engage in anti-competitive behaviour and of RTÉ's upstream and downstream margins; and,
 - The impact of the 2009 Act in negating / eliminating the identified competition problems.
- 13.11 Furthermore, as noted in paragraph 12.19 of this Decision, RTÉ raised, as an issue, its lack of ability to discriminate in the quality of transmission services, in the context of SMP analysis, which ComReg considers more applicable to discussion herein. ComReg considers this comment under the first bulleted theme identified above.

ComReg's analysis of competition problems was theoretical

- 13.12 RTÉ considered ComReg's analysis as largely theoretical and lacking a specific analysis of how such competition problems would be likely to occur.
- 13.13 The BAI stated that the potential exists for a vertically integrated SMP operator to limit access to Market B inputs, through a refusal to supply or delay in supply, foreclosure or the application of excessive pricing to protect its dominant position in this or related markets.
- 13.14 TV3 referred ComReg to its previous comments in response to section 8 - Competition Problems in Market A of the BTS Consultation⁴¹⁸, as it considered that similar issues also apply to Market B. TV3 indicated that a number of potential competition problems may arise in Market B and pointed to concerns raised in independent reports as well as its own experience as a purchaser of terrestrial BTS from RTÉ.
- 13.15 Furthermore, as noted in paragraph 13.11, RTÉ commented that given RTÉ's services are carried on the same DTT multiplexes as other Downstream DTT Broadcasters, there is no possibility for it to discriminate in relation to quality of the transmission service offered contrary to what ComReg's analysis in the BTS Consultation suggested.

⁴¹⁸ See paragraphs 7.14 to 7.16 of this Decision.

Insufficient analysis by ComReg of RTÉ's incentives to engage in anti-competitive behaviour and of RTÉ's upstream and downstream margins

- 13.16 RTÉ stated that, for Market B, ComReg presented no analysis of RTÉ's incentives to engage in the identified anti-competitive behaviours and made no reference to its relative upstream and downstream margins. Further to this, RTÉ was of the view that ComReg's analysis failed to take into account the network effects of different DTT programme services using the same platform, with the potential that RTÉ could benefit from having additional DTT programme services on the DTT platform in order to make it more attractive to end-users.

The impact of the 2009 Act in negating / eliminating the identified competition problems

- 13.17 RTÉ stated that issues regarding denial of access cannot arise, given its view that the BAI, along with the Minister decide on the number of non RTÉ broadcasting programme services to be considered on its PSB DTT multiplexes, and noted that, under section 103 of the 2009 Act, any new proposed RTÉ DTT programme service would also be subject to consent of the Minister. RTÉ stated that, in view of section 130 of the 2009 Act, it cannot discriminate and / or charge excessive tariffs and that ComReg's analysis ignored the work (under section 130 of the 2009 Act) that has been undertaken with ComReg over a two year period in relation to the RTÉ / RTÉNL tariff model (at the behest of the Minister) concerning its DTT tariffs.

ComReg's Assessment of Respondents' Views

- 13.18 ComReg assesses Respondents' views in turn under the themes identified before providing its final position on the issues raised.

ComReg's analysis of competition problems was theoretical

- 13.19 ComReg has discussed its reasoning as to why it believes that RTÉ should be designated with SMP in Market B in sections 12 and 13 of the BTS Consultation and sections 11 and 12 of this Decision respectively. As noted in the SMP Guidelines:

"SMP designation has no bearing on whether that undertaking has committed an abuse of a dominant position...merely implies that...the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers..."

- 13.20 Contrary to RTÉ's view, in the BTS Consultation, following its proposed designation of SMP upon RTÉ in Market B, ComReg subsequently outlined a range of potential competition issues which it believes could arise in Market B not only owing to RTÉ's position

as the sole supplier in Market B, but also given its incentives to engage in anti-competitive behaviour in Market B having regard to its vertically integrated nature. In section 14 of the BTS Consultation ComReg noted that this could encompass issues related to exploitation of customers⁴¹⁹, leveraging of market power into related downstream markets⁴²⁰, and exclusionary behaviour⁴²¹.

- 13.21 As part of this BTS Review, ComReg has also met with and issued questionnaires to broadcasting market participants to obtain their views on BTS in Ireland. In this respect, concerns were expressed by RTÉ's downstream competing broadcast customers (who purchase wholesale services from RTÉ) about a perceived lack of transparency and potential ability and incentives for RTÉ to engage in excessive / discriminatory pricing for its (then) provision of analogue terrestrial BTS, along with concerns that such related issues would continue to be present following the move to DTT.
- 13.22 Although not all directly relevant to Market B, a number of issues, as noted in paragraph 6.33 of this Decision, have arisen over the last number of years which appear to ComReg to suggest that, absent regulation, RTÉ may have the ability and incentive to engage in potential anti-competitive behaviours given its proposed SMP position in Market B.
- 13.23 ComReg is of the view that its analysis in the BTS Consultation, of the identified competition problems which could occur in Market B, owing to the ability (as the sole supplier in Market B and lack of effective constraints) and incentive (as a vertically integrated supplier of Market B services who also competes downstream with its customers) of RTÉ to engage in such behaviour, remain relevant.
- 13.24 ComReg also notes RTÉ's view that it cannot discriminate in relation to quality of transmission service offered given the shared nature of its underlying network. However, as ComReg indicated in the BTS Consultation⁴²², concerns may arise related to issues of quality of service where wholesale customers require SLAs with regard to service delivery and fault repair, which may not be forthcoming or may be discriminatory for example.
- 13.25 Further to this, minimum or average bitrates for DTT programme services carried on RTÉ's DTT multiplexes are likely to need to be agreed between relevant parties, as there may be the potential for the quality of TV programming to change dynamically, given capacity (bit rate) constraints based on the need of other programme services carried on the same multiplex e.g. as in the

⁴¹⁹ See paragraphs 14.6 to 14.11 of the BTS Consultation.

⁴²⁰ See paragraphs 14.13 to 14.21 of the BTS Consultation.

⁴²¹ See paragraphs 14.22 to 14.23 of the BTS Consultation.

⁴²² See paragraphs 14.14 to 14.18 of the BTS Consultation.

case of broadcasting Standard Definition ('SD') and High Definition ('HD') content.

- 13.26 Failure to address such issues in a reasonable and non-discriminatory fashion could potentially discourage market entry even where the Minister consents to carriage of additional content on RTÉ's PSB DTT multiplexes (as provided for under section 130 of the 2009 Act).

Insufficient analysis by ComReg of RTÉ's incentives to engage in anti-competitive behaviour and of RTÉ's upstream and downstream margins

- 13.27 Contrary to RTÉ's view, ComReg has been clear in its reasoning as to why the potential exists for competition problems to arise in Market B, given the ability and incentive of a vertically integrated monopoly SMP undertaking such as RTÉ to engage in such behaviour. As RTÉ's programme services compete in downstream retail markets (for audience market share and the associated advertising revenues it can receive) with the DTT broadcasting programme services of other Downstream DTT Broadcasters that RTÉ provides wholesale Market B services to, RTÉ has an incentive to leverage its market power in Market B into the downstream retail market in order to reduce such competitive threats. In section 14 of the BTS Consultation⁴²³, ComReg discussed a variety of means through which it considered that RTÉ could affect the competitive conditions in Market B (i.e. through exploitative and exclusionary behaviour and vertical leveraging of market power). ComReg also further discussed RTÉ's incentives to engage in such behaviours in the RIA in section 16 of the BTS Consultation⁴²⁴.
- 13.28 ComReg's analysis of the upstream Market A also analysed⁴²⁵ the incentives of RTÉ to engage in anti-competitive behaviour, through its wholly owned subsidiary RTÉNL. ComReg considers that RTÉ's incentives are applicable to both Market A and Market B.
- 13.29 While the carriage of more non RTÉ programme services would likely reduce transmission charges for RTÉ, the potential for more competition for audience market share and the potential for reduced advertising revenues from a greater number of competing Downstream Broadcasters and broadcasting content means that RTÉ has an incentive to engage in anti-competitive activity in order to protect its own position in downstream retail markets. While RTÉ would earn more revenues from carriage of a greater number of Downstream Broadcasters on its PSB DTT multiplexes, such

⁴²³ See paragraphs 14.6 to 14.23 of the BTS Consultation.

⁴²⁴ See section 16 of the BTS Consultation and Appendix F of this Decision.

⁴²⁵ See paragraphs 6.21 to 6.29 of the BTS Consultation.

wholesale revenues are not comparable to the advertising revenues that can be received by RTÉ⁴²⁶.

- 13.30 Further to this, RTÉ stated that it could benefit from the carriage of non RTÉ programme services as it would likely make its DTT platform more attractive to end-users. ComReg would note that it has previously considered in sections 3 and 4 of this Decision that other broadcast platforms are not substitutable to the DTT platform. ComReg noted that the range of content carried on other BTS platforms (such as cable and satellite) is far greater than the DTT platform. Although the carriage of additional non RTÉ programme services on the DTT platform could likely be expected to lead to some potential increase in its attractiveness to end-users, ComReg does not consider that, in view of the lower capacity for carriage of more non RTÉ programme services on its PSB DTT multiplexes (in comparison to cable and satellite for example), this would materially be of benefit RTÉ to the extent that it would constrain its incentives to engage in the competition problems identified in Market B.
- 13.31 ComReg is further of the view that situations which have arisen to date in terms of access to national terrestrial BTS would seem to contradict RTÉ's suggestion that it has the incentive to get as many as possible broadcasting customers on its terrestrial platform.
- 13.32 In this respect (although in the context of access to Market A services), ComReg notes the failure of commercial DTT to become established in Ireland following a BAI tendering process between 2008 and 2010, where it has been stated that one of the main contributory factors to this was a failure of parties to negotiate successfully⁴²⁷. ComReg notes that one of these parties (Eircom) has, in its Submission to the BTS Consultation⁴²⁸, stated that
- “RTÉNL held significant and disproportionate market power in the negotiation process and did not hesitate to prevent competitors entering the DTT market”.*
- 13.33 As noted earlier in paragraph 13.21 above, concerns have also been expressed to ComReg from RTÉ's terrestrial broadcasting customers regarding the pricing of RTÉ's BTS.
- 13.34 As noted in paragraph 13.22 above, the BAI submitted a report to the Minister highlighting that:

⁴²⁶ For example, according to RTÉ's Annual Report and Group Financial Statements 2011, total group (after removal of intra group revenues and costs) advertising income across all media was €123.8 million in the year ended 2011, while transmission, mast and towers income was €14.7 million. It should be noted however, that these advertising revenues are those accrued across all broadcasting platforms and not just the terrestrial platform. "Annual Report and Group Financial Statements", RTÉ, dated 2011. See <http://www.rte.ie/documents/about/RTE%202011%20Annual%20Report%20-%20English.pdf>.

⁴²⁷ See <http://www.bai.ie/?p=1462>

⁴²⁸ See page 5 of Eircom's Submission to the BTS Consultation.

“The issue of greatest concern to the prospects of any new services emerging relates to the proposed cost structure for carriage by envisaged by RTÉ / RTÉNL...Should this approach to cost be continued, it is the Authority’s view that it is unlikely that any new services, other than those proposed by RTÉ, will be in a position to be carried on the platform.”

- 13.35 ComReg maintains its view that where RTÉ is the sole wholesale supplier of Market B services and is also vertically integrated into competing downstream market(s) with its wholesale customers, it has the ability and incentive to appreciably behave independently of its customers, competitors and consumers and absent regulation, to engage in the anti-competitive behaviour previously identified. Therefore, RTÉ has the incentive and ability to limit entry / expansion and or exploit its wholesale broadcast customer competitors who compete with it in the retail market for audience market share and related advertising revenues.

The impact of the 2009 Act in negating / eliminating the identified competition problems

- 13.36 In paragraphs 11.38 to 11.52 of this Decision, ComReg has already expressed its views as to why it considers that the 2009 Act is not sufficient to address the competition concerns which may arise in Market B. For the same reasons set out therein, ComReg maintains these views.
- 13.37 In light of this, ComReg does not consider the provisions of the 2009 Act to be sufficient to address SMP related competition problems.

ComReg’s Position

- 13.38 Having regard to section 14 of the BTS Consultation and the discussion above, ComReg’s position is that, a vertically integrated monopoly SMP undertaking in Market B, such as RTÉ, has the ability and incentive to engage in a range of the anti-competitive behaviours which ComReg has identified in sections 13 and 14 of this Decision and the BTS Consultation respectively.

14 Remedies – Market B

Overview of Approach to Remedies in the BTS Consultation

- 14.1 In section 15 of the BTS Consultation, ComReg presented its preliminary views on the proposed imposition of appropriate and proportionate remedies to address the competition problems (identified in section 14 of the BTS Consultation) which could arise in Market B, absent *ex ante* regulation.
- 14.2 ComReg noted that, in accordance with Regulation 8(1) of the Access Regulations, where an undertaking is designated with SMP on a relevant market, ComReg is required to impose on that undertaking, such of the obligations set out in Regulations 9 to 13 of the Access Regulations as ComReg considers appropriate.
- 14.3 ComReg also noted that Regulation 8(6) of the Access Regulations provides that such obligations must be based on the nature of the competition problem identified, be proportionate and justified.
- 14.4 Furthermore, such obligations should only be imposed following public consultation and notification of draft measures to the European Commission, BEREC, and other NRAs.
- 14.5 In addition, ComReg noted that Regulations 12(1)(4) of the Access Regulations set out statutory criteria ComReg must take into account before imposing access obligations on an SMP undertaking⁴²⁹.
- 14.6 Other considerations⁴³⁰ were taken into account by ComReg, as appropriate (e.g. relevant comments letters issued by the European Commission to other NRAs pursuant to Articles 7 and 7a of the Framework Directive).
- 14.7 ComReg then went on to consider whether regulatory forbearance was appropriate, but set out its preliminary view that it was not, given that Market B was considered unlikely to be subject to effective competition in the timeframe of this BTS Review⁴³¹.
- 14.8 ComReg then proceeded to consider each of the *ex ante* obligations set out in Regulations 9 to 13 of the Access Regulations, justifying why or why not such obligations are required in Market B.
- 14.9 Below, ComReg considers the issues raised by Respondents and sets out its final position on the imposition of remedies in Market B.

⁴²⁹ Including the technical and economic viability of using or installing competing facilities; the feasibility of providing access; the initial outlay of investment by the undertaking; and the need to safeguard competition in the long term.

⁴³⁰ See paragraph 15.6 of the BTS Consultation.

⁴³¹ See paragraphs 15.8 to 15.16 of the BTS Consultation.

Imposition of Access Remedies

Position set out in the BTS Consultation

- 14.10 In the BTS Consultation, ComReg set out its preliminary view that **access obligations**⁴³², relating to the provision of DTT multiplexing services and associated services and facilities, should be imposed on RTÉ, having regard to the reliance of Downstream DTT Broadcasters on access to RTÉ's wholesale Market B services and the potential for constructive exclusionary / foreclosure problems to occur in Market B, absent regulation (as had been previously identified in section 14 of the BTS Consultation and section 13 of this Decision).
- 14.11 ComReg also proposed to impose the following access obligations:
- An obligation to negotiate in good faith⁴³³;
 - An obligation not to withdraw access to services and facilities already granted⁴³⁴;
 - An obligation to grant access in a fair, reasonable and timely manner⁴³⁵;
 - An obligation to ensure that SLAs are concluded and implemented⁴³⁶; and,
 - An obligation to provide objective criteria for any refusal or part refusal of access⁴³⁷.

BTS Consultation Question(s)

- 14.12 Having proposed the imposition of access obligations on RTÉ in Market B, ComReg then asked the following questions⁴³⁸.

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

⁴³² See paragraphs 15.19 to 15.47 of the BTS Consultation.

⁴³³ See paragraphs 15.30 to 15.32 of the BTS Consultation.

⁴³⁴ See paragraphs 15.33 to 15.36 of the BTS Consultation.

⁴³⁵ See paragraphs 15.37 and 15.38 of the BTS Consultation.

⁴³⁶ See paragraphs 15.39 to 15.46 of the BTS Consultation.

⁴³⁷ See paragraph 15.47 of the BTS Consultation.

⁴³⁸ See Questions 28 to 32, pages 217 and 218 of the BTS Consultation.

- Question 29.** ComReg has proposed an access remedy to RTÉ's multiplexes including associated facilities. What services / facilities do you consider RTÉ should be obliged to provide in light of the considerations contained in Regulation 12(4) of the access Regulations. In addition, what services / facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.
- Question 30.** ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider that service credits should be a condition of the proposed SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.
- Question 31.** ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg Decision Notice (D16/04) should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.
- Question 32.** Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Respondents' Views

- 14.13 **Three Respondents agreed** (TG4, the BAI, and TV3) with ComReg's proposed access obligations and, in some cases, provided additional comments on them.
- 14.14 **One Respondent disagreed** (RTÉ) with ComReg's proposed access obligations on the basis of its view that non-discrimination obligations and an obligation to negotiate in good faith would be sufficient to address the identified competition problems in Market B.

- 14.15 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 28 to Question 32 above. However, these Respondents stated that, overall, they agreed with ComReg's preliminary views in the BTS Consultation of the need for *ex ante* regulation regarding Market B.
- 14.16 ComReg considers that Respondents' views are mainly focused on issues which can be generally captured under the themes identified below.
- Whether access obligations are justified in Market B;
 - The scope of the access obligations; and,
 - The scope of the SLA obligations.

Whether access obligations are justified in Market B

- 14.17 RTÉ was of the view that the proposed access obligations raised difficult questions concerning compatibility of *ex ante* regulation with the function reserved for the Minister and the BAI under the 2009 Act. RTÉ also stated that it was difficult to see how RTÉ could act contrary to the instructions of the Minister and / or the 2009 Act and deny access.
- 14.18 RTÉ suggested that an obligation of non-discrimination, possibly accompanied by an obligation to negotiate in good faith, was sufficient in Market B.

The scope of the access obligations

- 14.19 The BAI stated that the scope of any access obligations should require the ability to deliver signals to the multiplex head-end in order to ensure onward distribution and carriage via an RTÉ terrestrial multiplex.
- 14.20 TV3 was of the view that its response on the Market A access obligations equally applied to Market B.
- 14.21 RTÉ suggested that any obligation of access should be limited to Downstream Broadcasters who have the right to be so broadcasted, in accordance with section 130(1) of the 2009 Act or they have been granted public interest status by the BAI.
- 14.22 Further to this, RTÉ was of the view that having regard to section 130 of the 2009 Act, it would be sufficient to limit the access obligations to negotiate in good faith only and, if the scope of the access obligations were wider, they should be limited to the types of services that are within RTÉ's capability to deliver.
- 14.23 RTÉ went on to say that an access obligation should be limited to provide fully managed national digital terrestrial BTS, and associated facilities should be limited to what is necessary to avail of such a service.
- 14.24 RTÉ was also of the view that it is inappropriate to require RTÉ to provide the multiplexing of broadcast signals themselves, as there

are a number of providers operating audio and video multiplexing services in Ireland.

The scope of the SLA obligations

- 14.25 The BAI stated that in terms of the parameters of the SLAs, such could include details of maximum, minimum and average bit rates, associated audio and data feeds, EPG, fault indices and other relevant issues.
- 14.26 RTÉ suggested the SLA obligation was not clear. The contractual arrangements in place between RTÉ and RTÉNL, in terms of the provision of this service, include an SLA covering the provision of BTS services. There is no SLA in place concerning the interaction between the multiplexing equipment and distribution / transmission equipment. RTÉ stated that it does not believe that this is what ComReg proposed, but to avoid doubt, RTÉ is of the view that such an obligation would serve no purpose and would unnecessarily introduce capital expenditure and operating costs.
- 14.27 RTÉ stated that if Market B is defined as the market for the provision of digital terrestrial BTS to terrestrial Downstream Broadcasters, then SLAs in the same form as those proposed in Market A could be agreed. RTÉ was of the view that any SLA between RTÉ and the relevant Downstream Broadcasters could only reasonably mirror the terms agreed between RTÉ and RTÉNL in the context of Market A.
- 14.28 RTÉ did not believe that it is reasonable or appropriate to allow for the specific service levels to be agreed for different Downstream Broadcasters being carried on a single multiplex; rather RTÉ should be required not to discriminate between RTÉ services and other Downstream Broadcasters' services in relation to SLAs and compensation for failure to achieve these.

ComReg's Assessment of Respondents' Views

- 14.29 ComReg assesses Respondents' views on the access obligations under the themes that have been identified above.

Whether access obligations are justified in Market B

- 14.30 In the BTS Consultation⁴³⁹ ComReg clearly indicated that the proposed access obligations had regard to section 130 of the 2009 Act and, therefore, ComReg's position is that issues of incompatibility between the access obligations and the provisions of the 2009 Act will not arise.
- 14.31 In the BTS Consultation⁴⁴⁰ ComReg indicated that, notwithstanding the provisions regarding access under the 2009 Act, RTÉ may

⁴³⁹ See paragraph 15.26 of the BTS Consultation.

⁴⁴⁰ See sections 14 to 16 (competition problems, remedies and RIA) of the BTS Consultation.

constructively limit / foreclose access to its PSB DTT multiplex(es). This means that while an outright / direct refusal of access by RTE to its PSB DTT multiplexes may not be a primary concern, downstream entry and / or expansion by Downstream DTT Broadcasters could be impeded through a constructive denial of access (such as the offering of unfavourable terms and conditions, delays in providing access or providing less favourable forms of access).

- 14.32 In the BTS Consultation, ComReg also provided the reasoning for its view that access obligations are warranted in Market B⁴⁴¹.
- 14.33 ComReg remains of the view that access obligations are justified in Market B.

The scope of the access obligations

- 14.34 ComReg notes that regulatory obligations that it may impose on an SMP undertaking should be proportionate, justified, and based on the nature of the competition problem identified. ComReg is of the view that competition problems in relation to the delivery of programme content signals to RTE's DTT multiplex head-end equipment do not arise. It is ComReg's view that there are alternative sources available for the delivery of Downstream DTT Broadcasters programming content to the DTT multiplex head-end equipment. Such delivery of broadcast signals can be achieved by means of (but are not limited to) fibre and satellite. On this basis, it is ComReg's view that the access obligations should not be extended to a requirement to ensure the delivery of Downstream DTT Broadcasters' programme content signals to the DTT multiplex head-end equipment.
- 14.35 ComReg notes that TV3 stated that its comments on the access obligations in Market A also apply to the access obligations for Market B. ComReg has provided its views on the issues raised by TV3 on Market A access obligations in paragraphs 8.25 to 8.62 of this Decision. ComReg is of the view that its response in paragraphs 8.25 to 8.62 of this Decision equally apply to these comments on the access obligations for Market B, and, therefore, ComReg does not repeat its analysis here again.
- 14.36 As noted in paragraph 14.31 above, ComReg stated in the BTS Consultation⁴⁴² that the proposed access obligations would have regard to section 130 of the 2009 Act.
- 14.37 In the BTS Consultation⁴⁴³, ComReg has set out its reasoning as to why it believes that each of the conditions to the access obligations

⁴⁴¹ See paragraphs 15.19 to 15.54, paragraphs 16.35 to 16.42, 16.49 to 16.56 and 16.68 to 16.72 of the BTS Consultation.

⁴⁴² See paragraph 15.26 of the BTS Consultation.

⁴⁴³ See paragraphs 15.30 to 15.47 of the BTS Consultation.

is necessary in Market B. ComReg is of the view that such do not impose any disproportionate burden on RTÉ nor does ComReg believe that such conditions are unreasonable in the context of competition problems which may arise in Market B, owing to RTÉ's ability and incentives as an SMP operator. These competition concerns have been discussed in section 14 of the BTS consultation and section 13 of this Decision.

- 14.38 ComReg would also clarify that the proposed access remedy in Market B is, in effect, the provision of fully managed DTT BTS, as RTÉ purchases Market A inputs combined with its DTT multiplexing services to provide a transmission and distribution service to Downstream DTT Broadcasters such as TV3. As part of this, RTÉ would facilitate the handover / connection of Downstream DTT Broadcasters programme content signals to its PSB DTT multiplex(es), as relevant. Where different forms of access are requested by Downstream DTT Broadcasters, then RTÉ would need to consider them in the context of the reasonableness of such requests.
- 14.39 In terms of RTÉ's comment on the requirement of an obligation relating to the multiplexing of broadcast signals, ComReg would note that where a Downstream DTT Broadcaster's programme service is to be transmitted in a digital terrestrial context, such programme content would have to be multiplexed via a DTT multiplex(es). As RTÉ is the sole DTT Multiplex Operator in the State, multiplexing of terrestrial broadcast signals can only be undertaken via RTÉ's PSB DTT multiplex(es). ComReg would note that the scope of the access obligation in Market B requires that Downstream DTT Broadcaster's content is multiplexed on RTÉ's PSB DTT multiplex(es).
- 14.40 Furthermore, having regard to Respondents' views, ComReg wishes to clarify an aspect concerning ComReg's intentions with respect to the applicability of the access and other obligations with respect to programme services that RTÉ may decide to broadcast pursuant to section 130(1)(e) of the 2009 Act⁴⁴⁴. Throughout the BTS Consultation and in this Decision, ComReg has sought to acknowledge (and take account in the analysis) the primacy of the 2009 Act in respect of its relationship with *ex ante* regulation, including the SMP obligations being imposed through this BTS Review. In this respect, in the BTS Consultation, ComReg set out its preliminary view that the proposed access (and other) obligations would exclude programme services provided pursuant to section 130(1)(e) of the 2009 Act, having regard to RTÉ's discharge of its public service obligations, and given that, subject to the

⁴⁴⁴ Section 130(1)(e) states "Without prejudice to the requirements of this section, RTE may, with the consent of the Minister, the Minister having consulted with the Authority, in respect of the use of spare capacity on a multiplex established, maintained and operated by RTE under section 114(1)(i), broadcast programme material in pursuance of its exploitation of commercial opportunities object."

requirements of section 130(1)(e) being fulfilled, it is at RTÉ's discretion to decide whether to broadcast certain programme services.

- 14.41 This exclusion was meant to reflect the primacy of the legislative position outlined above. ComReg wishes to clarify that the applicability of SMP access (and other) obligations to the broadcast of programme services pursuant to section 130(1)(e) will apply only in circumstances where RTÉ has decided, pursuant to the 2009 Act, to grant such access. The applicability of the access (and other) obligations to RTÉ with respect to the broadcast of programme material falling within the scope of section 130(1)(e) of the 2009 Act is conditional on RTÉ having first granted such access (in accordance with that provision). Such an approach balances the need to have regard to the primacy of the 2009 Act while at the same time addressing the need to impose remedies that deal with RTÉ's incentives and ability to engage in anti-competitive behaviours as a vertically integrated monopolist.
- 14.42 ComReg has clarified the above issues in the Decision Instrument for Market B.

The scope of the SLA obligations

- 14.43 ComReg notes that SLAs will be subject to the agreement between RTÉ and third parties through negotiations entered into in good faith. In Appendix B of the BTS Consultation and Annex 2 of Appendix E in this Decision, ComReg has set out the minimum parameters to be included in SLAs. ComReg is of the view that it is not necessary, at this point, for ComReg to specify further parameters beyond what is set out in Annex 2 of Appendix E of this Decision as SLAs will be subject to negotiation and agreement between RTÉ and third parties in the first instance. It is open for the parties to expand upon the minimum SLA parameters identified and RTÉ is obliged to meet all reasonable requests for access and to provide the objective reasoning for any refusal or partial grant. It is also open to any third party to submit a complaint / dispute to ComReg (for example, see paragraph 8.129 of this Decision), where it considers that a breach of regulatory obligations has occurred.
- 14.44 ComReg would also note that, as RTÉ is the DTT multiplex licensee, the agreement of SLAs is subject to the obligations imposed and would be by agreement between RTÉ and Downstream DTT Broadcasters through negotiations entered into in good faith. Separately, subject to the SLA obligation in Market A, RTÉ as a Multiplex Operator(s) (and other Multiplex Operators) would also agree SLAs with RTÉNL through negotiations entered into in good faith.
- 14.45 ComReg would note that, where the service provided by it to Downstream DTT Broadcasters is of an equivalent nature there

should be no material difference in the SLAs offered or provided, having regard to RTÉ's non-discrimination obligations (as discussed later in section 14 of this Decision). However, ComReg would note that it is possible to have different SLAs between different Downstream DTT Broadcasters but such SLAs should also be made available to other Downstream DTT Broadcasters on a non-discriminatory basis (e.g. if a Downstream DTT Broadcaster's SLA provided for a higher fault repair response time than other Downstream DTT Broadcasters, potentially at additional cost, that service, at potential additional cost, should also be made available to other Downstream DTT Broadcasters).

ComReg's Position

- 14.46 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing access obligations in Market B.
- 14.47 Having regard to the analysis set out in the BTS Consultation⁴⁴⁵, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of access obligations as now presented in the Decision Instrument to Market B in section 7 of Appendix E of this Decision (having also considered Respondents' views concerning the draft decision Instrument in Market B, later, in section 16 of this Decision).

Imposition of Non-Discrimination Remedies

Position set out in the BTS Consultation

- 14.48 In the BTS Consultation, ComReg set out its preliminary view that **non-discrimination obligations**⁴⁴⁶ should be imposed on RTÉ to ensure that RTÉ does not discriminate as between itself and / or between other Downstream DTT Broadcasters.

BTS Consultation Question(s)

- 14.49 Having proposed the imposition of non-discrimination obligations on RTÉ in Market B, ComReg then asked the following questions⁴⁴⁷.

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

⁴⁴⁵ See sections 14 to 16 (competition problems, remedies and RIA) of the BTS Consultation.

⁴⁴⁶ See paragraphs 15.48 to 15.55 of the BTS Consultation.

⁴⁴⁷ See Questions 33 and 34, pages 219 and 220 of the BTS Consultation.

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

Respondents' Views

- 14.50 **Four Respondents agreed** (TG4, the BAI, TV3 and RTÉ) with ComReg's proposed non-discrimination obligations and, in some cases, provided further comments on them.
- 14.51 **One Respondent** (RTÉ), while agreeing, raised a number of issues regarding the practicality of implementing the non-discrimination obligations.
- 14.52 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 33 and Question 34 above. However, these Respondents stated that, overall, they agreed with ComReg's preliminary views in the BTS Consultation of the need for *ex ante* regulation of Market B.
- 14.53 ComReg is of the view that Respondents' views are mainly focused on issues which can be generally captured under the theme identified below.
- The scope of the non-discrimination obligations.

The scope of the non-discrimination obligations

- 14.54 TV3 stated that its response on the proposed non-discrimination obligations in Market A also applies to the non-discrimination obligations in Market B.
- 14.55 RTÉ noted that RTÉNL has been operating under a non-discrimination obligation imposed under the 2004 Broadcasting Review and RTÉ accepted that this should extend to the provision of DTT BTS, and to such other services it may provide.
- 14.56 However, RTÉ was of the view that any requirement to provide information must recognise that RTÉ is the operator of the PSB DTT multiplexes by law and, therefore, is not in the same position as other Downstream DTT Broadcasters to which it provides access on its DTT multiplexes. RTÉ stated that, to the extent it is necessary, it should be made clear that any obligation of non-discrimination in relation to the provision of access to information and services is complied with, when sufficient and reasonable notice is provided to Downstream DTT Broadcasters and not at the 'same time' as it is known to RTÉ.
- 14.57 RTÉ also noted that its response to the non-discrimination obligations in Market A also applies with respect to the non-discrimination obligations in Market B.

- 14.58 Further, RTÉ went on to state that it noted the non-discrimination obligations would extend to the tariffs charged to terrestrial Downstream Broadcasters and that compliance with such an obligation should be subject to RTÉ's requirements of compliance with any directions made by the Minister under section 130 of the 2009 Act.

ComReg's Assessment of Respondents' Views

- 14.59 ComReg assesses Respondents' views on the non-discrimination obligations under the theme which was identified above.

The scope of the non-discrimination obligations

- 14.60 ComReg notes that TV3 and RTÉ stated that its comments on the non-discrimination obligations in Market A equally apply to the non-discrimination obligations for Market B. ComReg has provided its views on the issues raised by TV3 and RTÉ on the Market A non-discrimination obligations in paragraphs 8.79 to 8.96 of this Decision. ComReg is of the view that its response therein also applies to TV3's and RTÉ's comments on the non-discrimination obligations for Market B and, therefore, ComReg does not repeat its analysis here again.
- 14.61 ComReg accepts that RTÉ, as both a Multiplex Operator and Downstream DTT Broadcaster, would be in a different position to other Downstream DTT Broadcasters carried on its PSB DTT multiplexes, but nevertheless notes that the same information must be provided to all Downstream Broadcasters at the same time as RTÉ provides to itself in order to ensure compliance with its non-discrimination obligations. It is RTÉ's responsibility to ensure that its internal governance structures do not undermine compliance with its non-discrimination obligations.
- 14.62 ComReg does not accept that the obligation to provide information to Downstream DTT Broadcasters at the same time as RTÉ provides to itself is unworkable and would note that the wording of the Regulation 10(2) of the Access Regulations specifically refers to services and information being provided to all other undertakings under the same conditions and of the same quality as an SMP undertaking provides to itself.
- 14.63 ComReg notes that the non-discrimination obligations are required to address possible competition problems relating to, amongst other things, RTÉ gives itself preferential treatment, and seeks to ensure that RTÉ treats itself and other Downstream DTT Broadcasters in the same manner. It is ComReg's position that the ownership and governance structure of RTÉ has the potential to facilitate discriminatory behaviour among Downstream Broadcasters and, therefore, it is for RTÉ to ensure that its governance structures are compliant with its obligations.

14.64 ComReg would note that RTE's non-discrimination obligations would also apply to the tariffs it charges to Downstream DTT Broadcasters. If, and, to the extent that the Minister were to exercise his discretion under section 130 of the 2009 Act to direct Downstream DTT Broadcasters to make payments to RTE, ComReg would revisit its approach to price control in Market B, as appropriate.

ComReg's Position

14.65 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing non-discrimination obligations in Market B.

14.66 Having regard to the analysis set out in the BTS Consultation⁴⁴⁸, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of non-discrimination obligations as now presented in section 9 of the Decision Instrument to Market B in Appendix E of this Decision (having also considered Respondents' views concerning the draft decision Instrument in Market B, later, in section 16 of this Decision).

Imposition of Transparency Remedies

Position set out in the BTS Consultation

14.67 In the BTS Consultation ComReg set out its preliminary view that **transparency obligations**⁴⁴⁹ should be imposed on RTÉNL to, among other things, support the effectiveness and monitoring of other proposed remedies.

14.68 ComReg proposed the following transparency obligations:

- An obligation to publish a reference offer⁴⁵⁰;
- An obligation to publish information about products and services⁴⁵¹; and,
- An obligation to publish SLAs⁴⁵².

BTS Consultation Question(s)

14.69 Having proposed the imposition of a transparency remedy on RTÉNL in Market B, ComReg then asked the following questions⁴⁵³.

⁴⁴⁸ See sections 14 to 16 (competition problems, remedies and RIA) of the BTS Consultation.

⁴⁴⁹ See paragraphs 15.56 to 15.190 of the BTS Consultation.

⁴⁵⁰ See paragraphs 15.65 to 15.73 of the BTS Consultation.

⁴⁵¹ See paragraphs 15.74 to 15.75 of the BTS Consultation.

⁴⁵² See paragraphs 15.76 to 15.77 of the BTS Consultation.

⁴⁵³ See Questions 35 to 37, pages 223 and 224 of the BTS Consultation.

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

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

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

Respondents’ Views

- 14.70 **Four Respondents agreed** (TG4, the BAI, TV3 and RTÉ) with ComReg’s proposed transparency obligations and, in some cases, provided further comments on them.
- 14.71 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 35 to Question 37 above. However, these Respondents stated that, overall, they agreed with ComReg’s preliminary views in the BTS Consultation regarding the need for *ex ante* regulation in Market B.
- 14.72 ComReg is of the view that Respondents’ views are mainly focused on issues which can be generally captured under the theme identified below.
- The scope of the transparency obligations.

The scope of the transparency obligations

- 14.73 TV3 stated that its response to the proposed transparency obligations in Market A also applies to the transparency obligations in Market B.
- 14.74 RTÉ was of the view that, to the extent that ComReg’s proposals require the publication of a reference offer governing its provision of information and services between RTÉ and terrestrial Downstream Broadcasters for the provision of a fully managed distribution and transmission service, then RTÉ does not disagree with this proposal.
- 14.75 RTÉ stated that its response to the transparency obligations in Market A also applies to the transparency obligations in Market B.

- 14.76 Furthermore, RTÉ considered that there are circumstances where the level of charges to be levied may vary frequently and, therefore, this may present difficulties for RTÉ in complying with its transparency obligations. In particular, while charges for the supply of Market A BTS tend to be relatively stable, charges for Market B services can change more frequently given that they are dependent on the number of Downstream DTT Broadcasters purchasing such services, and the nature of the services purchased (e.g. standard definition or high definition broadcasting). In this respect, RTÉ considered that the requirement to publish changes to tariffs 3 months in advance of them coming into effect could cause difficulties.

ComReg's Assessment of Respondents' Views

- 14.77 ComReg assesses Respondents' view on the transparency obligations under the theme which was identified above.

The scope of the transparency obligations

- 14.78 ComReg notes that TV3 and RTÉ stated that its comments on the transparency obligations in Market A also apply to the transparency obligations for Market B. ComReg has provided its views on the issues raised by TV3 and RTÉ on Market B transparency obligations in paragraphs 8.116 to 8.146 of this Decision and is of the view that its response therein equally applies to TV3 and RTÉ's respective comments on the transparency obligations for Market B. ComReg, therefore, does not repeat its analysis here again.
- 14.79 In response to RTÉ's comments, ComReg would note that, in effect, the regulated service being provided to Downstream DTT Broadcasters in Market B is a fully managed terrestrial transmission and distribution service. The purpose of a reference offer in Market B⁴⁵⁴ is to provide *ex ante* regulatory and legal certainty for purchasers of Market B wholesale inputs, as well as to aid the monitoring of non-discrimination. This allows potential purchasers of Market B inputs to have clear visibility of the services available to them and their associated terms and conditions, thereby facilitating investment decisions associated with entry in downstream wholesale and retail markets.
- 14.80 ComReg notes that there is the potential for changes in Market B tariffs to occur until RTÉ's PSB DTT multiplexes are filled. However, ComReg does not expect that means it is infeasible for RTÉ to update its published tariffs without sufficient notice. ComReg notes that one of RTÉ's two PSB DTT multiplexes is already filled to capacity. ComReg is of the view that it would not be difficult or unduly burdensome on RTÉ to update its published tariffs as required, and this should become more stable in the long term.

⁴⁵⁴ See paragraphs 15.65 to 15.73 of the BTS Consultation.

ComReg's Position

- 14.81 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing transparency obligations in Market B.
- 14.82 Having regard to the analysis set out in the BTS Consultation⁴⁵⁵, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of transparency obligations as now presented in section 10 of the Decision Instrument to Market B in Appendix E of this Decision (having also considered Respondents' views concerning the draft decision Instrument in Market B, later, in section 16 of this Decision).

Imposition of Accounting Separation Remedies

Position set out in the BTS Consultation

- 14.83 In the BTS Consultation ComReg set out its preliminary view that **accounting separation obligations**⁴⁵⁶ should be imposed on RTÉ to, amongst other things, support the transparency and non-discrimination obligations by making wholesale internal transfer prices and allocation of costs across different services visible (as RTÉ is a vertically integrated entity).
- 14.84 ComReg's main proposals with respect to the accounting separation obligations covered the:
- Financial Data⁴⁵⁷; and,
 - Documentation⁴⁵⁸.

BTS Consultation Question(s)

- 14.85 Having proposed the imposition of accounting separation obligations on RTÉ in Market B, ComReg then asked the following questions⁴⁵⁹.

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

⁴⁵⁵ See sections 14 to 16 (competition problems, remedies and RIA) of the BTS Consultation.

⁴⁵⁶ See paragraphs 15.78 to 15.96 of the BTS Consultation.

⁴⁵⁷ See paragraphs 15.90 to 15.94 of the BTS Consultation.

⁴⁵⁸ See paragraphs 15.95 to 15.96 of the BTS Consultation.

⁴⁵⁹ See Questions 38 and 39, page 227 of the BTS Consultation.

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

Respondents' Views

- 14.86 **Three Respondents agreed** (TG4, the BAI, and TV3) with ComReg's proposed accounting separation obligations.
- 14.87 **One Respondent** (RTÉ) did not agree and was of the view that, given the accounting separation obligations in Market A, accounting separation obligations in Market B served no additional purpose in terms of transparency.
- 14.88 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 38 to Question 39 above. However, these Respondents stated that, overall, they agreed with ComReg's preliminary views in the BTS Consultation regarding the need for *ex ante* regulation in Market B.
- 14.89 ComReg is of the view that Respondents' views are mainly focused on issues which can be generally captured under the themes identified below.
- The need for accounting separation obligations in Market B in light of accounting separation obligations in Market A; and,
 - The scope of the accounting separation obligations.
- 14.90 Furthermore ComReg wishes to clarify some aspects of the accounting separation obligations. These are grouped under the theme below.
- Clarifications and timings of the accounting separation obligations.

The need for accounting separation obligations in Market B in light of accounting separation obligations in Market A

- 14.91 RTÉ did not agree with ComReg's proposal for accounting separation obligations in Market B and stated that, as RTÉNL operates the PSB DTT multiplexes on behalf of RTÉ (and invoices RTÉ for same), and given separate accounting separation obligations have been proposed on RTÉNL in Market A, the application of parallel accounting separation obligations in Market B would provide no additional transparency benefits or control, but would impose additional administrative costs.

The scope of the accounting separation obligations

- 14.92 TV3 stated that its response to the accounting separation obligations in Market A also applies to the accounting separation obligations in Market B.
- 14.93 RTÉ was of the view that the meaning of paragraph 15.82 of the BTS Consultation⁴⁶⁰ is unclear and that section 108 of the 2009 Act provides that RTÉ ensures transactions between its activities in pursuit of RTÉ's public service objectives, and activities in pursuit of commercial exploitation are conducted on arm's length basis. RTÉ stated that this effectively requires shared costs to be charged to commercial operations at market rates where such are available.

ComReg's Assessment of Respondents' Views

- 14.94 ComReg assesses Respondents' views on the accounting separation obligations under the themes which were identified above.

The need for accounting separation obligations in Market B in light of accounting separation obligations in Market A

- 14.95 ComReg would note that although it is intended that RTÉNL be subject to accounting separation obligations in Market A, these relate to Market A services only and, therefore, would not provide visibility of charges for Market B services. Accounting separation in Market B is therefore required to ensure ComReg has sufficient transparency on cost allocations and returns being made for Market B services.
- 14.96 The costs that Downstream DTT Broadcasters incur in Market B reflect the cost of Market A service inputs plus the additional costs of Market B services.
- 14.97 The cost of Market A services are likely to be the most significant cost inputs into the charges Downstream DTT Broadcasters will incur in purchasing Market B services. The accounting separation obligation in Market A will ensure that costs are allocated appropriately to the services provided in Market A e.g. charges levied on Multiplex Operators purchasing Market A services. The accounting separation obligation in Market A, however, would not ensure that costs are then allocated appropriately in Market B. The imposition of the accounting separation obligations in Market B will help to ensure that costs in Market B are allocated appropriately and on a basis that can be clearly understood.

⁴⁶⁰ This stated that, "As RTÉ should ensure that it conducts its commercial activities such as those of RTÉNL under market conditions it is important that the costs incurred by the commercial subsidiaries, if they did not exist, should be the minimum overhead costs allocated to the accounts of these subsidiaries".

- 14.98 ComReg acknowledges that there may be an additional administrative burden on RTÉ as a result of the imposition of these obligations. However, ComReg is of the view that much of this additional burden is likely to be in the first year of implementation only. ComReg considers that a significant amount of the financial information required for these accounting separation obligations is contained within the existing financial records of RTÉ. While there will be ongoing administrative costs for RTÉ associated with the annual compliance with this remedy, ComReg is of the view that the benefits (to downstream competition and end-users) should exceed the costs as these obligations should transparently ensure that RTÉ transfer charges are applied in a non-discriminatory fashion.

The scope of the accounting separation obligations

- 14.99 ComReg notes that TV3 stated that its comments on the accounting separation obligations in Market A also apply to the accounting separation obligations for Market B. ComReg has provided its views on the issues raised by TV3 on Market A accounting separation obligations in paragraphs 8.171 to 8.214 of this Decision and is of the view that its response therein equally applies to TV3's comments on the accounting separation obligations for Market B. ComReg, therefore, does not repeat its analysis here again.
- 14.100 In respect to RTÉ's comment on paragraph 15.82 of the BTS Consultation, ComReg would note that this requires that RTÉ ensures that internal transfer charges are done on an arm's length basis.
- 14.101 Section 108 of the 2009 Act is, in ComReg's view, aimed at securing accountability for expenditure of public monies and protecting against any inappropriate use of public funds. These provisions are not designed to address issues associated with the potential anti-competitive exercise of SMP *per se*, and neither of the provisions would, in ComReg's view, result in full transparency of internal pricing in the same manner as is envisaged under the electronic communications regulatory framework (and in the accounting separation obligations proposed in this Decision). The current form of publicly available financial statements from RTÉ does not provide sufficient transparency or financial data to a sufficient level of granularity or segmentation such that it would assist ComReg in targeting identified competition problems in a manner which achieves the policy objectives under Article 8 of the Framework Directive.

Clarifications and timings of the accounting separation obligations

- 14.102 Below ComReg provides further clarity on RTÉ's obligations under its accounting separation obligations in Market B. These are described in more detail in Annex 1 to the Market B Decision Instrument in Appendix E of this Decision and relate to:

- (a) Transfer charges;
- (b) Balance sheets;
- (c) Definition of services for reporting purposes;
- (d) Timing of the imposition of the remedy;
- (e) Compliance statement; and,
- (f) Disclosure.

Transfer charges

- 14.103 To understand the basis for reporting of transfer charges, ComReg describes what External, Inter and Intra charges relate to in Market B.
- 14.104 An **External** transaction refers to charges from RTÉ as a supplier of non-regulated / regulated services to its customers who are independent or unaffiliated with RTÉNL / RTE. For example, External transactions include:
- The charges related to the supply of non-regulated / regulated services to users of the PSB DTT multiplexes other than RTÉ.
- 14.105 An **Inter** transaction means a transaction between companies within one Group (i.e. between RTÉNL and RTÉ) for regulated and non-regulated services. For example, an Inter transaction refers to:
- The charges from RTÉ to RTÉNL (such as centrally incurred costs).
- 14.106 An **Intra** transaction means the charges within RTÉ itself for the provision of non regulated / regulated services. For example, an Intra transaction refers to:
- The consumption of Market B inputs by other regulated / non regulated services supplied by RTÉ. For example, capacity on the PSB DTT multiplex(es) may form part of a charge for an overall network service supplied. In this case the input charge from Market B will need to be separately disclosed.
- 14.107 In order to support the obligations of transparency and non-discrimination ComReg requires RTÉ to account for Inter and Intra transactions using the same cost allocation and apportionment principles as if it were an External transaction.
- 14.108 In doing so, RTÉ will ensure that cross-subsidisation between Inter / Intra and External transactions does not arise. Cross-subsidisation would arise were External transactions are charged higher rates than Inter / Intra transactions for equivalent services. Alternatively cross-subsidisation would also arise where charges for non-regulated services are sold below cost and which are compensated by the above cost sale of the regulated services.

- In the first instance, the charge levied for Inter / Intra usage shall be equivalent to the charge that is levied if the material service (regulated and unregulated) were an External sale rather than an Inter / Intra transaction;
 - Where there is no equivalent charge the nearest equivalent charge which would be the price / prices which most closely represent(s) the technical capabilities of the Inter / Intra transaction as if it were an External sale; and,
 - Finally, where there is neither an equivalent or nearest equivalent charge then a cost based transfer should be used.
- 14.109 For nearest equivalent and the cost based transfers, any differences in Inter / Intra charges when compared to charges for similar External services, should be fully explained and reconciled.
- 14.110 In accounting for charges, RTÉ must be able to clearly identify those elements of the transaction which are regulated and those which are non-regulated. Therefore, if RTÉ supplies services to a Downstream Broadcaster, which include both the use of the PSB DTT multiplex(es) (regulated) as well as ancillary services (non-regulated), it would be required to account for the transaction as follows:
- The cost of the occupancy of the PSB DTT multiplex(es) would be accounted for as an Intra transaction as this cost is part of the regulated services of Market B as defined; and,
 - The cost of the ancillary services (if they are not regulated), when sold outside of RTÉ would be an External transaction, and if sold to a subsidiary would be an Inter transaction.

Balance sheets

- 14.111 ComReg requires RTÉ to produce a balance sheet at the end of each financial period. However, the balance sheets will be on the basis of mean capital employed ('MCE') and not in a format similar to that used in RTÉ's statutory reporting process. This is because it is important, from a regulatory viewpoint, to assess returns being made compared to the weighted average cost of capital ('WACC'), thereby ensuring that appropriate returns are being made. In arriving at the statement of MCE, adjustments are required to the results which are reported in the statutory financial statements. This is because RTÉ produces one set of statutory financial statements that cover all aspects of its activities and not just the operation of the PSB DTT multiplexes. These adjustments can be considered in following two parts:
- The first is the exclusion of items not relevant in assessing the rate of returns (i.e. long term debt, taxation creditors). The exclusion of these items can be seen in the separated accounts of other regulated entities using MCE (e.g. Eircom). Long term debt is considered when calculating a WACC.

Therefore to include long term debt in the statement of MCE would result in double counting. Taxation creditors are not relevant for assessing the returns made by a regulated entity.

- The second relates to how RTÉ accounts for assets associated with RTÉ's PSB DTT multiplexes. Multiplex licences are held by RTÉ not RTÉNL. RTÉ's DTT multiplex licences and thereby the associated assets relate to Market B. ComReg understands that RTÉNL operates and manages RTÉ's PSB DTT multiplexes on behalf of RTÉ. In doing so RTÉNL has invested in assets related to Market B and these are recorded as fixed assets in the books and records and in the statutory financial statements of RTÉNL. For reporting under the accounting separation obligations ComReg requires RTÉNL to separately identify assets for Market A and for Market B. Market A assets will appear in the statement of MCE of RTÉNL. Assets held by RTÉNL will be excluded when preparing a statement of MCE for RTÉ. Market B assets will be included in a statement of MCE by RTÉ in Market B.

14.112 As a result of both of these adjustments an assessment of the returns made on the MCE in both markets can be made against their respective WACCs.

Definition of services for reporting purposes

14.113 ComReg requires RTÉ to be able to distinguish between the various services it offers. In the interests of transparency, ComReg is of the view that such services should be reported according to the users of those services. ComReg understands that service users include:

- Downstream DTT Broadcasters; and,
- Downstream Radio Broadcaster(s).

14.114 Should other regulated services be offered by RTÉ in the future or should a service which is currently regulated be de-regulated this list should be amended to reflect this.

14.115 RTÉ should also be able to produce further financial information to a more granular level (i.e. individual Downstream DTT Broadcasters) if necessary and this would be considered to be part of the confidential AFD. ComReg will advise RTÉ on a timely basis should this be required.

Timing of the imposition of the remedy

14.116 ComReg acknowledges that a certain level of cost, time and disruption may be incurred by RTÉ in order to implement the accounting separation obligations. ComReg considers that some further changes required of RTÉ include (a) the drafting of appropriate templates for reporting its financial position and (b) the development of appropriate cost drivers to allocate costs to services. ComReg does not consider, however, that the level of changes required should require fundamental changes within RTÉ.

This is because much of the data necessary for the implementation of these accounting separation obligations should be found within RTÉ's current financial systems.

- 14.117 ComReg is of the view that on an ongoing basis it will be necessary for RTÉ to publish regulated accounts on its website no more than four months after the end of its financial period unless there are valid reasons for not doing so and RTÉ submits an application for derogation to ComReg. Where ComReg considers that derogation should be granted, it may publish an information notice to this effect explaining the basis for the derogation. This will enable the users of the separated accounts to assess the financial data within them as soon as possible after the year end thereby ensuring that the data contained within them is timely and relevant.
- 14.118 ComReg remains of the view that the first financial period should be the year commencing 1 January 2013, otherwise financial information would not be available for almost two years. However, for the first year of implementation ComReg considers that, in light of the preparation required, it will be necessary to allow RTÉ additional time to produce its first set of regulatory accounts. ComReg will require the submission of the initial set of Regulatory Accounts by 30 June 2014, and thereafter it will be required within four months of RTÉ's financial year end.

Compliance statement

- 14.119 The majority of the cost information required for the preparation of regulated accounts for Market B is derived from the statutory financial statements of RTÉNL and not the accounts of RTÉ. For example, the costs of Market B are, in general:
- The input costs of Market A;
 - Depreciation charges associated with Market B assets;
 - WACC calculated on Market B assets;
 - Market B specific costs; and,
 - Other Market B costs.
- 14.120 The input cost of Market A is likely to form the largest part of the Market B costs. This cost is derived from an allocation of costs contained within the statutory financial statements of RTÉNL. While the licence(s) for the PSB DTT multiplex(es) is held by RTÉ, most of the assets are recorded in the financial statements of RTÉNL. In determining the costs of Market B, the depreciation charge and associated WACC of Market B assets will be identified and separated from Market A assets and WACC.
- 14.121 Market B specific costs include the cost of the PSB DTT multiplex licences. ComReg understands that the costs of the PSB DTT multiplex licences are incurred by RTÉNL and not RTÉ. However, in

calculating the costs of Market B these costs will need to be separately identified.

- 14.122 Other Market B costs are likely to be relatively minimal. These could include costs such as credit management costs of RTÉ in relation to its PSB DTT multiplex(es). Furthermore, RTÉNL's turnover is approximately 8% of RTÉ's consolidated turnover⁴⁶¹. RTÉNL's turnover comprises not only income from Market B, but also from Market A and non-regulated sources.
- 14.123 In the BTS Consultation, it was proposed that the accounts for Market B be signed by the directors of RTÉ. However, given that the substantial costs for Market B are derived from RTÉNL and not RTÉ, ComReg now considers it to be more proportionate for a suitably qualified person as approved by the board of RTÉ to sign the compliance statement for Market B rather than the board of RTÉ itself.

Disclosure

- 14.124 In preparing regulated accounts for Market B, RTÉ is required to only account for those items relevant to Market B and to remove non-relevant items. However, most costs relating to both Market A and Market B are derived from the books and records of RTÉNL and within this, the majority relate to Market A. Therefore, in preparing and publishing accounts for Market A the items associated with Market B (and non relevant items) are also identifiable. ComReg considers that in the interests of improved transparency, Market B regulated accounts should also be published and this will enable the users of the regulated accounts to understand the returns being made in this market. The regulated accounts for Market B will also be accompanied by a report of an independent auditor and ComReg requires a duty of care from the auditor to it. Certain commercially sensitive information will be submitted to ComReg in confidence.

ComReg's Position

- 14.125 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing transparency obligations in Market B.
- 14.126 Having regard to the analysis set out in the BTS Consultation⁴⁶², and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of accounting separation obligations as now presented in section 11 and Annex 1 in the Decision Instrument to Market B in Appendix E of this Decision (having also considered Respondents' views concerning the draft

⁴⁶¹ Raidió Teilifís Éireann Annual Report & Group Financial Statements 2011.

See <http://www.rte.ie/documents/about/RTE%202011%20Annual%20Report%20-%20English.pdf>

⁴⁶² See sections 14 to 16 (competition problems, remedies and RIA) of the BTS Consultation.

decision Instrument in Market B, later, in section 16 of this Decision).

Imposition of Price Control and Cost Accounting Remedies

Position set out in the BTS Consultation

- 14.127 In the BTS Consultation, ComReg set out its preliminary view that **price control and cost accounting obligations**⁴⁶³ should be imposed on RTÉ to, amongst other things, prevent the risks of excessive or discriminatory pricing occurring in Market B.
- 14.128 ComReg's main proposals to the price control and cost accounting obligations included that they should be based on:
- Cost orientation⁴⁶⁴; and,
 - Historical cost accounting ('HCA') using fully distributed costs ('FDC') and a top down ('TD') approach⁴⁶⁵.

BTS Consultation Question(s)

- 14.129 Having proposed the imposition of price control and cost accounting obligations on RTÉ in Market B, ComReg then asked the following questions⁴⁶⁶.

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

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

Question 42. Are there any additional issues or factors in relation to this cost accounting and price control obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

⁴⁶³ See paragraphs 15.97 to 15.190 of the BTS Consultation.

⁴⁶⁴ See paragraphs 15.127 to 15.150 of the BTS Consultation.

⁴⁶⁵ See paragraphs 15.151 to 15.187 of the BTS Consultation.

⁴⁶⁶ See Questions 40 to 42, pages 241 and 242 of the BTS Consultation.

Respondents' Views

- 14.130 **Three Respondents generally agreed** (TG4, the BAI, and TV3) with ComReg's proposal to impose price control and cost accounting obligations. However, TG4 and TV3 disagreed with aspects concerning the specific implementation of the price control obligations, stating that, in their view, LRIC is the most appropriate cost orientation methodology in regulating Market B DTT multiplexing services.
- 14.131 **One Respondent** (RTÉ) did not agree with ComReg's price control and cost accounting obligations proposals. RTÉ was of the view that, in light of work being currently undertaken under section 130 of the 2009 Act (review of RTÉ DTT tariffs to determine whether they are reasonable), it did not believe that ComReg can lawfully impose a price control on RTÉ. Furthermore, RTÉ stated that were ComReg to impose such *ex ante* obligations, they could place RTÉ in a position where it could be in breach of compliance, if the Minister were to direct the payments to be made to RTÉ by the relevant Downstream DTT Broadcasters under the provisions of section 130 of the 2009 Act.
- 14.132 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 40 to Question 42 above. However, these Respondents stated that, overall, they agreed with ComReg's preliminary views in the BTS Consultation regarding the need for *ex ante* regulation in Market B.
- 14.133 ComReg is of the view that Respondents' views are mainly focused on issues which can be generally captured under the themes identified below.
- The scope of the price control and cost accounting obligations; and,
 - The impact of the provisions of section 130 of the 2009 Act on price control and cost accounting obligations.

The scope of the price control and cost accounting obligations

- 14.134 TG4 believed that the same competition problems exist in Market B as in Market A. TG4 stated that ComReg should consider LRIC based pricing as the most appropriate methodology to assess efficient prices in Market B and that ComReg should set an interim cost related price at the time an SMP decision is made until price control and cost accounting obligations are further specified. TG4 was of the view that the interim price should then be replaced with a final cost price for access and with retrospection of tariffs.
- 14.135 The BAI was of the view that the final Decision in Market B needs to have regard to any decision made in Market A as the costs are directly related. The BAI raised similar issues to those in response to the price control and cost accounting obligations for Market A (i.e.

that this price control obligation should be imposed for a timeframe of no less than five years).

- 14.136 TV3 stated that its response to the proposed price control and cost accounting obligations in Market A also applies to the price control and cost accounting obligations in Market B.
- 14.137 TV3 then went on to say that it believes that LRIC costing is the most appropriate cost model to use in Market B and that, as such, Downstream DTT Broadcasters should only be charged the additional cost of multiplexing their broadcast signals.
- 14.138 Without prejudice to RTÉ's view that a price control obligation is not permissible by ComReg given section 130 of the 2009 Act, in terms of price control timeframes, RTÉ reiterated its response on price control and cost accounting obligations in Market A.

The impact of the provisions of section 130 of the 2009 Act on price control and cost accounting obligations

- 14.139 RTÉ did not agree with ComReg's price control and cost accounting proposals. RTÉ stated that it did not believe that ComReg can lawfully impose a price control in circumstances where the Minister has a power to direct payments to be made by Downstream DTT Broadcasters to RTÉ under section 130 of the 2009 Act.
- 14.140 RTÉ stated that ComReg's proposals would place RTÉ in the position where it may be required to charge different prices for the same services and, accordingly, would be placed in an impossible position of non compliance.

ComReg's Assessment of Respondents' Views

- 14.141 ComReg assesses Respondents' views on the price control and cost accounting obligations under the themes which were identified above.

The scope of the price control and cost accounting obligations


- 14.142 ComReg notes that TG4's and TV3's comments mirror those expressed on the price control and cost accounting obligations for Market A. ComReg has provided its views on the issues raised by TG4 and TV3 on the Market A price control and cost accounting obligations in paragraphs 8.232 to 8.315 of this Decision. ComReg is of the view that its response in section 8 of this Decision equally applies to these parties' comments on the price control and cost accounting obligations for Market B (ComReg considers that FDC based on HCA is the appropriate approach to cost orientation in Market B), and, therefore, ComReg does not repeat its analysis here again.
- 14.143 In determining the appropriate remedies (and their form), ComReg has been cognisant of the vertically integrated relationship between upstream Market A and downstream Market B. ComReg has considered that a cost oriented price control in each of Market A

and Market B based on the same methodology is appropriate i.e. a FDC, HCA, TD approach.

- 14.144 ComReg would also note that its comments in paragraphs 8.295 to 8.301 of this Decision also apply to the price control and cost accounting obligations in Market B.
- 14.145 With respect to RTE's comments on the timeframes of the price control and cost accounting obligations, ComReg has provided its views on these issues on Market A price control and cost accounting obligations in paragraphs 8.232 to 8.315 of this Decision. ComReg is of the view that its response therein equally applies to these comments on the price control and cost accounting obligations for Market B.
- 14.146 That is, ComReg is of the view that the price control should remain in place for a period of between three and five years but with annual / periodic reviews for exceptional events.
- 14.147 Under Article 27(6) of the Framework Regulations ComReg is required to conduct its market reviews every three years which may be exceptionally extended following a reasoned notification to the EU Commission. Therefore, having regard to the timeframes involved in a market review process and the need to provide certainty and predictability to market participants, ComReg believes that a timeframe of up to five years is the most appropriate approach to take.

The impact of the provisions of section 130 of the 2009 Act on price control and cost accounting obligations

- 14.148 In paragraphs 11.38 to 11.52 of this Decision ComReg has outlined its reasoning as to why it is of the view that the provisions of section 130 of the 2009 act are not sufficient to address potential price related competition problems in Market B and therefore *ex ante* price control and cost accounting obligations are required in Market B. ComReg has indicated that, if, and, to the extent that the Minister were to exercise his discretion under section 130 of the 2009 Act and require Downstream DTT Broadcasters to make payments to RTE, ComReg would revisit its approach to price control in Market B, as appropriate.

- 14.149 [§< 

[REDACTED].

- 14.150 Further, as previously noted in this Decision⁴⁶⁸, the Minister has welcomed ComReg's market analysis initiative, notwithstanding the DCENR's review under section 130 of the Broadcasting Act 2009.
- 14.151 Given the above, ComReg does not consider the provisions of the 2009 Act to be sufficient to address SMP price related competition problems.

ComReg's Position

- 14.152 In the analysis above, ComReg has considered Respondents' views regarding its approach to imposing price control and cost accounting obligations in Market B.
- 14.153 Having regard to the analysis set out in the BTS Consultation⁴⁶⁹, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of price control and cost accounting obligations as now presented in section 12 of the Decision Instrument to Market B in Appendix E of this Decision (having also considered Respondents' views concerning the draft decision Instrument in Market B, later, in section 16 of this Decision).

Other Remedy Issues

Respondents' Views

- 14.154 In addition to the comments raised by Respondents on each of the *ex ante* obligations above, RTÉ also raised matters concerning remedies under previous Questions (as noted in paragraphs 4.43 and 11.31 of this Decision) which ComReg considers more applicable for consideration here.
- 14.155 These issues can be generally captured under the theme identified below.
- Proportionality of SMP regulation having regard to customer demand and the impact of regulation under the 2009 Act.

Proportionality of SMP regulation having regard to customer demand and the impact of regulation under the 2009 Act

- 14.156 RTÉ noted that there is limited capacity left available for carriage of Downstream DTT Broadcasters on its PSB DTT multiplexes in light of the provisions for access under section 130(1) of the 2009 Act. In this circumstance, RTÉ submitted that ComReg's *ex ante*

⁴⁶⁷ [REDACTED].

⁴⁶⁸ See paragraphs 11.47 to 11.48 of this Decision.

⁴⁶⁹ See sections 14 to 16 (competition problems, remedies and RIA) of the BTS Consultation.

obligations in Market B is disproportionate and unwarranted, having regard to the existing level of non SMP regulation under the 2009 Act.

ComReg's Assessment of Respondents' Views

14.157 ComReg assesses Respondents' views under the theme which was identified above.

Proportionality of SMP regulation having regard to customer demand and the impact of regulation under the 2009 Act

14.158 ComReg notes that RTÉ previously raised similar issues in its response to the competition and SMP assessment in section 12 of this Decision. As such, ComReg would also refer to its response in paragraphs 12.24 to 12.28 of this Decision.

14.159 ComReg would note that although one of RTÉ's PSB DTT multiplexes no longer has capacity to carry additional DTT programme services, capacity remains available for carriage of more DTT programme services on RTÉ's second PSB DTT multiplex.

14.160 ComReg would also note that, notwithstanding the fact that the Minister has the power to designate which DTT programme services may be carried on RTÉ's PSB DTT multiplexes, access could still be constructively denied. For example, ComReg notes that the BAI submitted a report to the Minister with recommendations regarding the carriage of broadcasting content on RTÉ's PSB DTT multiplexes which highlighted that the proposed cost structure for carriage envisaged by RTÉ / RTÉNL is of concern and should this continue, it is the BAI's view that it is unlikely that any new services, other than those proposed by RTÉ, would be carried on the platform⁴⁷⁰.

14.161 As part of ComReg's assessment, ComReg has undertaken detailed analysis of the competition problems which may arise in Market B, and ComReg has taken an incremental approach to determining what remedies are appropriate, including a RIA. This is discussed in detail in sections 14 to 16 of the BTS Consultation and sections 12 to 15 of this Decision.

14.162 Furthermore, in the context of those provisions of the 2009 Act relevant to Market B, ComReg has discussed its view on this matter in sections 11 and 14 of this Decision and for the reasons set out therein, ComReg does not agree that the provisions of the 2009 Act are sufficient to effectively address the potential SMP related competition problems in Market B.

⁴⁷⁰ "Report and Recommendations by the Broadcasting Authority of Ireland on the exercise of its functions under Statutory Instrument No.67 of 2011", the BAI, dated August 2011. See http://www.bai.ie/wordpress/wp-content/uploads/20110815_BAIDTTEOI_FINAL.pdf.

ComReg's Position

14.163 Having regard to the BTS Consultation and the consideration of Respondents' views above, taking account of the impact the proposed remedies on stakeholders, competition and end-users; it is ComReg's position that the remedies in this Decision are justified and proportionate. In this respect, ComReg has taken an incremental approach to determining the appropriate remedies starting with the least onerous form of *ex ante* regulation.

Overall Conclusions on Remedies in Market B

Position set out in the BTS Consultation

14.164 Having regard to the discussion of competition problems and remedies in sections 14 and 15 of the BTS Consultation ComReg proposed to impose access, non-discrimination, transparency, accounting separation and price control and cost accounting remedies on RTÉ in Market B.

Respondents' Views

14.165 Of the **six responses received**, four responded specifically to the Questions on the proposed remedies.

14.166 **Three Respondents generally agreed** (TV3, TG4 and the BAI) with the imposition of the proposed remedies but in some cases disagreed with approach of the proposed remedies.

14.167 **One Respondent (RTÉ) generally disagreed** with ComReg's proposed remedies due to the presence of other legislation (2009 Act) which it considered sufficient to deal with the identified competition problems such as access or pricing. RTÉ was of the view that if *ex ante* regulation was warranted it should be limited to obligations of non-discrimination and transparency.

14.168 **Two Respondents** (Eircom and the Individual Respondent) did not comment specifically on the Questions but were of the view that *ex ante* regulation is required in Market B.

ComReg's Assessment of Respondents' Views

14.169 ComReg is of the view that Respondents have not provided any compelling evidence which would warrant material changes to its position on remedies as set out in the BTS Consultation. ComReg maintains its position on remedies as set out in the BTS Consultation subject to the clarifications discussed in this Decision.

ComReg's Position

14.170 In section 14 above, ComReg has considered Respondents' views regarding its approach to imposing each the regulatory obligations it proposed (in the BTS Consultation) in Market B.

14.171 Having regard to the analysis set out in the BTS Consultation⁴⁷¹, and the consideration of Respondents' views above, ComReg maintains its position with respect to the imposition of the regulatory obligations as presented in the Decision Instrument to Market B in Appendix E of this Decision (having also considered Respondents' views concerning the draft decision Instrument in Market B, later, in section 16 of this Decision).

⁴⁷¹ See competition problems, remedies, and RIA (sections 14, 15 and 16) of the BTS Consultation.

15 Regulatory Impact Assessment – Market B

- 15.1 In section 16 of the BTS Consultation, ComReg set out its preliminary RIA for Market B. In so doing, ComReg noted that the purpose of a RIA is to help identify regulatory options and whether proposed regulation is likely to have a desired impact.
- 15.2 Below, ComReg considers the issues raised by Respondents and sets out its final position on the matter.

Position set out in the BTS Consultation

Overview

- 15.3 ComReg set out its approach to conducting the RIA according to the five steps outlined below:
- (a) Describe the policy issue and identify the objectives;
 - (b) Identify and describe the regulatory options;
 - (c) Determine the impacts on stakeholders;
 - (d) Determine the impacts on competition; and,
 - (e) Assess the impacts and choose the best option.

Description of the policy issue at hand and identified the objectives⁴⁷²

- 15.4 ComReg noted that having designated RTÉ with SMP in Market B, as per 27(4) of the Framework Regulations, ComReg is obliged to impose at least one remedy on the SMP undertaking.
- 15.5 ComReg also noted that there are a number of considerations to take into account since ComReg's previous 2004 Broadcasting Review including:
- The Broadcasting Act 2009 and ASO⁴⁷³; and,
 - Concerns expressed by Downstream Broadcasters⁴⁷⁴.

Identify and describe the potential regulatory obligations⁴⁷⁵

- 15.6 In the BTS Consultation, ComReg recognised that regulatory measures should be kept to the minimum necessary to address the identified competition problems in an effective, efficient and proportionate manner. A range of potential incremental regulatory

⁴⁷² See paragraphs 16.4 to 16.18 of the BTS Consultation.

⁴⁷³ See paragraphs 16.11 to 16.15 of the BTS Consultation.

⁴⁷⁴ See paragraphs 16.16 to 16.18 of the BTS Consultation.

⁴⁷⁵ See paragraphs 16.19 to 16.46 of the BTS Consultation.

options were assessed by ComReg in order to address the identified competition problems in Market B. As part of this, the question of regulatory forbearance and the incremental imposition of one or more of the obligations set out in Regulations (9) to (13)⁴⁷⁶ of the Access Regulations were examined.

- 15.7 Thereafter, ComReg set out its preliminary views as to why regulatory forbearance was not appropriate and then, following an incremental assessment (starting from the lightest of remedies to the most intrusive) of the appropriateness of individual remedies, considered that transparency, non-discrimination, access, accounting separation and price control remedies, were appropriate for imposition on RTÉ as the SMP undertaking in Market B.
- 15.8 ComReg then proceeded to determine the impact of its proposed regulatory approach on stakeholders.

Determine the Impact on Stakeholders and Competition⁴⁷⁷

- 15.9 In determining the impact on stakeholders and competition ComReg considered the impact of each of the proposed regulatory obligations on RTÉ, the effect on competition in the market and ultimately on end-users.

Assess the likely impacts and choose the best option⁴⁷⁸

- 15.10 Having considered its obligations under Regulation 8(6) of the Access Regulations and Section 12(1)(a) of the Communications Regulations Acts 2002 to 2011 and, having considered the impacts on stakeholders and competition, ComReg's preliminary view was that the imposition of a full suite of remedies (transparency, non-discrimination, access, accounting separation, price control and cost accounting) is justified and proportionate.
- 15.11 ComReg stated that, although the regulatory obligations chosen may impose some cost on RTÉ in terms of time and resources dedicated to complying with the proposed regulatory obligations, it was of the preliminary view that these obligations will promote competition in the market to the benefit of end-users exceeding the costs associated with their implementation.

BTS Consultation Question(s)

- 15.12 Having undertaken the RIA in Market B ComReg then asked the following question⁴⁷⁹.

⁴⁷⁶ These include obligations of (a) access (b) transparency (c) non-discrimination (d) accounting separation and (e) price control and cost accounting.

⁴⁷⁷ See paragraphs 16.47 to 16.88 of the BTS Consultation.

⁴⁷⁸ See paragraphs 16.89 to 16.92 of the BTS Consultation.

⁴⁷⁹ See Question 43, page 257 of the BTS Consultation.

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

Respondents' Views

- 15.13 **Three Respondents broadly agreed** (TG4, the BAI and TV3) with ComReg's RIA, in some cases offering views. **One Respondent disagreed** (RTÉ) with ComReg's RIA.
- 15.14 **Two Respondents did not express specific views** (the Individual Respondent and Eircom), although both were broadly supportive of ComReg's overall preliminary conclusions.
- 15.15 ComReg is of the view that Respondents' views are mainly focused on issues which can generally be captured under the following themes:
- The appropriateness of an access obligation; and,
 - Adequacy of the consultation process.

The appropriateness of an access obligation

- 15.16 The BAI stated that it supports ComReg's preliminary views and that a full set of remedies is highly desirable to support development of the indigenous TV market and to support the BAI's objective of diversity in content for Irish audiences. The BAI stated that RTÉ is the only entity that can provide Market B services to other Downstream Broadcasters and this entity is in direct competition with these Downstream Broadcasters that are transmitted on RTÉ's PSB DTT multiplex(es).
- 15.17 RTÉ stated that *ex ante* SMP regulation is not appropriate in Market B having regard to the presence of its obligations under section 130 of the 2009 Act. RTÉ also commented that downstream entry cannot be encouraged through *ex ante* SMP regulation as was suggested by ComReg. RTÉ further stated that there is limited capacity available on its PSB DTT multiplexes and, therefore, this makes an *ex ante* access regulation a disproportionate form of regulatory intervention.

Adequacy of the consultation process

- 15.18 RTÉ stated that, following the issues it had raised in its response to each of the Questions set out in the BTS Consultation, RTÉ expected ComReg to review its consultation process and consult further on its analysis of the Relevant BTS Markets.

ComReg's Assessment of Respondents' Views

- 15.19 ComReg assesses Respondents' views under the themes identified, before providing its final position on the issues raised.

The appropriateness of an access obligation

- 15.20 In sections 14 to 16 of the BTS Consultation and 13 to 14 of this Decision ComReg has provided its reasoning underpinning the requirement for each of the regulatory remedies it intends to impose on RTÉ in Market B.
- 15.21 ComReg undertook a detailed and incremental assessment of each of the *ex ante* regulatory options, proportionate to the need to address the competition problems that were identified. ComReg considers these regulatory obligations to be proportionate and justified in light of the objectives laid down in section 12 of the Communications Regulations Acts 2002 to 2011 and in accordance with Regulation 16 of the Framework Regulations. ComReg has also taken into account the statutory criteria in Regulations 12(1) and 12(4) of the Access Regulations.
- 15.22 ComReg notes that RTÉ also raised the question as to whether *ex ante* regulation was necessary, including access remedies, in light of the provisions of the 2009 Act and the capacity limits on its PSB DTT multiplexes and these were noted in paragraphs 11.33, 12.20 and 12.21 of this Decision. ComReg has set out its response to such comments in paragraphs 11.38 to 11.52 and 12.24 to 12.28 of this Decision and for the reasons set out therein⁴⁸⁰, maintains its view that the regulatory obligations set out in this Decision are proportionate and justified.
- 15.23 In sections 14 to 16 the BTS Consultation, ComReg set out its objective reasoning as to why it was of the view that the *ex ante* regulation proposed in Market B is proportionate and justified to promote downstream competition to the benefit of end-users. The proposed *ex ante* obligations, including access, should encourage downstream market entry and expansion but also enable existing Downstream Broadcasters to compete on a level playing field to the benefit of end-users.
- 15.24 ComReg is of the position that each of the *ex ante* regulatory obligations, including access obligations, in this Decision are appropriate.

⁴⁸⁰ For example, in terms of the proportionality of regulatory intervention in light of capacity limitations as was suggested by RTÉ, ComReg noted that there is capacity available on its second PSB DTT multiplex for the carriage of more DTT programme services. The carriage of these programme services would be subject to the provisions of section 130 of the 2009 Act, including Ministerial consent. However, notwithstanding, ComReg considers that RTÉ could effectively deny access via constructive means such as through excessive / discriminatory pricing or onerous or unwarranted terms and conditions of access for example. ComReg would also note that the competition problems identified in the BTS Consultation are equally relevant to existing Downstream DTT Broadcasters who consume Market B wholesale services as well to potential purchasers of Market B wholesale services. As such, even if capacity constraints existed, this would not negate the need for *ex ante* obligations to address the identified competition problems for existing Downstream DTT Broadcasters with a view to promoting downstream competition to the benefit of end-users.

Adequacy of the consultation process

- 15.25 ComReg does not accept RTE's views that the consultation process was inadequate. ComReg has followed its published consultation procedures⁴⁸¹ in conducting this BTS Review. Prior to the publication of the BTS Consultation, ComReg also conducted a preliminary and initial Three Criteria Test⁴⁸² which was publicly consulted upon, and has, on each occasion, provided interested parties with adequate time to respond to the issues raised.
- 15.26 In determining its final position in this Decision, ComReg has taken account of all Respondents' views on the questions raised in the BTS Consultation and has set out the justification for each of the positions adopted.
- 15.27 In addition, throughout this overall BTS Review, ComReg has met with a number of Downstream Broadcasters, including RTE, to discuss their views, and ComReg has also issued two broadcasting questionnaires⁴⁸³ to industry participants in order to inform ComReg's analysis.
- 15.28 Further, ComReg would note that the European Commission agreed with ComReg's overall approach and did not raise any concerns regarding the adequacy of ComReg's consultation process⁴⁸⁴.
- 15.29 ComReg does not, therefore, consider that further consultation is required as the issues set out in this Decision have been the subject of adequate consultation.

ComReg's Position

- 15.30 Having regard to the BTS Consultation and having considered Respondents' views and taken account of the impact the proposed remedies on stakeholders, competition and end-users, ComReg presents its final RIA for Market B in Appendix F of this Decision. This remains largely unchanged from the RIA set out in the BTS Consultation, apart from some minor textual edits.
- 15.31 It is ComReg's position that the imposition of the full suite of remedies on RTE as detailed in this Decision is justified and proportionate to the potential concerns arising from its ability and incentives and position of SMP in Market B. ComReg's position is

⁴⁸¹ Information Notice on ComReg Consultation Procedures, ComReg Document 11/34a, May 2011.

See http://www.comreg.ie/fileupload/publications/ComReg_1134.pdf

⁴⁸² Consultation – Three Criteria Test on the Broadcasting Transmission Market, document Number 10/98 and Response to Consultation – Three Criteria Test on the Broadcasting Transmission Market, Document Number 11/24. See <http://www.comreg.ie/fileupload/publications/comreg1098.pdf> and <http://www.comreg.ie/fileupload/publications/ComReg1124.pdf>

⁴⁸³ ComReg broadcasting questionnaires, dated May 2010 and April 2011.

⁴⁸⁴ See Appendix B of this Decision.

that the imposition of Access, Transparency, Non-discrimination, Accounting Separation and Price Control obligations on RTÉ as set out in Appendix E of this Decision is warranted.

16 Decision Instrument – Market B

- 16.1 Following an analysis of remedies and a RIA in sections 15 and 16 of the BTS Consultation respectively, ComReg then set out a draft Decision Instrument for Market B in section 17 of the BTS Consultation which detailed the regulatory obligations ComReg proposed to impose on RTÉ as the proposed SMP undertaking in Market B.
- 16.2 Below, ComReg considers the issues raised by Respondents and sets out its final position on the matter.

Position set out in the BTS Consultation

- 16.3 Having regard to the proposed remedies set out in the BTS Consultation, ComReg set out a Decision Instrument which specified in legal form the proposed regulatory obligations to be imposed on RTÉ including:
- Access Obligations⁴⁸⁵;
 - Non-Discrimination Obligations⁴⁸⁶;
 - Transparency Obligations⁴⁸⁷;
 - Accounting Separation Obligations⁴⁸⁸; and,
 - Price Control and Cost Accounting Obligations⁴⁸⁹.

BTS Consultation Question(s)

- 16.4 Having presented its draft Decision Instrument for Market B ComReg then asked the following question⁴⁹⁰.

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

⁴⁸⁵ See paragraphs 15.19 to 15.47 of the BTS Consultation.

⁴⁸⁶ See paragraphs 15.48 to 15.55 of the BTS Consultation.

⁴⁸⁷ See paragraphs 15.56 to 15.77 of the BTS Consultation.

⁴⁸⁸ See paragraphs 15.78 to 15.96 of the BTS Consultation.

⁴⁸⁹ See paragraphs 15.97 to 15.190 of the BTS Consultation.

⁴⁹⁰ See Question 44, page 267 of the BTS Consultation.

Respondents' Views

- 16.5 **Three Respondents broadly agreed** (TG4, the BAI and TV3) with ComReg's draft Decision Instrument. **One Respondent did not agree (RTÉ)** with ComReg's draft Decision Instrument.
- 16.6 **Two Respondents did not express specific views** (the Individual Respondent and Eircom) on Question 44 above (although both were broadly supportive of ComReg's overall preliminary conclusions).
- 16.7 Furthermore, ComReg takes note of the European Commission Comments as described in paragraph 1.22 of this Decision which agreed with ComReg's overall approach to remedies.
- 16.8 ComReg is of the view that Respondents' views are mainly focused on issues which can generally be captured under the following themes:
- Comments on the proposed access obligations;
 - Comments on the proposed non-discrimination obligations;
 - Comments on the proposed price control and cost accounting obligations; and,
 - Other comments on the draft Decision Instrument.

Comments on the proposed access obligations

- 16.9 The BAI suggested that in relation to section 7 of the draft Decision Instrument concerning obligations to provide access, ComReg should consider whether it is necessary or appropriate for section 12(2)(g) of the Access Regulations to be added to the access obligations in order to fulfil potential interoperability requirements for Downstream Broadcasters on RTÉ's PSB DTT multiplexes.

Comments on the proposed non-discrimination obligations

- 16.10 RTÉ stated that the wording of the non-discrimination obligations was unclear, and there should not be an obligation upon it to provide information to Downstream Broadcasters at the 'same time' as RTÉ, as this is not a requirement that can be met by RTÉ given it has a position in both wholesale Market B and downstream retail markets.
- 16.11 RTÉ stated that the meaning of paragraph 9.4 of the draft Decision Instrument was unclear and no rationale has been set out that is capable of explaining the scope and content of this non-discrimination obligation.

Comments on the proposed price control and cost accounting obligations

- 16.12 RTÉ stated that no price control should be imposed on RTÉ in Market B because this is a matter which is in the remit of the Minister under section 130 of the 2009 Act.

Other comments on the draft Decision Instrument

- 16.13 TV3 stated that its comments made with respect to the Market A draft Decision Instrument were also applicable to the draft Market B Decision Instrument.
- 16.14 RTÉ did not agree with the proposed draft Decision Instrument because it was of the view that *ex ante* regulation is unwarranted in Market B. Notwithstanding this view, RTÉ stated that any reference to ‘multiplexing services’ should be avoided because it is confusing and inaccurate as this could be taken to refer to that the multiplexing activity of itself which is being regulated.

ComReg’s Assessment of Respondents’ Views

- 16.15 ComReg assesses Respondents’ views under the themes identified, before providing its final position on the issues raised.

Comments on the proposed access obligations

- 16.16 In reference to the BAI’s comment on including section 12(g) of the Access Regulations, ComReg considers that issues of interoperability are adequately captured under the obligation imposed in section 7.2(iv) of the Decision Instrument in Appendix E of this Decision pursuant to Regulation 12(e) of the Access Regulations, namely that, RTÉNL shall have an obligation to grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services.

Comments on the proposed non-discrimination obligations

- 16.17 ComReg notes RTÉ’s comment on the suggested lack of clarity of the wording and scope of the non-discrimination obligation. ComReg would note that the wording of the non-discrimination obligation is in line with Regulation 12 of the Access Regulations and considers the obligation as now set out in the Decision Instrument to be clear. Notwithstanding, ComReg has, having regard to Respondents’ views, set out its position on the non-discrimination obligation in section 14⁴⁹¹, and for the reasons set out therein, maintains its position that the non-discrimination obligations as specified in section 9 of the Decision Instrument in Appendix E of this Decision is appropriate.

⁴⁹¹ See paragraphs 14.48 to 14.66 of this Decision.

- 16.18 In respect to paragraph 9.4 of the draft Decision Instrument⁴⁹², the purpose was to highlight that, if RTÉ provides information concerning Market B services to its downstream arm (for example, in relation to a new form of access), then notwithstanding that another Downstream Broadcaster has not specifically sought such information, RTÉ should make this information available to all Downstream DTT Broadcasters at the same time, thereby treating them in the same manner as it treats itself. ComReg considers that this obligation is clear.

Comments on the proposed price control and cost accounting obligations

- 16.19 RTÉ had previously raised this issue in its response to previous BTS Questions⁴⁹³. In reply, ComReg set out its position that other legislation does not obviate the need for an *ex ante* price control in Market B in paragraphs 11.38 to 11.52 of this Decision and therefore does not repeat the analysis here.

Other comments on the draft Decision Instrument

- 16.20 With respect to TV3's comments, ComReg has already provided its views on the issues raised by TV3⁴⁹⁴ on the Market A draft Decision Instrument in section 10 of this Decision. ComReg is of the view that its response⁴⁹⁵ to TV3's comments that section equally apply to its comments on the draft Decision Instrument for Market B and, therefore, ComReg does not repeat its analysis here.
- 16.21 To avoid any confusion as to ComReg's intended meaning of Market B 'multiplexing services', ComReg has clarified its description of Market B in this Decision⁴⁹⁶ and would also note that it has described the definition of multiplexing services in the final Decision Instrument now set out in Appendix E of this Decision. In this respect, the Market B Decision Instrument states that:

"Multiplex means an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public, and the term 'Multiplexing Services' shall have the same meaning".

⁴⁹² This is now set out in paragraph 9.3 in the final Decision Instrument in Appendix E of this Decision.

⁴⁹³ See paragraph 11.33 of this Decision.

⁴⁹⁴ See paragraphs 10.10, 10.11 and 10.14 to 10.19 of this Decision.

⁴⁹⁵ See paragraphs 10.22 to 10.40 of this Decision.

⁴⁹⁶ See section 4 of this Decision.

ComReg's Position

16.22 Having regard to the BTS Consultation and having considered the responses to the BTS Consultation, taking account of the impact of the proposed remedies on stakeholders, competition and end-users, it is ComReg's position that the substance of the regulatory obligations proposed in the BTS Consultation in draft Decision Instrument for Market B are justified and remain appropriate.

Changes to the Market B Decision Instrument

16.23 As noted in paragraph 1.24 of this Decision, having considered Respondents' Submissions, ComReg has made a number of minor structural and textual changes to the Decision Instrument for Market B. These have been made with a view to improving the clarity of the Decision Instrument and do not affect the substance of it as published in draft form in the BTS Consultation. The main changes, including the reasons for such changes, are discussed below.

Access obligations

16.24 For the reasoning outlined in paragraphs 14.40 and 14.41 of this Decision, ComReg has clarified that the access (and other) obligations within the Decision Instrument with respect to the broadcast of programme material by RTÉ pursuant to section 130(1)(e) of the 2009 Act, only apply in circumstances where RTÉ has decided to grant such access. ComReg has also clarified this in section 3 of the Decision Instrument dealing with scope and application.

Accounting separation obligations

16.25 As noted in section 14 of this Decision⁴⁹⁷, ComReg has clarified the reporting requirements of the accounting separation obligations in Market B. Further to this, ComReg has made some minor amendments to the detail of the accounting separation obligations in Annex 1 of the Market B Decision Instrument in Appendix E of this Decision.

16.26 To further increase transparency, while continuing to protect commercially sensitive information, in the Decision Instrument ComReg also notes that RTÉ should both publish certain separated accounting information and submit certain information to ComReg in confidence.

16.27 ComReg has also clarified RTÉ's reporting requirements under its accounting separation obligations. In this respect, ComReg noted that:

- RTÉ will be required to distinguish between External, Inter and Intra transfer charges;

⁴⁹⁷ See paragraphs 14.83 to 14.126 of this Decision.

- Balance sheets will be conducted on the basis of MCE;
- RTÉ will report on the services it offers as outlined in this Decision;
- RTÉ will comply with timelines of the obligations outlined in this Decision;
- The compliance statement for Market B will now be signed by a suitably qualified person approved by the board of RTÉ; and,
- In terms of disclosure, the regulated accounts for Market B will be accompanied by a report from an independent auditor and ComReg requires a duty of care from the auditor.

Price control and cost accounting obligations

16.28 In the BTS Consultation, the draft Market B Decision Instrument proposed that a cost orientation obligation would be imposed on RTÉ, and ComReg discussed the proposed nature and form of the cost orientation obligation in the body of the BTS Consultation⁴⁹⁸ itself.

16.29 Having considered Respondents' views, as discussed in section 8 of this Decision, ComReg has now detailed the specific cost orientation methodology that RTÉ must comply with. That is, RTÉ must ensure that its cost orientation obligation is based on Fully Distributed Costs using the Historical Cost Accounting methodology adjusted, where appropriate, for efficiencies.

Definitions

16.30 To provide greater clarity and avoid duplication, where relevant, ComReg has streamlined the definitions in the Decision Instrument.

16.31 For clarity, ComReg has also included the description of a Reference Offer in the definition section of the Decision Instrument.

16.32 The term 'Television Multiplex' has been removed from the Decision Instrument, as it was not referred to under any of the obligations of the Decision Instrument.

16.33 'Broadcaster' has been amended to reflect the clarification of the applicability to section 130(e) of the 2009 Act, having regard to ComReg's reasoning in paragraphs 14.40, 14.41 and 16.24 of this Decision.

16.34 A number of other formatting and minor amendments have also been made, but given that they do not materially alter the form or nature of the wording of the Decision Instrument, they are not highlighted here.

⁴⁹⁸ See section 9 of the BTS Consultation.

17 Next Steps

- 17.1 In the preceding sections of this Decision ComReg has given its final position on its analysis of the Relevant BTS Markets and has today published its Decision on its publicly available website: www.comreg.ie
- 17.2 Each of the SMP undertakings, RTÉNL in Market A, and RTÉ in Market B, are hereby notified of this Decision.

Appendix A Consultation with the Competition Authority

- A.1 The following is a copy of the opinion of the Competition Authority setting out its agreement with ComReg's definition of the Relevant BTS Market(s) and the assessment of competition within these markets.



The Competition Authority
An tÚdarás Iomaíochta

Mr. Kevin O'Brien
Commissioner
Commission for Communications Regulation
Abbey Court
Irish Life Centre
Lower Abbey Street
Dublin 1

By Post

11th April 2013

Re: Commission for Communications Regulation ("ComReg") Market Review – Broadcasting Transmission Services (BTS)

Dear Kevin,

Pursuant to the Cooperation Agreement between ComReg and the Competition Authority, and to Regulation 27 of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, S.I.No. 307 of 2003, as amended, ComReg has consulted with the Competition Authority on ComReg's market definition and the assessment of competition in its BTS Market Review.

On the basis of the facts and analysis as presented by ComReg, the Authority is satisfied that there are no compelling grounds for altering the definition of two separate markets (Market A and Market B) proposed by ComReg.

Furthermore, on the basis of the facts and analysis as presented by ComReg, the Authority finds no compelling grounds to disagree with ComReg's conclusion that RTÉNL should be designated as having significant market power in Market A and that RTÉ should be designated as having significant market power in Market B.

Yours sincerely,

Patrick Kenny
Acting Chair
The Competition Authority

Tel: 01 804 5400
Email: pk@tca.ie

Appendix B European Commission Comments

B.1 The following is a copy of correspondence from the European Commission setting out comments pursuant to Article 7 of the Framework Directive.



EUROPEAN COMMISSION

Brussels,
C(2013)

Commission for Communications
Regulation (ComReg)

Block DEF
Abbey Court
Irish Life Centre
Lower Abbey Street
Dublin 1
Ireland

For the attention of:
Mr Kevin O'Brien
Chairperson of the Commission

Fax: +35318788193

Dear Mr O'Brien,

Subject: Commission Decision concerning Case IE/2013/1445 — Wholesale market for broadcasting transmission services in Ireland

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 12 April 2013, the Commission registered a notification from the Irish national regulatory authority, the Commission for Communications Regulation (ComReg),¹ concerning the wholesale market for broadcasting transmission services² in Ireland.

The national consultation³ ran between 13 July and 19 September 2012.

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 18 in the previous Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 114, 8.5.2003, p. 45.

³ In accordance with Article 6 of the Framework Directive.

On 19 April 2013, a request for information⁴ was sent to ComReg and a response was received on 24 April 2013.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The first review of this market was carried out in 2004.⁵ At that time, ComReg excluded the market for broadcasting transmission services on cable and satellite networks from the market analysis (considering that it tended toward effective competition) along with the market for local/regional analogue terrestrial radio broadcasting transmission services (considering that it was characterised by low entry barriers). ComReg proposed to designate RTÉ Transmission Network Limited (RTÉNL)⁶ as having significant market power (SMP) in the two wholesale markets for radio and television broadcasting transmission services on national analogue terrestrial networks. ComReg imposed transparency and non-discrimination obligations.

In its comments the Commission invited ComReg to monitor closely the competitive conditions in the provision of cable and satellite transmission services and to revisit if necessary the analysis with regard to satellite and cable transmission.

In November 2004⁷ ComReg notified a draft measure concerning the implementation of remedies in the market. ComReg considered supplementing the obligations of transparency and non-discrimination imposed on RTÉNL with a further obligation of accounting separation. In ComReg's reasoning this obligation was necessary to ensure that cost allocations would become transparent and that any excessive profits would be revealed. The Commission issued a no comments letter on this draft measure.

II.2. Market definition

Having regard to the recent move to digital terrestrial television (DTT) broadcasting in Ireland, ComReg has now undertaken a second review of the market.⁸

⁴ In accordance with Article 5(2) of the Framework Directive.

⁵ Case IE/2004/0042.

⁶ RTÉNL is the transmission operating arm of RTÉ, the Irish national public service broadcaster (RTÉNL is a wholly owned subsidiary of RTÉ and operates a network of transmission sites from which terrestrial radio and television services are broadcast).

⁷ Case IE/2004/0114.

⁸ The switch-off of analogue terrestrial television services took place on 24 October 2012.

With the current notification, ComReg intends to define two separate wholesale markets for the provision of terrestrial broadcasting transmission services in Ireland as follows:

- Market A: the market for wholesale access to national terrestrial broadcast transmission services;⁹
- Market B: the market for wholesale access to DTT multiplexing services.¹⁰

ComReg concludes that the geographic scope of both Market A and Market B is national.

In terms of television transmission and viewership, ComReg notes that retail broadcasting services are available primarily via terrestrial broadcasting, cable, satellite and internet.

There are currently three terrestrial TV broadcast programme service providers operating in Ireland, namely TV3, TG4 and Raidió Teilifís Éireann (RTÉ). The Irish terrestrial programme services of RTÉ, TG4 and TV3 are required to be broadcast on a national free-to-air (FTA) basis. Consolidated national audience market shares show that Irish terrestrial TV broadcasters together maintain large audience viewing shares.¹¹ ComReg also stresses the continued importance of Irish terrestrial broadcasters' TV programme services for Irish viewers where, despite the increase in the range of television programme services being available over time across cable and satellite platforms, these Irish FTA programme services have continued to maintain a large share of TV viewership relative to other commercial programme services.¹²

With regard to radio broadcasting, ComReg's view is that end-users would not be expected to switch to other radio broadcast platforms (such as cable, satellite or Internet Protocol) in the timeframe of this review in such a way that it would effectively constrain the terrestrial radio transmission platform.

In terms of radio transmission, content is primarily deployed over terrestrial broadcasting networks, transmitted to in-home radio equipment or to in-car radios. There are two categories of national terrestrial radio broadcast services in Ireland, namely RTÉ's Public Service Broadcasting radio services and national independent commercial radio services provided under a licensing contract with the Broadcasting Authority of Ireland (BAI) by Today FM and Newstalk. Non-national/local radio services are also provided by other independent broadcasters who have entered into contractual arrangements with the BAI.

⁹ Market A consists of the provision of terrestrial broadcasting transmission services (including distribution) to broadcast operators for the purpose of delivering terrestrial broadcasting content to end-users.

¹⁰ Market B consists of the provision of digital terrestrial television (DTT) multiplexing services to downstream DTT broadcasters for the purpose of delivering digital terrestrial broadcasting content to end-users.

¹¹ According to ComReg, between 2005 and 2013 the Irish terrestrial audience has been steadily decreasing, from around 53% in 2005 to around 45% in 2012 of the national daily shares across all TV platforms. In the week of 27 January 2013, RTÉ (RTÉ One, RTÉ One +1 and RTÉ Two) still had a viewing market share of 29.8%, TV3 had 12.0% and TG4 had 1.5% across all platforms.

¹² As of January 2013, approximately 14% of TV homes have an FTA satellite service and 48% a pay TV satellite service and such services are national in scope. However, due to content rights issues (i.e. the costs associated with purchasing broadcasting content rights), Irish terrestrial TV programme services are not available via FTA satellite. 25% of TV homes have a cable TV service (with approximately 53% of TV homes passed by cable television services), which requires a subscription fee and is limited in coverage. Internet Protocol TV (as a managed TV transmission service) can be regarded as another transmission platform for TV broadcasting; however, it is currently limited to urban areas and has low take-up at less than 2% of television homes.

II.3. Three criteria test

As the market has been removed from the Recommendation on relevant markets, ComReg has carried out the three criteria test¹³ with regard to the notified market in order to assess its susceptibility to *ex ante* regulation.

With regard to the first criterion, ComReg finds that both Market A and Market B are subject to high and non-transitory entry barriers, due *inter alia* to the existence of structural barriers to entry arising from coverage requirements, the need to develop network infrastructure and high sunk and fixed costs.¹⁴

Concerning the second criterion, ComReg explains that the markets are characterised by very high market shares, no countervailing buyer power, high switching costs and limited prospects of potential competition.

With regard to the insufficiency of competition law (third criterion), ComReg explains in relation to Market A that competition law is limited to *ex post* investigations which can take considerable time to complete. In this market, addressing a particular harm through *ex post* competition law may not create sufficient legal/regulatory certainty or predictability for existing or potential market participants. Regarding Market B, ComReg observes on the other hand that should commercial DTT multiplex operations become established in the timeframe of this market review it would re-assess the market to determine whether the three criteria test remains satisfied or to amend/withdraw regulatory obligations where appropriate.

II.4. Finding of significant market power

ComReg is of the view that RTÉ is a vertically integrated monopolistic wholesale supplier in both Market A and Market B and has a strong presence in downstream retail markets where it competes with other broadcasters (for audience market share and the related advertising revenues). Therefore, potential competition concerns arise in both Market A and Market B with the associated negative impact for end-users.

ComReg proposes to designate RTÉNL, being the sole terrestrial transmission supplier operating in Market A, as having SMP in this market.¹⁵ RTÉNL has a 100% market share. There are no competitors in Market A and it is ComReg's view that this is unlikely to materially change within the period of this review.

¹³ In order to determine whether the market (i) is characterised by high non-transitory barriers to entry, (ii) lacks a tendency to effective competition, and (iii) cannot be safeguarded by competition law alone.

¹⁴ ComReg finds that RTÉNL's infrastructure cannot be easily duplicated. Moreover, in its reply to the Commission's request for information ComReg indicated that site sharing, while encouraged by the planning guidelines, is not mandatory and would not, therefore, be considered as sufficient (or provide legal and regulatory certainty) to address the competition concerns identified in Market A in Ireland.

¹⁵ The criteria used by ComReg are: market shares, overall size of the undertaking, relevant strength of existing competitors, control of infrastructure not easily duplicated, financial (sunk) costs, economies of scale, economies of scope, vertical integration, overall strength of potential competitors and countervailing buying power.

ComReg proposes to designate RTÉ,¹⁶ the sole DTT multiplex operator supplying in Market B, as having SMP¹⁷ and proposes to impose a range of regulatory obligations on RTÉ.

RTÉ has a 100% market share. There are no competitors in Market B and ComReg believes that this is unlikely to materially change within the period of this review.

II.5 Regulatory remedies

As RTÉ is vertically integrated, ComReg believes that market failures may arise where competing broadcast operators and DTT broadcasters may be charged excessive fees, discriminated against in the supply of wholesale services by RTÉNL/RTÉ to them, or (constructively) refused access to weaken their competitive threat at the wholesale and/or retail level.¹⁸

Having regard to a range of identified competition problems, ComReg proposes to impose a range of regulatory obligations on RTÉNL on Market A. These are obligations of access, non-discrimination, transparency, accounting separation, price control and cost accounting.¹⁹

On Market B, ComReg also envisages imposing on RTÉ obligations of access, non-discrimination, transparency, accounting separation, price control and cost accounting.²⁰

III. COMMENTS

The Commission has examined the notification and the additional information provided by ComReg and has the following comment:²¹

¹⁶ RTÉ is a vertically integrated entity and self-supplies terrestrial network services via its wholly owned subsidiary RTÉNL. RTÉ launched its DTT platform marketed as ‘Saorview’ in May 2011.

¹⁷ The criteria used by ComReg are: market shares, overall size of the undertaking, relevant strength of existing competitors, control of infrastructure not easily duplicated, financial costs, vertical integration and countervailing buying power.

¹⁸ Insofar as downstream retail broadcasting services are concerned, RTÉ competes with other broadcasters for advertising revenues based on audience market share and the type of audience reached. Therefore, RTÉ faces downstream competition from other terrestrial broadcasters’ programme services which may intensify with the entry/expansion of non-RTÉ terrestrial broadcasting programme service provision.

¹⁹ ComReg has proposed cost orientation in Market A in order to facilitate effective conditions of entry for national analogue radio and multiplex operators. As indicated in the reply to the request for information, while not precluding such entry, ComReg’s focus is on ensuring that the right conditions exist to allow actual and potential customers (i.e. national analogue radio and multiplex operators) to gain effective access to Market A upstream inputs in order to facilitate downstream competition (including in Market B).

²⁰ In its reply to the request for information, ComReg indicates that potential competition in Market B through the entry of any new commercial DTT multiplex operators could, subject to the effectiveness of any such competition, ultimately lead to a lessening of remedies imposed on RTÉ in Market B, up to and including the possibility of de-regulation in this market. However, ComReg does not consider that the competitive conditions of Market B would change sufficiently within the timeframe of this review.

²¹ In accordance with Article 7(3) of the Framework Directive.

Need to monitor the effectiveness of *ex ante* regulation

The market for broadcasting transmission services is no longer recommended by the Commission for *ex ante* regulation, as greater platform competition and fewer capacity constraints, mainly due to the transition from analogue to digital transmission platforms, should render it effectively competitive.

The Commission notes, however, that the terrestrial broadcasting markets in Ireland present strong features of lack of competitive conditions, with only one vertically integrated supplier so far, and therefore appear to warrant *ex ante* regulation.

However, the Commission notes also that — following successful completion of a contract award process that would be conducted by the Broadcasting Authority of Ireland — entry of a number of commercial DTT multiplex operators on Market B may occur within the timeframe of the review and could therefore impact the competitive dynamics on the market.

The Commission therefore invites ComReg to closely monitor the development of competition in the two markets (and in particular Market B) in terms of infrastructure and services competition at both the retail and wholesale level and re-assess the need for and appropriateness of the remedies imposed if necessary.

Pursuant to Article 7(7) of the Framework Directive, the Commission for Communications Regulation (ComReg) shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²² the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²³ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.²⁴ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

²² Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

²³ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²⁴ The Commission may inform the public of the result of its assessment before the end of this three-day period.

Appendix C Updated Retail Trends Analysis

Broadcasting Trends

Television Transmission / Viewership

- C.1 As of April 2013, there were 1.527 million TV homes in Ireland according to the Nielsen TV Audience Measurement Establishment Survey⁴⁹⁹.
- C.2 According to data from Nielsen's TAM Establishment Survey, approximately 12% of TV homes were solely dependent on FTA terrestrial services for TV viewing (see Figure C1 below), a figure that has fallen from circa 39% in 2003. Prior to ASO in October 2012 the proportion of terrestrial only TV homes had been relatively stable between 2010 and 2012 averaging 20%.
- C.3 28% of TV homes have a FTA TV service (which is split between the 12% accessing their programme services via FTA terrestrial means and 16% accessing via a FTA satellite platform)⁵⁰⁰.
- C.4 Approximately 72% of TV homes had a pay TV service as of April 2013, up from 61% in 2003.
- C.5 Although 12% of TV homes are solely reliant on terrestrial FTA services, 35%⁵⁰¹ of TV homes have a terrestrial FTA terrestrial reception method⁵⁰² (see Figure C2 below), which compares to a figure of 56% in 2003. This suggests that a certain number of homes are likely using both FTA terrestrial and other transmission platforms such as FTA satellite services for example to view TV programme services through one TV set.
- C.6 Although pay TV services have gained popularity overtime (increasing by 11 percentage points between 2003 and 2013), the proportion of

⁴⁹⁹ Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd. The Establishment Survey is a survey produced by Nielsen TV Audience Measurement (fieldwork is carried out by Behaviours and Attitudes) on behalf of Television Audience Measurement Ireland Ltd (a TV ratings body). The Establishment Survey covers areas such as ownership of TV related equipment, method of TV reception and demographics of TV household individuals such as age etc.

⁵⁰⁰ This '**Reception Type**' measurement is determined by the programme services the TV home receives. This is hierarchically defined and mutually exclusive. A home is classified once within a reception type and this is based upon the highest form of reception (being the reception method which allows for the most programme services to be received) available within the home. For example, Irish FTA terrestrial TV homes are those homes who received the most channels via this platform.

⁵⁰¹ Includes Saorsat.

⁵⁰² This '**Reception Method**' data is measured differently to that of Reception Type. Each TV home can have more than one method of reception e.g. cable and satellite etc. This is a different measure to Reception Type. Each TV home can have more than one method of reception e.g. DTT and Cable, or Sky and Cable, etc. Each home is asked what is the reception method for their main TV set and up to a further 8 TV sets (9 in total). For this reason, the total for the Reception Methods adds up to more than 100% (as a home could use several Reception Methods for the same or different TV sets).

existing FTA TV homes has remained relatively stable over the latter portion of that time period (ranging from 30% to 28% between 2008 and 2012).

- C.7 The continued importance of Irish terrestrial broadcasters' TV programme services for Irish viewers is evident where, despite the increase in the range of TV programme services being available overtime across cable and satellite platforms, these Irish FTA programme services have continued to maintain a large share of TV viewership relative to other commercial programme services.
- C.8 In this respect, consolidated national audience market shares for these broadcasters showed that in the week of 12 May 2013, RTÉ (RTÉ One, RTÉ One +1 and RTÉ Two) had a viewing market share of 25.2%, TV3 had 11.9% and TG4 had 1.8% across all platforms⁵⁰³. This compares to an aggregate audience share of below 40% in the week to 18 October 2010. TV programme services market shares are long tailed (i.e. a few TV programme services (as above) dominate viewership and the majority of TV programme services are more disbursed in popularity).
- C.9 End-users can also receive satellite services on either a FTA or pay subscription basis. As of April 2013, approximately 16% of TV homes have a FTA satellite service and 47% a pay TV satellite service and such services are national in scope⁵⁰⁴.
- C.10 26% of TV homes have a cable TV service (with approximately 53% of TV homes passed by cable television services).
- C.11 IPTV⁵⁰⁵ (as a managed TV transmission service) can be regarded as another transmission platform for TV broadcasting⁵⁰⁶; however, it is

⁵⁰³ The share of viewing by channel for the week May 12 2013 showed RTÉ One had 19.15%, RTÉ One + 1 had 0.45%, RTÉ Two had 5.61%, TV3 had 9.93%, TG4 had 1.79% and 3e had 1.98% audience market share. TAM Ireland Ltd. dated 12 May 2013. See www.tamireland.ie/box-clever/tv-basics/share-and-reach

⁵⁰⁴ These numbers refer to Reception Type. Therefore, it is based on the highest number of TV programme services received in a TV home and is mutually exclusive.

⁵⁰⁵ Magnet Networks Limited provides an IPTV service as part of a bundled package.

Eircom have also recently announced plans to launch an IPTV service later in 2013. See Eircom press release of 29 February 2013 available at: http://pressroom.eircom.net/press_releases/article/herb_hribar_ceo_eircom_group_addresses_ibec_ceo_conference/

This IPTV service is to be provided over Eircom's FTTC network which is currently being rolled out. Its FTTC network initially serves in the region of 300,000 homes and businesses at its launch in May 2013, and is expected to rise to 1.2 million when the rollout completes in 2015. It is unclear at this time as to the nature of the programme content which is to be made available by Eircom via its proposed IPTV service. Pricing of such services is also unclear; however, such a service is likely to be made available on a paid for subscription basis (whether at an additional cost to an existing service or included in the cost of a subscription to an existing service). Both the timing of the roll-out of Eircom's IPTV service and the nature of its content / pricing will likely impact the degree to which it may be an effective substitute for other subscription based services provided over other platforms. However, while noting Eircom's potential IPTV roll-out, having regard to assessment of demand and supply-substitution in section 3 of this Decision ComReg's position is that in the medium term, retail substitution from the FTA terrestrial platform to other platforms (including IPTV, cable and satellite) is not likely to be sufficient such that it might warrant a broader retail market definition.

currently limited to urban areas and has low take-up at less than 2% of television homes⁵⁰⁷.

C.12 Based on a ComReg survey in 2011⁵⁰⁸, in an average week approximately 22% of those with an internet subscription at home streamed movies or television, 15% downloaded movies and 25% watched online videos. Eurostat data⁵⁰⁹ showed that in 2012, 32% of individuals in Ireland listened to web radio or watched web television.

Figure C1: Television Homes by Reception Type, April 2013

TV Reception Type (000s format)	April 2013	% of TV Homes
Irish FTA Terrestrial	183	11.6%
UK DTT (freeview) / FTA Satellite	252	16.0%
Cable / Pay TV Satellite	1,138	72.4%
Total TV Homes	1,572	n/a
Reception Type: Categories are hierarchically defined and mutually exclusive. A home is classified once within each reception type, and the Reception Type is identified based upon the 'highest form' of reception available within the home, being the reception method through which the TV homes receives the most channels.		
Irish FTA Terrestrial: Includes Saorsat reception.		
Cable: Includes MMDS and IPTV homes.		

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

Figure C2: Television Homes by Reception Method, April 2013

TV Reception Method (000s format)	April 2013	% of TV Homes
Irish FTA Terrestrial	553	35.2%
UK DTT (freeview) / FTA Satellite	301	19.1%
Cable / Pay TV Satellite	1,149	73.1%
Total TV Homes	1,572	n/a

⁵⁰⁶ Although broadcasting content can be viewed via the internet in a non-linear form this is not likely comparable to linear TV services. It is a non managed service which can suffer from degradation, due to internet quality issues.

⁵⁰⁷ Nielsen TV audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.

⁵⁰⁸ "Consumer ICT Survey", ComReg document No. 11/96a, dated November 2011. See www.comreg.ie/fileupload/publications/ComReg1196a.pdf.

⁵⁰⁹ Information and Society Statistics, Internet Activities, 2012. See http://epp.eurostat.ec.europa.eu/portal/page/portal/information_society/data/database.

TV Reception Method (000s format)	April 2013	% of TV Homes
Reception Method: This is a different measure to 'Reception Type' employed in Figure C1 above. This measure is based on the 'Reception Method' whereby each home can have more than one method of reception e.g. DTT and cable, or Sky and cable etc. Each home is asked what is the reception method for their main TV set and up to a further 8 TV sets (9 in total). For this reason, the total for the Reception Method adds up to more than 100% (as a home could use several Reception Methods for the same or different TV sets).		
Irish FTA Terrestrial: Includes Saorsat reception.		
Cable: Includes MMDS and IPTV homes.		

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

Radio Transmission / Listenership

- C.13 In terms of radio transmission, content is primarily deployed over terrestrial broadcasting networks, transmitted to in-home radio equipment or to in-car radios. Although a number of years old, a ComReg consumer survey⁵¹⁰ indicated that listening to the radio via a radio set was the most popular means of access (81%), followed by listening via car radio (48%). A 2009 BAI report⁵¹¹ also highlighted that listenership via devices other than through fixed radio set (88%) and car radio (87%) is low.
- C.14 There are two categories of national terrestrial radio broadcast services in Ireland, namely, RTÉ's PSB radio services and national independent commercial radio services provided by Today FM and Newstalk. Non-national / local radio services are also provided by other independent broadcasters.
- C.15 Listenership figures from April 2012 to March 2013⁵¹² indicated that 84% of the adult population listened to a daily mix of national, regional, multi-city and local radio. 45% of listeners listened to a national radio service during the weekday, 76% of which was represented by listenership to RTÉ's radio services⁵¹³.
- C.16 Independent commercial national digital terrestrial radio services are not expected to be launched in the timeframe of this BTS review though RTÉ does provide T-DAB to a portion of the population (44%) via its own sound broadcasting multiplex.

⁵¹⁰ "Consumer ICT Survey", ComReg Document No. 09/07, dated February 2009. See <http://www.comreg.ie/fileupload/publications/ComReg0907.pdf>

⁵¹¹ "Digital Radio for Ireland: Competing Options Public Expectations", BAI, dated September 2009. See http://www.bci.ie/documents/digital_radio_final_report_2509.pdf.

⁵¹² Ipsos MRBI/JNLR Press Release, dated April 2013. See http://www.bai.ie/wordpress/wp-content/uploads/201304_PressRelease-April_PK.pdf.

⁵¹³ RTÉ Radio 1, RTÉ 2FM, RTÉ Lyric FM.

Appendix D Final Decision Instrument – Market A

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to the market for wholesale access to national terrestrial broadcast transmission services, as defined by ComReg in the document entitled “*Market Review, Broadcasting Transmission Services in Ireland*” (ComReg Document 13/71), which satisfies the three criteria test as set out in ComReg Document 13/71, as required by the European Commission in its Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation¹.

- (i) Pursuant to and having had regard to the functions and objectives of ComReg as set out in sections 10 and 12 of the Communications Regulation Act, 2002 to 2011², Regulation 6(1) of the Access Regulations³ and Regulation 16 of the Framework Regulations⁴;
- (ii) Having had regard to, where appropriate, the Broadcasting Act, 2009⁵;
- (iii) Having, where appropriate, complied with the Policy Directions made by the Minister further to section 13 of the Communications Regulation Act 2002⁶;

¹ European Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services – OJ L 344/65 (the “**2007 Recommendation**”).

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

³ S.I. No. 334 of 2011 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (“**Access Regulations**”).

⁴ S.I. No. 333 of 2011 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (“**Framework Regulations**”).

⁵ Broadcasting Act, 2009, No 18 of 2009.

⁶ Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

- (iv) Having taken the utmost account of the European Commission's 2007 Recommendation and the European Commission's SMP Guidelines⁷;
- (v) Having had regard to the three criteria test, market definition, market analysis and reasoning conducted by ComReg in the Consultation, Market Review: Broadcasting Transmission Services in Ireland (ComReg Document 12/77);
- (vi) Having taken account of the submissions received in response to ComReg's Consultation, Market Review: Broadcasting Transmission Services in Ireland (ComReg Document 12/77);
- (vii) Having consulted with the Competition Authority further to Regulation 27 of the Framework Regulations;
- (viii) Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 13 of the Framework Regulations and having taken the utmost account, pursuant to Regulation 13(6) of the Framework Regulations, of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State;
- (ix) Pursuant to Regulations 25, 26 and 27 of the Framework Regulations and Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations.

1.2 The provisions of ComReg Document 12/77 and Response to Consultation and Final Decision D11/13 shall, where appropriate, be construed with this Decision Instrument.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)

2 DEFINITIONS AND INTERPRETATION

2.1 In this Decision Instrument:

“**Access**” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time, and for the purposes of this Decision Instrument access shall include Associated Facilities where appropriate;

⁷ European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services of 11 July 2002 – OJ C 165/03 (“**SMP Guidelines**”).

“Access Regulations” means the European Communities (Electronic Communications and Network Services) (Access) Regulations, 2011 (S.I. No. 334 of 2011), as may be amended from time to time;

“Act of 2009” means Broadcasting Act, 2009, No.18 of 2009;

“Act of 2002” means Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011);

“Associated Facilities” shall have the same meaning as under Regulation 2 of the Framework Regulations and for the avoidance of doubt shall include handover with a Multiplex Contractor, where ‘handover’ means adequate connectivity to a Multiplex;

“Authorisation Regulations” means the European Communities (Electronic Communications and Network Services) (Authorisation) Regulations, 2011 (S.I. No. 335 of 2011), as may be amended from time to time;

“BAI” means the Broadcasting Authority of Ireland, as established in accordance with Part 2 of the Act of 2009;

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“Broadcast Distribution Service(s)” means the delivery of programme material (television and/or radio) from where it is compiled to a network of broadcast transmission sites;

“Broadcast Operator” means, for the purposes of this Decision Instrument, a Multiplex Contractor, a national Sound Broadcasting Contractor and RTÉ;

“Broadcasting Service” shall have the same meaning as under section 2 of the Act of 2009;

“Broadcast Transmission Service(s)” means the delivery of programme material (television and/or radio) via a terrestrial network for consumption by the public;

“Combiner” means radio frequency equipment that is used to combine radio frequencies from a number of different broadcast transmission sources into one output;

“ComReg” means the Commission for Communications Regulation, as established under section 6 of the Act of 2002;

“**ComReg Decision D11/13**” means ComReg’s Response to Consultation and Final Decision of July 2013, ComReg Document 13/71;

“**ComReg Document 12/77**” means ComReg’s Consultation Paper and Draft Decision: Market Review: Broadcasting Transmission Services in Ireland of 13 July 2012;

“**Feeder(s)**” means equipment used to connect the output of an apparatus for wireless telegraphy or combiner to an antenna;

“**Framework Regulations**” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time;

“**Multiplex**” means an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public, and the term “**Multiplexing Services**” shall have the same meaning;

“**Multiplex Contractor**” shall have the same meaning as under section 2 of the Act of 2009 and for the avoidance of doubt shall include a Sound Broadcasting Multiplex Contractor;

“**Programme material**” shall have the same meaning as under section 2 of the Act of 2009;

“**Reference Offer**” or “**RO**” means the offer of contract by RTÉNL to a Broadcast Operator in respect of Broadcast Distribution Services and Broadcast Transmission Services (and Associated Facilities) in accordance with the requirements of this Decision Instrument. The RO sets out products, services and facilities including, but not limited to, service descriptions, associated terms and conditions and standards to be offered in accordance with the requirements set out in this Decision Instrument. To the extent that there is any conflict between the RO and the obligations now set out herein, the latter shall prevail;

“**RTÉ**” means Raidió Teilifís Éireann and its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns;

“**RTÉNL**” means RTÉ Transmission Network Limited and its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns and including for the avoidance of doubt RTÉ;

“**Service Level Agreements**” or “**SLAs**” are legally binding contracts between RTÉNL and a Broadcast Operator in relation to the service levels which RTÉNL commits to from time to time;

“Significant Market Power (SMP) obligations” are those obligations set out in Regulation 8 to 13 of the Access Regulations, as may be amended from time to time;

“Sound Broadcasting Contractor” means persons having entered into a sound broadcasting contract with the BAI under section 63 of the Act of 2009, where the area specified in the sound broadcasting contract is national or quasi-national;

“Sound Broadcasting Multiplex Contractor” means a person having entered into a contract with the BAI in accordance with section 131 of the Act of 2009 for the purpose of establishing, maintaining and operating a multiplex in which programme material is predominantly sound;

“Sound Broadcasting Service” means a sound broadcasting service, as defined by section 2 of the Act of 2009, which is available on a national or quasi-national basis;

“Terrestrial” shall have the same meaning as under section 2 of the Act of 2009;

“Transmission” shall have the same meaning as under section 2 of the Act of 2009;

“wholesale access to national terrestrial broadcast transmission services” and references to the **“Market”** means the market for wholesale access to national terrestrial broadcast transmission services and, for the avoidance of doubt, includes both wholesale Broadcast Distribution Services and Broadcast Transmission Services, as set out in section 4 below;

“Wireless Telegraphy” shall have the same meaning as under section 2 of the Act of 2009.

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

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument applies to RTÉNL in respect of activities falling within the scope of the Market, as defined in section 4 of this Decision Instrument.
- 3.2 This Decision Instrument is binding upon RTÉNL and RTÉNL shall comply with it in all respects.

4 MARKET DEFINITION

- 4.1 Pursuant to Regulation 26 of the Framework Regulations, taking the utmost account of the European Commission's 2007 Recommendation, and taking utmost account of its SMP Guidelines and in accordance with the principles of competition law, the product market in this Decision Instrument is defined as the market for wholesale access to national terrestrial broadcast transmission services, as set out in detail in section 4 of ComReg Decision D11/13.
- 4.2 Pursuant to Regulation 26 of the Framework Regulations, taking the utmost account of the European Commission's SMP Guidelines and the European Commission's Explanatory Note⁸ and in accordance with the principles of competition law, the relevant geographic market is defined as Ireland.

5 DESIGNATION OF UNDERTAKING WITH SIGNIFICANT MARKET POWER ("SMP")

- 5.1 Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations, the completion of the three criteria test pursuant to the European Commission's 2007 Recommendation and consistent with the SMP Guidelines and the assessment of significant market power, having determined that the market is not effectively competitive, RTÉNL is designated as having SMP on the Market.

PART II – SMP OBLIGATIONS (SECTIONS 6 TO 12 OF THE DECISION INSTRUMENT)

6 SMP OBLIGATIONS

- 6.1 ComReg is imposing certain SMP obligations on RTÉNL in accordance with and pursuant to Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations, as detailed further in sections 7 to 12 below.

7 OBLIGATIONS TO PROVIDE ACCESS

- 7.1 Pursuant to Regulation 12(1) of the Access Regulations and having regard to section 115 of the Act of 2009, RTÉNL shall meet all reasonable requests from Broadcast Operators for the provision of Access, including Associated Facilities.

⁸ Commission Staff Working Document Explanatory Note accompanying document to the European Commission's Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation SEC (2007) 1483/2, 13 November 2007.

- 7.2 Without prejudice to the generality of section 7.1, pursuant to Regulation 12(2) of the Access Regulations, RTÉNL shall have an obligation to provide and grant Broadcast Operators access to a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) including Associated Facilities, which includes, but is not limited, to:
- (i) The provision of co-location space for the transmitter equipment;
 - (ii) The provision of power and the backup power supply for the transmitter and associated equipment;
 - (iii) The provision of telemetry services;
 - (iv) The provision of access to the antenna combiner and Feeder to enable the connection of the transmitter equipment to the combiner;
 - (v) The provision of access to the microwave distribution system;
 - (vi) The provision of support services.
- 7.3 Pursuant to Regulation 12(1) of the Access Regulations, RTÉNL shall meet all reasonable requests from Broadcast Operators for Access on an unbundled/unmanaged basis whereby access to any element of a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) that falls within the scope of section 7.2 above may be sought by Broadcast Operators on a disaggregated basis.
- 7.4 Without prejudice to the generality of sections 7.1 to 7.3:
- (i) Pursuant to Regulation 12(2)(a) of the Access Regulations, RTÉNL shall have an obligation to give Broadcast Operators access to specified network elements or facilities;
 - (ii) Pursuant to Regulation 12(2)(b) of the Access Regulations, RTÉNL shall have an obligation to negotiate in good faith with Broadcast Operators requesting Access;
 - (iii) Pursuant to Regulation 12(2)(c) of the Access Regulations, RTÉNL shall have an obligation not to withdraw, without the prior approval of ComReg, Access to services and facilities already granted;
 - (iv) Pursuant to Regulation 12(2)(e) of the Access Regulations, RTÉNL shall have an obligation to grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services;

- (v) Pursuant to Regulation 12(2)(f) of the Access Regulations, RTÉNL shall have an obligation to provide co-location or other forms of Associated Facilities sharing.

8 CONDITIONS ATTACHED TO THE ACCESS OBLIGATIONS

8.1 Pursuant to Regulation 12(3) of the Access Regulations, RTÉNL shall, in relation to the obligations set out under Section 7 above, grant Access in a fair, reasonable and timely manner.

8.2 Without prejudice to the generality of section 8.1, RTÉNL shall:

- (i) Conclude, maintain and keep updated, as appropriate, legally binding SLAs with Broadcast Operators that shall include, but shall not be limited to, the maintenance of the SLA requirements as set out in Annex 2 to this Decision Instrument;
- (ii) Negotiate in good faith with Broadcast Operators in relation to the conclusion of legally binding and fit for purpose SLAs;
- (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter for negotiation between RTÉNL and Broadcast Operators and recovery of service credits shall be, in the first instance, a matter for the Broadcast Operators and RTÉNL;
- (iv) Ensure SLAs detail how service credits, when they occur, are calculated, to include the provision of an example calculation;
- (v) Ensure that payment of service credits, when they occur, shall be made in a timely and efficient manner.

8.3 Where a request by a Broadcast Operator for the provision of Access or a request by a Broadcast Operator for the provision of information is refused or granted only in part, RTÉNL shall provide the objective criteria and reasons for such refusal, or partial grant, to the Broadcast Operator which made the request, in a fair, reasonable and timely manner.

9 OBLIGATION OF NON-DISCRIMINATION

9.1 RTÉNL shall have an obligation of non-discrimination as provided for by Regulation 10 of the Access Regulations.

9.2 Without prejudice to the generality of section 9.1 and pursuant to Regulation 10(2) of the Access Regulations, RTÉNL shall:

- (i) Apply equivalent conditions in equivalent circumstances to other Broadcast Operators providing equivalent services;
 - (ii) Ensure that all services (including Associated Facilities) and information are provided to other Broadcast Operators under the same conditions and of the same quality as the services and information that RTÉNL provides to itself or to its subsidiaries or partners, including RTÉ;
 - (iii) Ensure that all services and information are provided to other Broadcast Operators at the same time as such services and/or information are made available by RTÉNL to itself or to its subsidiaries or partners, including RTÉ.
- 9.3 For the avoidance of any doubt, the obligations set out at this section 9 apply irrespective of whether or not a specific request for services or information has been made.

10 OBLIGATION OF TRANSPARENCY

- 10.1 RTÉNL shall have an obligation of transparency as provided for by Regulation 9 of the Access Regulations.
- 10.2 Without prejudice to the generality of the obligation in section 10.1, pursuant to Regulation 9(2) of the Access Regulations, RTÉNL shall have an obligation to make publicly available and keep updated on its publicly available website, a Reference Offer. The Reference Offer shall be comprehensive and appropriately detailed. The Reference Offer shall be sufficiently detailed to ensure that Broadcast Operators availing of services and facilities are not required to pay for services or facilities which are not necessary for the service or facility requested.
- 10.3 Without prejudice to the generality of the obligation in section 10.2, pursuant to Regulation 9(2) of the Access Regulations, RTÉNL's Reference Offer shall include at least the following:
- (i) A description of the relevant offerings broken down into components according to market needs;
 - (ii) A description of the technical specifications and network characteristics of the Access being offered;
 - (iii) A description of the associated terms and conditions for supply and use, including prices, which shall include a detailed description of the tariff model and how it operates to derive such prices.

- 10.4 Pursuant to Regulation 9(2) of the Access Regulations, the Reference Offer referred to in section 10.2 shall be published within four months of the effective date of this Decision Instrument.
- 10.5 Pursuant to Regulations 9(2) and 9(3) of the Access Regulations, RTÉNL shall, unless otherwise determined by ComReg, make publicly available and publish on its publicly available website at least two months in advance of coming into effect, any proposed changes to the Reference Offer and proposed changes to wholesale prices (including prices for new services and facilities). RTÉNL shall notify ComReg, in writing, with the information to be published, at least one month in advance of such publication, i.e. three months prior to any changes coming into effect. The periods referred to in this section may be varied with the agreement of ComReg or at ComReg's discretion.
- 10.6 Pursuant to Regulation 9(3) of the Access Regulations, ComReg may issue directions requiring RTÉNL to make changes to the Reference Offer and publish the Reference Offer with such changes.
- 10.7 Without prejudice to the generality of the obligation of transparency in section 10.1, RTÉNL shall make public information on its publicly available website, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to under the Access obligation in section 7, as specified from time to time by ComReg and all other information which may be reasonably required by Broadcaster Operators.
- 10.8 Pursuant to Regulations 9(2) and 9(3) of the Access Regulations, RTÉNL shall have an obligation to publish all SLAs (and any updates) on its publicly available website.
- 10.9 Pursuant to Regulation 18 of the Access Regulations, ComReg may issue directions to RTÉNL from time to time requiring it to publish information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.

11 OBLIGATION OF ACCOUNTING SEPARATION

- 11.1 Pursuant to Regulation 11 of the Access Regulations, RTÉNL shall have an obligation to maintain separated accounts as detailed in Annex 1 attached to this Decision Instrument.

12 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING

- 12.1 Pursuant to Regulation 13(1) of the Access Regulations, RTÉNL shall maintain appropriate cost accounting systems in respect of Access, including Associated Facilities, referred to in section 7.
- 12.2 Pursuant to Regulation 13(1) of the Access Regulations, RTÉNL shall be subject to a price control obligation in the form of an obligation of cost orientation, as regards the prices charged by it to any Broadcast Operator (including, for the avoidance of doubt, RTÉ) for Access, including Associated Facilities, referred to in section 7.
- 12.3 Without prejudice to the generality of section 12.2 and in accordance with Regulation 13(3) of the Access Regulations, RTÉNL shall ensure that the cost orientation obligation referred to in section 12.2 shall be based on Fully Distributed Costs using the Historical Cost Accounting methodology adjusted, where appropriate, for efficiencies as described in Annex 1.
- 12.4 RTÉNL shall ensure that its charges in respect of Access, including Associated Facilities, referred to in section 7 are no more than those calculated in accordance with the methodology specified in section 12.3 above.

PART IV – OBLIGATIONS AND EFFECTIVE DATE (SECTIONS 13 TO 16 OF THE DECISION INSTRUMENT)

13 STATUTORY POWERS NOT AFFECTED

- 13.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument) from time to time as the occasion requires.

14 MAINTENANCE OF OBLIGATIONS

- 14.1 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

15 WITHDRAWAL OF SMP OBLIGATIONS

- 15.1 ComReg Document No. 04/47, Decision Notice: Market Analysis – Wholesale Broadcasting Transmission Services, Decision No. D6/04 and ComReg Document No. 04/122, Decision Notice: Wholesale Broadcasting Transmission Services Markets – SMP Obligations, Decision No. D16/04, are hereby withdrawn when this Decision shall take effect.

16 EFFECTIVE DATE

- 16.1 The effective date of this Decision Instrument shall be the date of its publication and notification to RTÉNL and it shall remain in force until further notice by ComReg.

KEVIN O'BRIEN

COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE 26 DAY OF JULY 2013

Annex 1 – Detail of the Accounting Separation Obligations - Market A

1 DEFINITIONS AND INTERPRETATION

1.1 In this Annex 1, unless otherwise indicated:

“Accounting Documentation” refers to the description of policies and methodologies used to produce the financial information contained within the Regulated Accounts and the Additional Financial Data.

“Accounting Policies” means the specific policies and procedures used by a company to prepare its Regulated Accounts.

“Additional Financial Data” means the data that shall be provided by RTÉNL, as determined by ComReg, on an annual basis.

“Agreed Upon Procedures” means procedures agreed between relevant parties pursuant to a letter of engagement.

“Attribution Methods” refers to the methods employed to allocate and apportion revenues, costs and capital employed to Market A or Service levels.

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

“Cost Component” means the accumulation of various costs (direct, indirect, and common) through the various cost allocation stages within the cost accounting system from initial input layer through to final Services.

“Effective Date” means the date set out in Section 16 of this Decision Instrument.

“External” means the supply of Services to parties outside of RTÉ.

“Fixed Asset” means tangible and intangible items that are held for use in the production or supply of goods or services, for rental to others, or for administrative purposes and which are expected to be used during more than one period.

“Functional Cost Categories” means the various expense categories as set out in paragraph 4.3.2 of this Annex.

“Income Statement” means a statement showing all items of income and expense recognised in a period.

“Inter” means the supply of Services between RTÉ and its subsidiaries.

“Intra” means the supply of Services within RTÉNL.

“Market A” means the market for wholesale access to national terrestrial broadcast transmission services as set out in section 4 of this Decision Instrument.

“Mean Capital Employed” is the mean of the assets and liabilities of RTÉNL, adjusted to amend for certain assets and liabilities which are excluded for regulatory purposes.

“Nearest Equivalent Charge” means a price and/or prices set out in RTÉNL’s Reference Offer (as defined in the Decision Instrument) price list which most closely represent(s) the technical capabilities of a Service as if it were an External transaction.

“Primary Accounting Documentation” means those documents containing the information set out at paragraph 5.3 of this Annex.

“Regulatory Accounting Principles” establish the key doctrines to be applied in the preparation of regulatory accounting information. They should include, but not be limited to, the principles of cost causality, objectivity, transparency and consistency of treatment.

“Regulated Accounts” means those accounts as described in section 3.2 of this Annex.

“Separated Accounts” refers to the financial information referred to in section 3.1 of this Annex.

“Secondary Accounting Documentation” means those documents containing the information set out at paragraph 5.4 of this Annex.

“Service(s)” for the purposes of this Annex shall mean Broadcast Transmission Services and Broadcast Distribution Services as provided to Broadcast Operators, other regulated services (as may arise from time to time) and non-regulated services.

“Statutory Accounts” means the accounts of RTÉNL, and its successors, which RTÉNL is required to prepare pursuant to the Companies Acts 1963 to 2012.

- 1.2 Where a capitalised term used in this Annex is not defined, the definition in the Market A Decision Instrument shall prevail.

2 FUNDAMENTAL REQUIREMENTS OF SMP OBLIGATIONS

- 2.1 RTÉNL’s financial records and accounting systems shall be sufficiently detailed and supported by sufficient data to ensure that:

- (i) RTÉNL is in a position to comply with the transparency, non-discrimination, accounting separation, price control, and cost accounting obligations imposed on it by the Decision Instrument; and,

- (ii) RTÉNL is in a position to prepare Separated Accounts which shall be maintained for Market A and, where specified, for Services.

3 REPORTING AND TRANSPARENCY

3.1 Separated Accounts

3.1.1 Without prejudice to the generality of section 2 of this Annex, RTÉNL shall prepare Separated Accounts annually.

3.1.2 RTÉNL's Separated Accounts shall contain:

- a) Regulated Accounts (as set out in section 3.2 of this Annex);
- b) Additional Financial Data (as set out in section 3.3 of this Annex);
- c) Accounting Documentation (as set out in section 5 of this Annex).

3.2 Regulated Accounts

3.2.1 RTÉNL's Regulated Accounts will consist of Historical Cost Accounts ("HCA").

3.2.2 RTÉNL's Regulated Accounts shall contain:

- a) A statement or reference to the Regulatory Accounting Principles followed when preparing the Regulated Accounts which shall include, but not be limited to, the following terms:
 - Cost causality;
 - Objectivity;
 - Transparency;
 - Consistency of treatment.
- b) An income Statement and statement of Mean Capital Employed;
- c) Notes to the Regulated Accounts as required.

3.2.3 RTÉNL's Regulated Accounts shall be accompanied by:

- (i) A signed statement from the directors of RTÉNL acknowledging their responsibilities for the preparation of the Regulated Accounts and confirming their compliance with the requirements of this Annex in this regard.

- (ii) A report and opinion by an Auditor on the Regulated Accounts and RTÉNL's compliance with the requirements of this Annex in respect of the preparation of the Regulated Accounts, including the requirements set out in paragraph 6.1(b) of this Annex.

- 3.2.4 The Regulated Accounts shall be prepared in accordance with the Regulatory Accounting Principles and Accounting Policies. These Regulated Accounts shall show data for RTÉNL's last complete financial period as well as the previous financial period and where these figures are not comparable, as a result of (for example) a material change in Accounting Policy, cost attribution methodology or material error, the figure for the preceding financial period must be adjusted, unless ComReg agrees [in writing] that it would be unreasonable to have to make such an adjustment.
- 3.2.5 The Regulated Accounts shall include a reconciliation to the Statutory Accounts and contain (where relevant) a description of adjustments made between the Statutory Accounts and the Regulated Accounts.
- 3.2.6 In accordance with the transparency obligation in section 10 of the Decision Instrument, RTÉNL shall publish its Regulated Accounts on its publicly available website no later than four months after the end of the financial period (or otherwise as or when required by ComReg).
- 3.2.7 RTÉNL shall include the report and opinion of the Auditor with the published Regulated Accounts.

3.3 Additional Financial Data

- 3.3.1 RTÉNL shall prepare such Additional Financial Data as required by ComReg (from time to time) and in a format as requested by ComReg, which may include the following:
 - a) HCA Income Statements for each Service. RTÉNL shall provide comparative prior period data, where available, unless ComReg agrees [in writing] that to have to do so would be unreasonable.
 - b) Schedule of charges for Services. RTÉNL shall provide comparative prior period data where possible, unless ComReg agrees [in writing] that it would be unreasonable to have to do so. The Services required to be included in the schedule of charges shall be determined annually by ComReg prior to the end of the financial period and notified to RTÉNL.
- 3.3.2 Income Statements requested by ComReg pursuant to paragraph 3.3.1 of this Annex shall distinguish between External and Inter/Intra revenues and costs.

- 3.3.3 RTÉNL's Additional Financial Data shall follow the same Regulatory Accounting Principles as applied in the preparation of the Regulated Accounts.
- 3.3.4 RTÉNL shall submit its Additional Financial Data to ComReg and, when required by it, the related opinion(s) of the Auditor or the report(s) from a qualified independent body, no later than four months after the end of the financial period (or otherwise as or when required by ComReg).
- 3.3.5 RTÉNL shall submit a copy of the Fixed Asset register as reconciled to the property, plant and equipment note and the intangible assets note (or their equivalents) per the Statutory Accounts no later than four months after the end of the financial period (or otherwise as or when required by ComReg).
- 3.3.6 The format and level of detail shown in the Additional Financial Data shall be determined by ComReg on an annual basis prior to the end of the financial period.

4 ACCOUNTING PRINCIPLES

4.1 General

- 4.1.1 The collection of data and the basis on which it is to be allocated and apportioned between regulated and unregulated markets and Services are detailed under the following headings:
- Cost allocation and apportionment principles (as set out in section 4.2 of this Annex);
 - Cost allocation and apportionment rules (as set out in section 4.3 of this Annex);
 - Inter/Intra transactions (as set out in section 4.4 of this Annex); and
 - Survey techniques (as set out in section 4.5 of this Annex).

4.2 Cost allocation and apportionment principles

- 4.2.1 RTÉNL shall allocate costs to each Service on a fully allocated cost basis, in the following manner:
- a) Where possible, costs which can be directly assigned to a particular Service shall be so assigned.
 - b) Common costs, which are costs that cannot be directly assigned to a particular Service, shall be allocated as follows:

- Whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
- When direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible, the indirect linkage shall be based on comparable cost structures; and
- When neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of an Equi-Proportional Mark Up, computed by using the ratio of all relevant expenses directly or indirectly assigned or allocated, to each Service.

4.3 Cost allocation and apportionment rules

4.3.1 RTÉNL shall ensure that costs are apportioned among the various Cost Components on the basis of factors/drivers which reflect the different impact of each item on the Functional Cost Categories. Where survey techniques are applied for the apportionment of costs the principles outlined in section 4.5 of this Annex shall be followed.

4.3.2 At a minimum and where relevant, RTÉNL shall ensure that the hierarchy of costs to be applied shall enable the cost of the following Functional Cost Categories to be calculated:

- Employee and personnel related costs;
- Network electricity;
- Maintenance costs;
- Other operating costs;
- Depreciation and amortisation;
- Central shared services costs;
- Rent and rates.

4.3.3 There shall be consistency in definitions of Functional Cost Categories between the Regulated Accounts and the Additional Financial Data.

4.3.4 ComReg reserves the right to amend this list as required from time to time.

4.4 Inter/Intra transactions

4.4.1 RTÉNL shall comply with the following transfer charging principles:

- a) Transfer charges (revenues and costs) shall be attributed to Cost Components, for regulated and unregulated Services, in accordance with the activities, which cause the revenues to be earned, or costs to be incurred.
- b) The attribution described in (a) shall be objective and not intended to benefit any Service (regulated or unregulated).
- c) There shall be consistency of treatment of transfer charges from period to period.
- d) The transfer charging methods used shall be transparent. There shall be a clear rationale for the transfer charges used and each charge shall be justifiable (and supporting calculations shall be made available to ComReg pursuant to paragraph 5.3(i) of this Annex).
- e) The charge for Inter/Intra usage shall be equivalent to the charge that is levied if the Service(s) were an External transaction rather than an Inter/Intra transaction. Where no equivalent charge exists the Nearest Equivalent Charge shall be charged and fully justified to ComReg by RTÉNL, pursuant to paragraph 5.3(i) of this Annex. Where no Nearest Equivalent Charge exists for the Inter/Intra transaction, a cost based charge shall be transferred and fully justified to ComReg by RTÉNL, pursuant to paragraph 5.3(i) of this Annex.

4.5 Survey techniques

4.5.1 RTÉNL shall ensure that survey data is based on appropriate methods. This shall result in a fair and objective allocation of revenue (including transfer charges), costs (including transfer charges), assets and liabilities. In this regard, any survey techniques used shall take account of the following:

- The survey data is unbiased and objective;
- The survey data is representative of the entire population;
- The survey data is not obscured by seasonal or other factors; and
- The survey data is updated annually.

5 ACCOUNTING DOCUMENTATION

5.1 RTÉNL's Accounting Documentation shall be sufficiently transparent and shall explain, but not be limited to, the regulatory principles used and the methodologies applied, for the purpose of preparing:

- The Regulated Accounts;
- The Additional Financial Data.

5.2 The Accounting Documentation shall consist of two principal documents.

5.3 'Primary Accounting Documentation', which shall include details on:

- An explanation of the basis of preparation of the Regulated Accounts, including an explanation of the key Accounting Policies adopted by RTÉNL. This shall include, but not be limited to, details of RTÉNL's income recognition policy, depreciation policy, capitalisation policy, and its approach to dealing with issues such as cost allocation, prior period adjustments and changes in Accounting Policies.
- A description of RTÉNL's business, explaining the main activities and functions performed.
- The definitions in relation to Functional Cost Categories.
- An overview of the regulatory accounting systems, in terms of the underlying principles and the conceptual flow of costs and revenues from source financial systems.
- An overview of the basis of calculation of any Inter/Intra transactions.
- An overview of the key cost allocation methodologies employed.
- The details of material period on period changes to the form and content of the Regulated Accounts and changes to cost allocation methodologies having a material impact.

5.4 'Secondary Accounting Documentation', which shall set out details of the systems, processes and procedures, material methodologies (i.e. those having a material impact on any of the financial statements specifically those used for deriving or calculating the costs, revenues, assets and liabilities (including details of attribution methodologies, valuation methodology and other relevant methodologies) used to prepare the Regulated Accounts and the Additional Financial Data.

5.5 Without prejudice to the generality of paragraph 5.4, the Secondary Accounting Documentation shall contain at least the elements listed below:

- a) An explanation of how the underlying financial records supporting RTÉNL's business activities and functions are grouped to provide the costs, revenues, assets and liabilities used within the internal system to apportion costs, revenues, assets and liabilities to Functional Cost Categories and Services.
- b) A description of the process of allocation/apportionment of each Functional Cost Category at the Service level. This shall also include an analysis of all material activities associated with each Functional Cost Category together with each Functional Cost Category's treatment as direct, indirect or common cost. Details and explanation of choice of cost driver shall also be disclosed.
- c) The means by which RTÉNL identifies how costs are found to be directly or indirectly attributable or common including:
 - How costs are directly allocated to Services;
 - How indirect costs have been apportioned on the basis of the associated cost driver; and
 - How common costs have been allocated on the basis of an Equi-Proportional Mark-Up.
- d) Details of cost driver definitions (i.e. basis of allocation) and calculations used in the preparation of the Regulated Accounts.
- e) Details of the internal safeguards that are implemented to ensure that the cost allocation system is free from material error.
- f) The means by which RTÉNL reviews, updates and verifies cost allocation drivers together with a description of changes in basis of allocation/apportionment from period to period, which have a material impact on the Regulated Accounts.
- g) Details of the survey techniques employed, including the design, scope, objectives, methodology, and why these are considered appropriate.
- h) Details of when surveys were last updated, frequency of updating, and reasons for updating.
- i) Details of the basis of calculation of any Inter/Intra transactions.

5.6 RTÉNL shall submit to ComReg (by email), for approval, an annual edition of the Accounting Documentation, detailing any amendments to the prior period versions.

5.7 Where it considers that one off or exceptional adjustments are required for the preparation of the Regulated Accounts, RTÉNL shall submit its proposals in this regard in advance to ComReg for consideration and approval. This shall detail any amendments to the relevant section of the Accounting Documentation, together with supporting files and/or workings where necessary. RTÉNL shall inform ComReg of these proposed adjustments in sufficient time to allow for them to be reviewed. These one-off or exceptional adjustments shall include (for example):

- a) Changes to study methodologies resulting in prior period adjustments;
- b) Changes to study methodologies resulting in significant changes to cost allocations; and
- c) Changes in Accounting Policies, methodologies and estimation techniques.

5.8 RTÉNL shall submit its Accounting Documentation to ComReg as follows:

- For the financial period commencing on or after 1 January 2013 a draft copy of the Accounting Documentation shall be submitted by 30 November 2013 (or otherwise as or when required by ComReg);
- For the financial periods commencing on or after 1 January 2014 a draft copy of the Accounting Documentation (detailing any amendments to the prior period version) shall be submitted within four months of the end of the financial period (or otherwise as or when required by ComReg).

5.9 RTÉNL shall:

- a) Review and update the Accounting Documentation annually.
- b) Publish the Primary Accounting Documentation on its publically available website following ComReg's approval.

6 REVIEW AND CONFIRMATION OF COMPLIANCE

6.1 RTÉNL shall:

- a) Submit a statement signed by the directors of RTÉNL acknowledging their responsibilities for the preparation of the Separated Accounts and confirming RTÉNL's compliance with the requirements of this Annex. This signed statement shall be submitted to ComReg four months after the end of the financial period (or otherwise as or when required by ComReg).
- b) Engage an Auditor to perform an audit of the Regulated Accounts, including considering compliance of the Regulated Accounts with this Annex, in accordance with International Standards on Auditing (UK and Ireland) and the principles and guidance set out by bodies' representative of the Irish accountancy professions from time to time. Such an audit opinion should be on a:
 - "Fairly presents in accordance with ..." basis or
 - "Properly prepared in accordance with..." basisin respect of the Regulated Accounts as a whole, as shall be notified in writing to RTÉNL from time to time by ComReg.
- c) Provide a report in respect of Additional Financial Data from a qualified independent body, when required by ComReg from time to time, prepared according to "Agreed Upon Procedures" which have been agreed between ComReg, RTÉNL and the qualified independent body.
- d) Consult with ComReg before the appointment/reappointment of the Auditor and provide assurances that its preferred Auditor has the necessary expertise.
- e) Procure a qualified independent body, to provide an appropriate opinion or report on the compliance of RTÉNL's Regulated Accounts, or part thereof, with this Annex, as required by ComReg from time to time. ComReg's requirements in this regard will be notified to RTÉNL in advance of its financial period end or in exceptional circumstances after the start of its next financial period where such an opinion or report is required.

6.2 RTÉNL shall ensure:

- a) That the Accounting Documentation is subject to review by a qualified independent body annually; and
- b) That the processes and procedures used by RTÉNL be subject to a review by a qualified independent body on an annual basis.

- 6.3 RTÉNL shall prepare and submit draft Regulated Accounts schedules and Draft Additional Financial Data schedules to ComReg within four months of the Effective Date of this Decision Instrument for ComReg's review. RTÉNL and ComReg shall endeavour to agree these schedules insofar as possible. ComReg, however, reserves the final right to determine and amend these schedules from time to time where agreement cannot be reached.
- 6.4 In this section, references to a qualified independent body may include an Auditor.

Annex 2 – Parameters for inclusion in the SLA obligation - Market A

1. The SLA parameters shall include, but shall not be limited to the following:
 - a) The scope of the SLA and details of the duration and negotiation of the SLA;
 - b) The objective of the SLA;
 - c) Broadcaster operators' business support;
 - d) Fault incidents;
 - e) Fault management;
 - f) Fault response;
 - g) Escalation process;
 - h) Network monitoring centre;
 - i) Service requests;
 - j) Business continuity management;
 - k) Routine meetings;
 - l) Reports;
 - m) A dispute resolution procedure to be used between parties;
 - n) Provisions regarding confidentiality of non-public parts of the SLA;
 - o) A description of the network access to be provided, including technical information;
 - p) The locations of the points of network access;
 - q) The technical standards for network access (including any usage restrictions and other security issues);
 - r) The conditions for access to ancillary and supplementary services;
 - s) Details of traffic and network management;
 - t) Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
 - u) Details of quality metrics;

- v) Details of measures to ensure compliance with requirements for network integrity; and,
- w) Rules of allocation between the parties when supply is limited.

Appendix E Final Decision Instrument – Market B

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to the market for wholesale access to DTT Multiplexing Services as defined by ComReg in the document entitled “*Market Review, Broadcasting Transmission Services in Ireland*” (ComReg Document 13/71), which satisfies the three criteria test as set out in ComReg Document 13/71, as required by the European Commission in its Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation¹.

- (i) Pursuant to and having regard to the functions and objectives of ComReg as set out in sections 10 and 12 of the Communications Regulations Act, 2002 to 2011², Regulation 6(1) of the Access Regulations³ and Regulation 16 of the Framework Regulations⁴;
- (ii) Having had regard to, where appropriate, the Broadcasting Act, 2009⁵;
- (iii) Having, where appropriate, complied with the Policy Directions made by the Minister further to section 13 of the Communications Regulation Act 2002⁶;

¹ European Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services – OJ L 344/65 (the “**2007 Recommendation**”).

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

³ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (“**Access Regulations**”) (S.I. No. 334 of 2011).

⁴ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (“**Framework Regulations**”) (S.I. No. 333 of 2011).

⁵ Broadcasting Act, 2009, No. 18 of 2009.

⁶ Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

- (iv) Having taken the utmost account of the European Commission's 2007 Recommendation and the European Commission's SMP Guidelines⁷;
- (v) Having had regard to the three criteria test, market definition, market analysis and reasoning conducted by ComReg in the Consultation, Market Review: Broadcasting Transmission Services in Ireland (ComReg Document 12/77);
- (vi) Having taken account of the submissions received in response to ComReg's Consultation, Market Review: Broadcasting Transmission Services in Ireland (ComReg Document 12/77);
- (vii) Having consulted with the Competition Authority further to Regulation 27 of the Framework Regulations;
- (viii) Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 13 of the Framework Regulations and having taken the utmost account, pursuant to Regulation 13(6) of the Framework Regulations, of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State;
- (ix) Pursuant to Regulations 25, 26 and 27 of the Framework Regulations and Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations.

1.2 The provisions of ComReg Document 12/77 and Response to Consultation and Final Decision D11/13 shall, where appropriate, be construed with this Decision Instrument.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)

2 DEFINITIONS AND INTERPRETATION

2.1 In this Decision Instrument:

“Access” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time, and for the purposes of this Decision Instrument access shall include Associated Service and Associated Facilities where appropriate;

⁷ European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services of 11 July 2002 – OJ C 165/03 (the **“SMP Guidelines”**).

“Access Regulations” means the European Communities (Electronic Communications and Network Services) (Access) Regulations, 2011 (S.I. No. 334 of 2011), as may be amended from time to time;

“Act of 2009” means Broadcasting Act, 2009, No.18 of 2009;

“Act of 2002” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011);

“Associated Facilities” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“Associated Services” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“Authorisation Regulations” means the European Communities (Electronic Communications and Network Services) (Authorisation) Regulations, 2011 (S.I. No. 335 of 2011), as may be amended from time to time;

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“Broadcaster” shall have the same meaning as under section 2 of the Act of 2009 and for the purposes of this Decision Instrument, the Broadcaster shall have the necessary statutory basis or Ministerial consent pursuant to section 130 of the Act of 2009, having regard to section 3.3 of this Decision Instrument;

“Broadcasting Service” shall have the same meaning as under section 2 of the Act of 2009;

“ComReg” means the Commission for Communications Regulation, as established under section 6 of the Act of 2002;

“ComReg Decision D11/13” means ComReg’s Response to Consultation and Final Decision of July 2013, ComReg Document 13/71;

“ComReg Document 12/77” means ComReg’s Consultation Paper and Draft Decision: Market Review: Broadcasting Transmission Services in Ireland of 13 July 2012;

“DTT” means Digital Terrestrial Television;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework)

Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time;

“**Multiplex**” means an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public, and the term “**Multiplexing Services**” shall have the same meaning;

“**Multiplex Infrastructure**” means, but is not limited to, the electronic system which combines the programme material, other related material and other data in a digital form, where “programme material” has the same meaning as under section 2 of the Act of 2009 and “related material” means material and other data directly related to, and associated with, the programme material;

“**Reference Offer**” or “**RO**” means the offer of contract by RTÉ to another Broadcaster in respect of Multiplexing Services (and Associated Services and Associated Facilities) in accordance with the requirements of this Decision Instrument. The RO sets out products, services and facilities including, but not limited to, service descriptions, associated terms and conditions and standards to be offered in accordance with the requirements set out in this Decision Instrument. To the extent that there is any conflict between the RO and the obligations now set out herein, the latter shall prevail;

“**RTÉ**” means Raidió Teilifís Éireann its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns;

“**Service Level Agreements**” or “**SLAs**” are legally binding contracts between RTÉ and Broadcasters in relation to the service levels which RTÉ commits to from time to time;

“**Significant Market Power (SMP) obligations**” are those obligations set out in Regulations 8 to 13 of the Access Regulations, as may be amended from time to time;

“**Transmission**” shall have the same meaning as under section 2 of the Act of 2009;

“**wholesale access to DTT Multiplexing Services**” and references to the “**Market**” means the market for wholesale access to DTT Multiplexing Services and, for the avoidance of doubt means wholesale access to any Multiplex operated and maintained by RTÉ for the purposes of DTT, as set out in section 4 below.

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

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument applies to RTÉ in respect of activities falling within the scope of the Market, as defined in section 4 of this Decision Instrument.
- 3.2 This Decision Instrument is binding upon RTÉ and RTÉ shall comply with it in all respects.
- 3.3 For the avoidance of doubt, the obligations set out in section 6 to 12 of this Decision Instrument apply to RTÉ with respect to its broadcast of programme material pursuant to section 130(1)(e) of the Act of 2009 only if RTÉ has exercised its discretion to broadcast such programme material.

4 MARKET DEFINITION

- 4.1 Pursuant to Regulation 26 of the Framework Regulations, taking the utmost account of the European Commission's 2007 Recommendation and taking utmost account of its SMP Guidelines and in accordance with the principles of competition law, the product market in this Decision Instrument is defined as the market for wholesale access to DTT Multiplexing Services, as set out in detail in section 4 of ComReg Decision D11/13.
- 4.2 Pursuant to Regulation 26 of the Framework Regulations, taking the utmost account of the European Commission's SMP Guidelines and the European Commission's Explanatory Note⁸ and in accordance with the principles of competition law, the relevant geographic market is defined as Ireland.

5 DESIGNATION OF UNDERTAKING WITH SMP

- 5.1 Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations, the completion of the three criteria test pursuant to the European Commission's 2007 Recommendation and consistent with the SMP Guidelines and the assessment of significant market power, having determined that the market is not effectively competitive, RTÉ is designated as having SMP on the Market.

⁸ Commission Staff Working Document Explanatory Note accompanying document to the European Commission's Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation SEC (2007) 1483/2, 13 November 2007.

PART II – SMP OBLIGATIONS (SECTIONS 6 TO 12 OF THE DECISION INSTRUMENT)

6 SMP OBLIGATIONS

- 6.1 ComReg is imposing certain SMP obligations on RTÉ in accordance with and pursuant to Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations, as detailed further in sections 7 to 12 below.

7 OBLIGATIONS TO PROVIDE ACCESS

- 7.1 Pursuant to Regulation 12(1) of the Access Regulations and in accordance with section 130(1) of the Act of 2009, RTÉ shall meet all reasonable requests from Broadcasters in the context of section 130 of the Act of 2009 for the provision of Access, including Associated Facilities and Associated Services, subject to section 3.3 of this Decision Instrument.

- 7.2 Without prejudice to the generality of sections 7.1, RTÉ shall:

- (i) Pursuant to Regulation 12(2)(a) of the Access Regulations, give Broadcasters Access to specified Multiplex Infrastructure elements or facilities;
- (ii) Pursuant to Regulation 12(2)(b) of the Access Regulations, negotiate in good faith with Broadcasters requesting Access;
- (iii) Pursuant to Regulation 12(2)(c) of the Access Regulations, not withdraw, without the prior approval of ComReg, Access to services and facilities already granted,;
- (iv) Pursuant to Regulation 12(2)(e) of the Access Regulations, grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services;
- (v) Pursuant to Regulation 12(2)(f) of the Access Regulations, provide co-location or other forms of Associated Facilities sharing where relevant.

8 CONDITIONS ATTACHED TO THE ACCESS OBLIGATIONS

- 8.1 Pursuant to Regulation 12(3) of the Access Regulations and subject to section 3.3 of this Decision Instrument, RTÉ shall, in relation to the obligations set out under section 7 above, grant Access to the Market and Associated Services and Associated Facilities in a fair, reasonable and timely manner.

- 8.2 Without prejudice to the generality of section 8.1, RTÉ shall:
- (i) Conclude, maintain and keep updated, as appropriate, legally binding SLAs with Broadcasters that shall include, but shall not be limited to, the maintenance of the SLA requirements as set out in Annex 2 to this Decision Instrument;
 - (ii) Negotiate in good faith with Broadcasters in relation to the conclusion of legally binding and fit-for-purpose SLAs;
 - (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter of negotiation between RTÉ and Broadcasters and recovery of service credits shall be, in the first instance, a matter for the Broadcasters and RTÉ;
 - (iv) Ensure that SLAs detail how service credits, when they occur, are calculated, to include the provision of an example calculation;
 - (v) Ensure payment of service credits, when they occur, shall be made in a timely and efficient manner.
- 8.3 Where a request for provision of Access, or a request for provision of information is refused or granted only in part, RTÉ shall provide the objective criteria and reasons for such refusal, or partial grant, to the Broadcaster which made the request, in a fair, reasonable and timely manner,.

9 OBLIGATION OF NON-DISCRIMINATION

- 9.1 RTÉ shall have an obligation of non-discrimination as provided for by Regulation 10 of the Access Regulations, subject to section 3.3 of this Decision Instrument.
- 9.2 Without prejudice to the generality of section 9.1 and pursuant to Regulation 10(2) of the Access Regulations, RTÉ shall:
- (i) Apply equivalent conditions in equivalent circumstances to other Broadcasters providing equivalent services;
 - (ii) 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;

- (iii) 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.

9.3 For the avoidance of any doubt, the obligations set out at this section 9 apply irrespective of whether or not a specific request for services or information has been made.

10 OBLIGATION OF TRANSPARENCY

10.1 RTÉ shall have an obligation of transparency as provided for by Regulation 9 of the Access Regulations.

10.2 Without prejudice to the generality of the obligation in section 10.1, pursuant to Regulation 9(2) of the Access Regulations, RTÉ shall have an obligation to make publicly available and keep updated on its publicly available website (or such other publicly available website as may be agreed by ComReg), a Reference Offer. The Reference Offer shall be comprehensive and appropriately detailed. The Reference Offer shall be sufficiently detailed so as to ensure that Broadcasters availing of services and facilities are not required to pay for services or facilities which are not necessary for the service or facility requested.

10.3 Without prejudice to the generality of the obligation in section 10.2, pursuant to Regulation 9(2) of the Access Regulations, RTÉ's Reference Offer shall include at least the following:

- (i) A description of the relevant offerings broken down into components according to market needs;
- (ii) A description of the technical specifications and network characteristics of the Access being offered;
- (iii) A description of the associated terms and conditions for supply and use, including prices, which shall include a detailed description of the tariff model and how it operates to derive such prices.

10.4 Pursuant to Regulation 9(2) of the Access Regulations, the Reference Offer referred to in section 10.2 shall be published within four months of the effective date of this Decision Instrument.

- 10.5 Pursuant to Regulations 9(2) and 9(3) of the Access Regulations, RTÉ shall, unless otherwise determined by ComReg, make publicly available and publish on its publicly available website (or such other publicly available website as may be agreed by ComReg) at least two months in advance of coming into force, any proposed changes to the Reference Offer and any proposed changes to wholesale prices (including prices for new services and facilities). RTÉ shall notify ComReg, in writing, with the information to be published at least one month in advance of any such publication, i.e. three months prior to any changes coming into effect. The periods referred to in this section may be varied with the agreement of ComReg or at ComReg's discretion.
- 10.6 Pursuant to Regulation 9(3) of the Access Regulations, ComReg may issue directions requiring RTÉ to make changes to the Reference Offer and to publish the Reference Offer with such changes.
- 10.7 Without prejudice to the generality of the obligation of transparency in section 10.1, RTÉ shall make public information on its publicly available website (or such other publicly available website as may be agreed by ComReg), such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 7, as specified by ComReg from time to time and all other information which may be reasonably required by Broadcasters.
- 10.8 Pursuant to Regulations 9(2) and 9(3) of the Access Regulations, RTÉ shall have an obligation to publish all SLAs (and any updates) on its publicly available website (or such other publicly available website as may be agreed by ComReg).
- 10.9 Pursuant to Regulation 18 of the Access Regulations, ComReg may issue directions to RTÉ from time to time requiring it to publish information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.

11 OBLIGATION OF ACCOUNTING SEPARATION

- 11.1 Pursuant to Regulation 11 of the Access Regulations, RTÉ shall have an obligation to maintain separated accounts as detailed in Annex 1 attached to this Decision Instrument.

12 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING

- 12.1 Pursuant to Regulation 13(1) of the Access Regulations, RTÉ shall maintain appropriate cost accounting systems in respect of Access, including Associated Services and Associated Facilities, referred to in section 7.
- 12.2 Pursuant to Regulation 13(1) of the Access Regulations, having regard to section 3.3 of this Decision Instrument, RTÉ shall be subject to a price control obligation in the form of an obligation of cost orientation, as regards the prices charged by it to any Broadcaster for Access, including Associated Services and Associated Facilities, referred to in section 7.
- 12.3 Without prejudice to the generality of section 12.2 and in accordance with Regulation 13(3) of the Access Regulations, RTÉ shall ensure that the cost orientation obligation referred to in section 12.2 shall be based on Fully Distributed Costs using the Historical Cost Accounting methodology adjusted, where appropriate, for efficiencies as described in Annex 1.
- 12.4 RTÉ shall ensure that its charges in respect of Access, including Associated Services and Associated Facilities, referred to in section 7 are no more than those calculated in accordance with the methodology specified in section 12.3 above.

PART IV – OBLIGATIONS AND EFFECTIVE DATE (SECTIONS 13 TO 15 OF THE DECISION INSTRUMENT)

13 STATUTORY POWERS NOT AFFECTED

- 13.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument) from time to time as the occasion requires.

14 MAINTENANCE OF OBLIGATIONS

- 14.1 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

15 EFFECTIVE DATE

- 15.1 The effective date of this Decision Instrument shall be the date of its publication and notification to RTÉ and it shall remain in force until further notice by ComReg.

KEVIN O'BRIEN

COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE 26 DAY OF JULY 2013

Annex 1 – Detail of the Accounting Separation Obligations - Market B

1 DEFINITIONS AND INTERPRETATION

1.1 In this Annex 1, unless otherwise indicated:

“**Accounting Documentation**” refers to the description of policies and methodologies used to produce the financial information contained within the Regulated Accounts and the Additional Financial Data.

“**Accounting Policies**” means the specific policies and procedures used by a company to prepare its Regulated Accounts.

“**Additional Financial Data**” means the data that shall be provided by RTÉ, as determined by ComReg, on an annual basis.

“**Agreed Upon Procedures**” means procedures agreed between relevant parties pursuant to a letter of engagement.

“**Attribution Methods**” refers to the methods employed to allocate and apportion revenues, costs and capital employed to Market B or Service levels.

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

“**Cost Component**” means the accumulation of various costs (direct, indirect, and common) through the various cost allocation stages within the cost accounting system from initial input layer through to final Services.

“**Effective Date**” means the date set out in section 15 of the Decision Instrument.

“**External**” means the supply of Services to parties outside of RTÉ.

“**Fixed Asset**” means tangible and intangible items that are held for use in the production or supply of goods or services, for rental to others, or for administrative purposes and which are expected to be used during more than one period.

“**Functional Cost Categories**” means the various expense categories as determined from time to time by ComReg.

“**Income Statement**” means a statement showing all items of income and expense recognised in a period.

“**Inter**” means the supply of Services between RTÉ and its subsidiaries.

“**Intra**” means the supply of Services within RTÉ.

“Market B” means the market for wholesale access to DTT multiplexing services as set out in section 4 of this Decision.

“Mean Capital Employed” is the mean of the assets and liabilities of RTÉ, adjusted to amend for certain assets and liabilities which are excluded for regulatory purposes.

“Nearest Equivalent Charge” means a price/prices from RTÉ’s Reference Offer (as defined in the Decision Instrument) price list which most closely represent(s) the technical capabilities of a Service as if it were an External transaction.

“Accounting Documentation” means those documents containing the information set out at section 5 of this Annex.

“Regulatory Accounting Principles” establish the key doctrines to be applied in the preparation of regulatory accounting information. They should include, but not be limited to, the principles of cost causality, objectivity, transparency and consistency of treatment.

“Regulated Accounts” mean those accounts as described in section 3.2 of this Annex.

“Separated Accounts” refers to the financial information referred to in section 3.1 of this Annex.

“Service(s)” for the purposes of this Annex shall mean Multiplexing Services

- 1.2 Where a capitalised term used in this Annex is not defined, the definition in the Market B Decision Instrument shall prevail.

2 FUNDAMENTAL REQUIREMENTS AND FURTHER SPECIFICATION OF SMP OBLIGATIONS

- 2.1 RTÉ’s financial records and accounting systems shall be sufficiently detailed and supported by sufficient data to ensure that for the Services:

- (i) RTÉ is in a position to comply with the transparency, non-discrimination, accounting separation, price control, and cost accounting obligations imposed on it by the Decision Instrument; and
- (ii) RTÉ is in a position to prepare Separated Accounts which shall be maintained for Market B and, where specified, for Services.

3 REPORTING AND TRANSPARENCY

3.1 Separated Accounts

3.1.1 Without prejudice to the generality of section 2 of this Annex, RTÉ shall prepare Separated Accounts annually.

3.1.2 RTÉ's Separated Accounts shall contain:

- a) Regulated Accounts (as set out in section 3.2 of this Annex);
- b) Additional Financial Data (as set out in section 3.3 of this Annex);
- c) Accounting Documentation (as set out in section 5 of this Annex).

3.2 Regulated Accounts

3.2.1 RTÉ's Regulated Accounts will consist of Historical Cost Accounts ("HCA").

3.2.2 RTÉ's Regulated Accounts shall contain:

- a) A statement or reference to the Regulatory Accounting Principles followed when preparing the Regulated Accounts which shall include but not be limited to the following terms:
 - Cost causality;
 - Objectivity;
 - Transparency;
 - Consistency of treatment.
- b) An income Statement and statement of Mean Capital Employed for the Services.
- c) Notes to the Regulated Accounts as required by ComReg.

3.2.3 RTÉ's Regulated Accounts shall be accompanied by:

- a) A signed statement from a suitably qualified person as approved by the board of RTÉ and ComReg acknowledging the board's responsibilities for the preparation of the Regulated Accounts and confirming its compliance with the requirements of this Annex in this respect.
- b) A report and opinion by an Auditor on the Regulated Accounts and RTÉ's compliance with the requirements of this Annex, in respect of the preparation of the Regulated Accounts, including the requirements set out in paragraph 6.1(b) of this Annex.

- 3.2.4 The Regulated Accounts shall be prepared in accordance with Regulatory Accounting Principles and Accounting Policies. These Regulated Accounts shall show data for RTÉ's last complete financial period for the Services(s) as well as the previous financial period and where these figures are not comparable, as a result of (for example) a material change in Accounting Policy, cost attribution methodology or material error, the figure for the preceding financial period must be adjusted unless ComReg agrees [in writing] that it would be unreasonable to have to make such an adjustment.
- 3.2.5 In accordance with the transparency obligation in section 10 of the Decision Instrument RTÉ shall publish its Regulated Accounts on the publicly available website of RTÉ and/or RTÉNL no later than four months after the end of the financial period (or otherwise as or when required by ComReg.).
- 3.2.6 RTÉ shall include the report and opinion of the Auditor with the published Regulated Accounts.

3.3 Additional Financial Data

- 3.3.1 RTÉ shall prepare such Additional Financial Data as required by ComReg from time to time, in a format requested by it, which may include the following:
- a) Schedule of charges by individual Broadcasters. This shall also be reconciled to the income per the Income Statement in paragraph 3.2.2 (b) of this Annex.
 - b) Copy of the Fixed Asset register of assets relevant to Services in respect of Market B.
- 3.3.2 Income Statements requested by ComReg pursuant to paragraph 3.3.1 of this Annex shall distinguish between External and Inter/Intra revenues and costs.
- 3.3.3 RTÉ's Additional Financial Data shall follow the same Regulatory Accounting Principles as applied in the preparation of the Regulated Accounts.
- 3.3.4 RTÉ shall submit Additional Financial Data to ComReg and, when required by it, the related opinion(s) of the Auditor or the report(s) from a qualified independent body, no later than four months after the end of the financial period (or otherwise as or when required by ComReg).

3.3.5 The format and level of detail shown in RTÉ's Additional Financial Data shall be determined by ComReg on an annual basis prior to the end of the financial period.

4 ACCOUNTING PRINCIPLES

4.1 General

4.1.1 In the collection of data and the basis on which such data is to be allocated and apportioned between Broadcasters, is detailed under the following headings:

- Cost allocation and apportionment principles (as set out in section 4.2 of this Annex);
- Cost allocation and apportionment rules (as set out in section 4.3 of this Annex);
- Inter/Intra transactions (as set out in section 4.4 of this Annex); and,
- Survey techniques (as set out in section 4.5 of this Annex).

4.2 Cost allocation and apportionment principles

4.2.1 RTÉ shall allocate costs to each Service on a fully allocated cost basis, in the following manner:

- a) Where possible, costs which can be directly assigned to a particular Service shall be so assigned.
- b) Common costs, which are costs that cannot be directly assigned to a particular Service, shall be allocated as follows:
 - Whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
 - When direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible, the indirect linkage shall be based on comparable cost structures; and
 - When neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of an Equi-Proportional Mark Up, computed by using the ratio of all relevant expenses

directly or indirectly assigned or allocated, to each Service.

4.3 Cost allocation and apportionment rules

4.3.1 RTÉ shall ensure that costs are apportioned among the various Cost Components on the basis of factors/drivers which reflect the different impact of each item on the Functional Cost Categories. Where survey techniques are applied for the apportionment of costs the principles outlined in section 4.5 of this Annex shall be followed.

4.4 Inter/Intra transactions

4.4.1 RTÉ shall comply with the following transfer charging principles:

- a) Transfer charges (revenues and costs) shall be attributed to Broadcasters in accordance with the activities which cause the revenues to be earned, or costs to be incurred;
- b) The attribution described in (a) above shall be objective and not intended to benefit any particular Broadcaster in preference to another;
- c) There shall be consistency of treatment of transfer charges from period to period;
- d) The transfer charging methods used shall be transparent. There shall be a clear rationale for the transfer charges used and each charge shall be justifiable (and supporting calculations shall be made available to ComReg, including the details of the basis of calculation of any Inter/Intra transactions); and
- e) The charge for Inter/Intra usage shall be equivalent to the charge that is levied if the Service (regulated and unregulated) were an External sale rather than an Inter/Intra transaction. Where no equivalent charge exists the Nearest Equivalent Charge shall be charged and fully justified to ComReg by RTÉ. Where no Nearest Equivalent Charge exists, a cost based transfer charge shall be used and fully justified to ComReg by RTÉ, including the details of the basis of calculation of any Inter/Intra transactions.

4.5 Survey techniques

4.5.1 RTÉ shall ensure that survey data is based on appropriate methods. This shall result in a fair and objective allocation of revenue (including transfer charges), costs (including transfer charges), assets and

liabilities. In this regard, any survey techniques used shall take account of the following:

- The survey data is unbiased and objective;
- The survey data is representative of the entire population;
- The survey data is not obscured by seasonal or other factors; and
- The survey data is updated annually.

5 ACCOUNTING DOCUMENTATION

5.1 RTÉ's Accounting Documentation shall be sufficiently transparent and shall explain, *inter alia*, the regulatory principles used and the methodologies applied, for the purpose of preparing:

- The Regulated Accounts;
- The Additional Financial Data.

5.2 The Accounting Documentation shall contain:

- Information on the sources of financial data.
- Details on the cost drivers used to allocate costs.
- Details on the Services offered and the associated capacity required on the Multiplex.

5.3 RTÉ shall review and update the Accounting Documentation annually.

5.4 RTÉ shall publish the Accounting Documentation annually on the publicly available website of RTÉ and/or RTÉNL following ComReg's approval.

5.5 RTÉ shall submit its Accounting Documentation to ComReg as follows:

- For the financial period commencing on or after 1 January 2013 a draft copy of the Accounting Documentation shall be submitted by 30 November 2013 (or otherwise as or when required by ComReg);
- For the financial periods commencing on or after 1 January 2014 a draft copy of the Accounting Documentation (detailing any amendments to the prior period version) shall be submitted within four months of the end of the financial period (or otherwise as or when required by ComReg).

6 REVIEW AND CONFIRMATION OF COMPLIANCE

6.1 RTÉ shall:

- a) Submit a statement signed by a suitably qualified person as approved by the board of RTÉ and ComReg acknowledging his/her responsibilities for the preparation of the Separated Accounts and confirming his/her compliance with the requirements of this Annex in this respect. This signed statement shall be submitted to ComReg four months after the end of the financial period (or otherwise as or when required by ComReg).
- b) Engage an independent Auditor qualified for appointment as an Auditor under the companies Acts to perform an audit of the Regulated Accounts, including considering compliance of the Regulated Accounts with this Annex, in accordance with International Standards on Auditing (UK and Ireland) and the principles and guidance set out by bodies' representative of the Irish accountancy professions from time to time. Such an audit opinion should be on a:
 - “Fairly presents in accordance with ...” basis or
 - “Properly prepared in accordance with....” basisin respect of the Regulated Accounts as a whole as shall be notified in writing to RTÉ from time to time by ComReg.
- c) Provide a report in respect of RTÉ's Additional Financial Data from a qualified independent body, when required by ComReg from time to time, prepared according to “Agreed Upon Procedures”, which have been agreed between ComReg, RTÉ and the qualified independent body.
- d) Consult with ComReg before the appointment/reappointment of the Auditor and provide assurance that its preferred Auditor has the necessary expertise.
- e) Procure a qualified independent body, to provide an appropriate opinion or report on the compliance of RTÉ's Regulated Accounts, or part thereof, with this Annex, as required by ComReg from time to time. ComReg's requirements in this regard will be notified to RTÉ in advance of its financial period end or in exceptional circumstances where such an opinion or report is required.

6.2 RTÉ shall ensure:

- a) That the Accounting Documentation is subject to review by a qualified independent body annually; and
 - b) That the processes and procedures used by RTÉ be subject to a review by a qualified independent body on an annual basis.
- 6.3 RTÉ shall prepare and submit draft Regulated Accounts schedules and draft Additional Financial Data schedules to ComReg within four months of the Effective Date of this Decision Instrument for ComReg's review. RTÉ and ComReg shall endeavour to agree these schedules insofar as possible. ComReg, however, reserves the final right to determine and amend these schedules from time to time where agreement cannot be reached.
- 6.4 In this section, references to a qualified independent body may include an Auditor.

Annex 2 – Parameters for inclusion in the SLA obligation - Market B

1. The SLA parameters shall include, but shall not be limited to the following:
 - a) The scope of the SLA and details of the duration and negotiation of the SLA;
 - b) The objective of the SLA;
 - c) Broadcasters' business support;
 - d) Fault incidents;
 - e) Fault management;
 - f) Fault response;
 - g) Escalation process;
 - h) Network monitoring centre;
 - i) Service requests;
 - j) Business continuity management;
 - k) Routine meetings;
 - l) Reports;
 - m) A dispute resolution procedure to be used between parties;
 - n) Provisions regarding confidentiality of non-public parts of the SLA;
 - o) A description of the network access to be provided, including technical information;
 - p) The locations of the points of network access;
 - q) The technical standards for network access (including any usage restrictions and other security issues);
 - r) The conditions for access to ancillary and supplementary services;
 - s) Details of traffic and network management;
 - t) Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests; and,
 - u) Details of quality metrics.

- v) Details of measures to ensure compliance with requirements for network integrity; and,
- w) Rules of allocation between the parties when supply is limited.

Appendix F Regulatory Impact Assessments

Market A - Regulatory Impact Assessment

- F.1 The RIA is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have a desired impact. It is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.
- F.2 ComReg's approach to RIA follows the RIA Guidelines⁹ published by ComReg in August 2007 and takes into account the Government's Better Regulation programme¹⁰ and international best practice (for example, considering developments about RIA published by the European Commission and the OECD).
- F.3 Section 13(1) of the Communications Regulation Acts 2002-2011 requires ComReg to comply with Ministerial Policy Directions. In this regard, Ministerial Policy Direction 6 of February 2003¹¹ requires that, before deciding to impose regulatory obligations, ComReg shall conduct a RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.
- F.4 ComReg's approach to RIA follows five steps:
- Step 1: Describe the policy issue and identify the objectives.
 - Step 2: Identify and describe the regulatory options.
 - Step 3: Determine the impacts on stakeholders.
 - Step 4: Determine the impacts on competition.
 - Step 5: Assess the impacts and choose the best option.
- F.5 The purpose of a RIA is to aid decision-making through identifying regulatory options and analysing the impact of those options in a structured manner. The Government's Revised RIA Guidelines state that:

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

⁹ ComReg, "Guidelines on ComReg's Approach to Regulatory Impact Assessment", [ComReg Document 07/56a](#), 10 August 2007 (the 'RIA Guidelines').

¹⁰ Department of the Taoiseach, "Regulating Better", January 2004. See also "Revised RIA Guidelines: How to conduct a Regulatory Impact Analysis", June 2009, [/www.betterregulation.ie/eng/Publications/Revised_RIA_Guidelines.pdf](http://www.betterregulation.ie/eng/Publications/Revised_RIA_Guidelines.pdf).

¹¹ Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

- F.6 The European Commission, in reviewing its own use of impact assessments, also notes that:

“Impact assessments need to be conducted earlier in the policy development process so that alternative courses of action can be thoroughly examined before a proposal is tabled.”¹²

- F.7 Having regard to these guidelines, it is clear that the RIA should be introduced as early as possible in the assessment of potential regulatory options, where appropriate and feasible. The consideration of regulatory impact provides a discussion of options, and the RIA should therefore be integrated within the overall analysis. This is the approach that ComReg has followed in the BTS Review. This is the final RIA of Market A having taken into account of Respondents’ views to the BTS Consultation and comments from the CA and the European Commission.

Step 1 - Describe the policy issue and identify the objectives

- F.8 ComReg’s principal objective is to ensure that BTS provides for effective competition to positively benefit end-users. To this end, ComReg aims to ensure that a dominant operator is prevented from potential exploitation of its market power, as this would negatively impact the retail market.
- F.9 As has been discussed previously in BTS Consultation and this Decision, this is ComReg’s second BTS Review, and regulatory remedies were put in place following the 2004 Broadcasting Review.
- F.10 At that time the BTS Review concluded that RTÉNL had SMP in two Relevant Markets. A range of actual and potential competition problems were identified and, in order to address these, remedies were imposed (obligations of transparency and non-discrimination).
- F.11 In the BTS Consultation and this Decision, ComReg carried out an analysis of competition which indicated that RTÉNL has SMP in Market A. Further to 27(4) the Framework Regulations, following a finding of SMP, ComReg is obliged to impose at least one regulatory obligation on an SMP undertaking. Therefore, not imposing a regulatory obligation is not an option under the Framework Regulations.
- F.12 There is one BTS provider in Market A, and that is RTÉNL. RTÉNL has built a BTS network capable of providing digital and analogue terrestrial BTS on a national basis. While analogue terrestrial TV services ceased on 24 October 2012, analogue terrestrial radio services continue to be broadcast.
- F.13 ComReg does not believe the competitive conditions of Market A will substantially alter in the timeframe of this BTS Review. The fact that this

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Second strategic review of Better Regulation in the European Union”, COM(2008) 32 final 30.01.2008, p. 6.

infrastructure also caters for the transmission of digital signals (which should allow for the carriage of more programme services) rather than analogue signals alone, as was the case at the time of the ComReg's 2004 Broadcasting Analysis, does not improve the competitive conditions of the market due to the ability and incentives of RTÉ. As RTÉ, through RTÉNL, has the ability and incentives to engage in exploitative and exclusionary behaviour in Market A in order to protect its audience share of the retail market and in turn the commensurate advertising revenues it can command, this may mean that quality and choice is restricted in the retail market for end-users.

- F.14 It is therefore necessary and appropriate to impose regulatory obligation(s) on RTÉNL in order to facilitate greater choice and quality to end-users and to ensure a level playing field for Downstream Broadcasters and Multiplex Operators reliant on RTÉNL's wholesale inputs.
- F.15 There are a number of considerations to take into account since ComReg's 2004 Broadcasting Analysis which ComReg considers requires the introduction of remedies. These include:
- The 2009 Act and ASO;
 - Investment by RTÉNL in BTS infrastructure; and,
 - Concerns expressed by Downstream Broadcasters.

The 2009 Act and ASO

- F.16 ComReg imposed regulatory obligations of transparency and non-discrimination on RTÉNL in 2004 following designation of SMP as ComReg believed these regulatory obligations to be appropriate at that time. ComReg, at that time, believed that such level of regulation was appropriate, expecting that this would facilitate growth and development of a market(s) which was new to *ex ante* regulation.
- F.17 The 2009 Act introduced the possibility of digital terrestrial services entering the market. This would enable Multiplex Operators programme services to compete at the retail level with RTÉ, however, any potential Multiplex Operator would require access to RTÉNL's BTS infrastructure for the purposes of broadcasting the programme services on their multiplex(es).
- F.18 The move to digital terrestrial BTS should mean that there is capacity available for broadcast of more programme services content on the terrestrial network but, in ComReg's view, potential competition problems are exacerbated as well. This is because ComReg is of the view that over time potential competition problems in terms of terrestrial BTS have remained for Downstream Broadcasters and such competition problems have now also expanded (to include issues for Multiplex Operators) with the move to digital terrestrial BTS such that more rigorous *ex ante* regulation is required to address failures in Market A, as defined by ComReg.

- F.19 With the potential for more competition from a greater number of Downstream Broadcasters and related programme services content, an SMP operator may engage in anti-competitive activity in upstream wholesale markets to protect its own position in downstream markets. While an SMP operator would earn more revenues from carriage of a greater number of Downstream Broadcasters and Multiplex Operators, BTS revenues are not comparable to the advertising revenues that can be commanded.¹³ Therefore, market conditions may not be conducive to a competitive outcome as entry may be limited to the downstream retail market by anti-competitive behaviour in this wholesale market.
- F.20 ComReg considers that it is unlikely that an effective alternative national terrestrial BTS source will develop in the timeframe of this BTS Review and so Downstream Broadcasters and Multiplex Operators will be dependent on access to RTÉNL's BTS network infrastructure in order to provide their own downstream retail market services.
- F.21 It is therefore important to ensure that access to RTÉNL's BTS infrastructure is not foreclosed or limited and that access is appropriately priced as there are currently no alternative BTS options available for Downstream Broadcasters and Multiplex Operators and therefore negotiation of reasonable prices by commercial means may be less likely.

Investment by RTÉNL in BTS infrastructure

- F.22 RTÉNL has made significant investment in upgrading its network to cater for digital terrestrial transmission. The number of sites considered necessary for transmission of digital services has reduced from the number which was used for analogue terrestrial TV BTS.
- F.23 Much of RTÉNL's network infrastructure has been in place for a long time and has required replacement regardless of the move to digital terrestrial BTS. Some of this has involved the replacement of towers and masts which require significant levels of investment.
- F.24 As the sites required for digital terrestrial BTS may be different to the sites required by RTÉNL to offer analogue terrestrial BTS and non BTS, it would be necessary to ensure that costs are allocated appropriately across the RTÉNL's BTS network. This is to ensure that BTS and non BTS customers receive their fair share of costs in a non-discriminatory fashion.

Concerns expressed by Downstream Broadcasters

- F.25 In recent years concerns have been expressed to ComReg from some Downstream Broadcasters regarding the pricing of RTÉNL's BTS.

¹³ For example, according to RTÉ's Annual Report and Group Financial Statements 2011, total group (after removal of intra group revenues and costs) advertising income across all media was €123.8 million in the year ended 2011, while transmission, mast and towers income was €14.7 million. It should be noted however, that these advertising revenues are those accrued across all broadcasting platforms and not just the terrestrial platform. "Annual Report and Group Financial Statements", RTÉ, dated 2011. See <http://www.rte.ie/documents/about/RTE%202011%20Annual%20Report%20-%20English.pdf>

Concern has been expressed at the perceived lack of transparency in the tariffs being charged by RTÉNL. None of these tariffs have been subject to independent review.

- F.26 The introduction of regulatory obligations of price control and cost accounting would enable ComReg to assess the validity of any future complaints and provide transparency and / or assurances that the calculation of tariffs by RTÉNL is reasonable.
- F.27 While it is not necessary for ComReg to point to actual examples of competition problems arising from dominance, where SMP is identified in a market, such competition problems may arise absent regulation.

Step 2 - Identify and describe the potential regulatory options

- F.28 ComReg recognises that *ex ante* regulatory measures should be kept to the minimum necessary to address the identified market failure in an effective, efficient and proportionate manner. There are a range of potential regulatory options available to ComReg to address competition problems in Market A.
- F.29 In this regard, *ex ante* regulation can be considered to be incremental, such that only regulatory obligations which are necessary and proportionate to the competition problems which have been identified are imposed. The lightest measure that can be imposed is the obligation of transparency. Should this be insufficient to address competition problems on its own, ComReg may apply a non-discrimination obligation. If this is still not sufficient, ComReg may next consider the imposition of an access obligation, generally supported by accounting separation obligations. The final measure to be considered is the imposition of a price control and cost accounting remedy.
- F.30 The question of regulatory forbearance and the incremental imposition of one or more of the above regulatory obligations are considered below.

Forbearance

- F.31 In the BTS Consultation and this Decision ComReg set out its view that Market A is neither effectively competitive nor likely to become effectively competitive within the timeframe covered by this BTS Review.
- F.32 As such, absent the imposition of any remedies, it is ComReg's position that Market A would not be likely to operate in an effectively competitive manner. It is ComReg's position that the option of regulatory forbearance in Market A is not, therefore, appropriate or justified.

Transparency Obligations

- F.33 Following ComReg's review of potential competition problems in the BTS Consultation, and the views expressed in this Decision ComReg is of the position that a transparency obligation is necessary in Market A to facilitate the development of effective downstream competition.

- F.34 However, ComReg is of the view that transparency obligations, on their own, are not sufficient. While transparency obligations allow monitoring and observation of actions, they do not directly affect the actions / behaviour of an SMP undertaking itself.

Non-Discrimination Obligations

- F.35 In light of the competition problems identified in the BTS Consultation, and the views expressed in this Decision, ComReg is of the position that a non-discrimination obligation should be imposed on RTÉNL. A non-discrimination remedy requires that RTÉNL ensures that Downstream Broadcasters and Multiplex Operators being provided with the same terrestrial BTS are not treated differently, for example in a different manner to the BTS which RTÉNL provides to RTÉ.
- F.36 The transparency obligations are complementary to this non-discrimination obligation as they provide the means of observing that discrimination is not occurring. In view of potential issues of discriminatory treatment (on price or non-price terms), transparency obligations alone would not address such issues. Furthermore, a non-discrimination obligation itself (or coupled with transparency) does not specifically address what type of product or service should be offered, or how it should be offered. Recourse to a non-discrimination obligation tends to be on an *ex post* basis, so that a Downstream Broadcaster and Multiplex Operator alleges a breach after the event.
- F.37 Thus, the operation of the non-discrimination and transparency obligations alone are considered inadequate by ComReg as a means of ensuring, *ex ante*, that RTÉNL provides access, including requests for different types of access, in a fair, reasonable and timely manner.

Access Obligations

- F.38 In its review of the potential competition problems in the BTS Consultation, and this Decision, ComReg identified issues related to denial of access. While a non-discrimination obligation would be a necessary supporting obligation to address these issues, it is ComReg's position that it would not on its own, or coupled with transparency obligations, be sufficient.
- F.39 An access obligation provides the right to request access and establishes the principles on which the relevant BTS should be made available. ComReg is of the position that, an access remedy relating to the requirement to provide access, and to do so in a fair, reasonable and timely manner (and to provide objective reasons where requests for access are refused); the requirement to negotiate in good faith; the requirement not to withdraw access to facilities already granted is required Market A.
- F.40 It is ComReg's position that the absence of such access obligations would hinder the development of effectively competitive retail markets by restricting or distorting competition to the detriment of end-users.
- F.41 ComReg is cognisant of the investment RTÉNL has had to make in its BTS network. However, ComReg does not believe that in the absence

of a stipulated access remedy, competition will develop to the benefit of end-users. ComReg believes that this access obligation is not imposing an unreasonable burden on RTÉNL. In a competitively functioning market RTÉNL would have the incentive to attract as many BTS customers as possible to increase its revenues. The imposition of an access obligation is not at the denial of RTÉNL's rights to be allowed a reasonable return reflective of the efficient costs incurred in granting access.

- F.42 In view of SMP designation and the competition problems identified in relation to a potential refusal of supply, ComReg proposes that, it is justifiable to oblige RTÉNL to have an obligation to supply access to its BTS. The aim of the access remedy is to ensure that Downstream Broadcasters and Multiplex Operators can access BTS which will allow them to compete effectively in retail broadcasting markets without having to replicate RTÉNL's extensive network of BTS infrastructure as replication of comparable BTS network services is extremely difficult for the reasons already discussed in the BTS Consultation and this Decision.
- F.43 Access obligations are therefore considered necessary and appropriate in achieving the objectives of section 12 of the Communications Regulation Acts 2002-2011 and Regulation 16 of the Framework Regulations, namely the promotion of competition, and protecting the interests of end-users.

Accounting Separation Obligations

- F.44 ComReg is of the position that RTÉNL should ensure its wholesale prices and its internal transfer prices are transparent in view of the potential price related competition problems identified in the BTS Consultation and this Decision.
- F.45 Separated accounts would make visible the wholesale prices and internal transfer prices of RTÉNL's services, thereby facilitating transparency as regards any potential misallocation of costs across different services. It is therefore considered proportionate to impose an obligation on RTÉNL to keep separated accounts to help disclose possible competition problems which might otherwise undermine the access, non-discrimination, transparency and price control obligations.

Price Control and Cost Accounting Obligations

- F.46 In light of the review of competition problems in the BTS Consultation and this Decision, ComReg is of the position that it is necessary to ensure that charges for access to BTS should be subject to price control and cost accounting obligations. ComReg has proposed imposing requirements that access is cost oriented, which will be subject to a separate ComReg pricing consultation in the coming months.
- F.47 It is ComReg's position that RTÉNL has SMP, there is limited constraint offered by actual competition, potential competition and countervailing buying power and as a consequence, RTÉNL's BTS prices are not likely to be appreciably constrained in the absence of *ex ante* regulation.

ComReg is of the view that transparency, non-discrimination and access obligations combined are not sufficient to address this potential market failure and therefore a price control and cost-orientation obligation is necessary to address the potential for discriminatory pricing.

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

- F.48 ComReg has proposed that regulatory forbearance is not an option and so it can be discounted when considering impacts on stakeholders.
- F.49 Below, ComReg identifies the incremental impact of each regulatory obligation on stakeholders.
- F.50 ComReg considers the potential impact on RTÉ and RTÉNL and the potential implications for competition and end-users arising from the proposed regulatory obligations.

Impact on RTÉ and RTÉNL

Access Obligations

- F.51 ComReg's position is that BTS voluntarily provided over RTÉNL's network may not exist in some cases absent regulation. Absent regulation, access to RTÉNL's BTS may be restricted (either explicitly or tacitly) or to be supplied on discriminatory or unreasonable terms and conditions.
- F.52 In light of this, ComReg has proposed that there is a need for an access obligation to be imposed on RTÉNL. This relates to access for Downstream Broadcasters and Multiplex Operators for the provision of terrestrial BTS required for sustainable downstream competition.
- F.53 No access obligations have been previously imposed on RTÉNL; however, given the range of potential competition issues discussed in the BTS Consultation and this Decision, ComReg is of the opinion that the access obligation is proportionate and justified.
- F.54 RTÉ is a vertically integrated entity and therefore it is relevant to consider the impact of this obligation on both its upstream and downstream operations. At the retail level RTÉ has the most viewed and listened to national television and radio programme services in the state. RTÉ generally operates on a 50:50 public broadcasting model.¹⁴ This means that approximately 50% of its revenues are derived from commercial activities. Commercial advertising revenues in the broadcasting sector are generally related to the amount and type of viewers / listeners a Downstream Broadcaster can reach i.e. based on every 1,000 of the population, and, type reached.
- F.55 From a retail perspective, it may be that in the long run RTÉ may face more competition in the retail market should the access obligation(s) be

¹⁴ Athena Media, Irish Broadcasting Landscape: Economic and Environmental Review for the Broadcasting Authority of Ireland (BAI), August 2010.

imposed in this market. For example, according to Nielsen / Tam Ireland¹⁵ TV viewership data, in 2012, RTÉ TV programme services had a 66% market share of viewers in Terrestrial TV Only Homes and 30%% across all TV platforms which have a greater number of competing TV programme services¹⁶. However, DTT does not provide a comparable number of TV programme services which are available via other TV platforms such as cable and satellite. The initial line up on DTT includes eight TV programme services compared to hundreds of TV programme services available on cable and satellite TV platforms for example. In any case, some reduction of viewership / listenership time would likely translate to a reduction in commercial revenues for RTÉ. However, given RTÉ's popularity due to its position as the national PSB, its access to key content such as certain live sports events and the fact that circa 50% of its revenue stream is publicly provided, the revenue impact on RTÉ is likely to be less than would otherwise be the case.

- F.56 From a wholesale perspective, RTÉNL would experience an increase in revenue streams in the case where there was the addition of more customers using its network (e.g. Multiplex Operators). This means the net revenue impact on RTÉ (as a Group entity) would be lower. Furthermore, RTÉ's own costs may fall due to a greater sharing of common costs across the network. It should also be noted that under a cost orientation principle RTÉNL would be allowed to cover its costs of providing BTS to its customers as well as allowing RTÉNL to earn a reasonable rate of return on its efficient investment.
- F.57 While ComReg acknowledges that the conditions of this access obligation, such as the requirement to provide SLAs, might impose a burden on RTÉNL in terms of time and other resources required to meet these regulatory obligations, ComReg does not believe these are unwarranted in the context of the need to ensure that RTÉNL provides an agreed quality of service to Downstream Broadcasters and Multiplex Operators.
- F.58 ComReg believes that the need to seek approval from ComReg before withdrawal of services, the need to negotiate in good faith, grant access in a fair and timely manner and the need to provide objective criteria for any refusal of access to Downstream Broadcasters and Multiplex Operators are appropriate and justified in the context of the competition problems that may arise in this market. These conditions are proposed to ensure that RTÉNL operates in a fair and reasonable manner towards third parties.

¹⁵ Nielsen TV Audience Measurement conducts this research on TAM Ireland's behalf.

¹⁶ This 'Consolidated' TV viewership data means Live + Timeshift data (any TV viewing that happens post Live broadcast). This is the information upon which TV advertising is traded.

Non-discrimination Obligations

- F.59 ComReg proposes that an obligation of non-discrimination should be imposed on RTÉNL to ensure that it applies the same conditions in equivalent circumstances to Downstream Broadcasters and Multiplex Operators as it does to RTÉ. The provision of relevant information on services is only proposed to apply to Downstream Broadcasters and Multiplex Operators who have already agreed a reference offer with RTÉNL as such information may be commercially sensitive.
- F.60 The collation and provision of relevant information to Downstream Broadcasters and Multiplex Operators may consume RTÉNL time and other resources but ComReg does not see this as placing a majorly unnecessary burden on RTÉNL. RTÉNL was subject to non-discrimination for analogue terrestrial TV and radio BTS under ComReg's 2004 Broadcasting Review so the impact of this non-discrimination obligation is unlikely to lead to the same level of burden that would otherwise occur if this was a new process to RTÉNL. Imposing this condition means that potential discriminatory behaviour by RTÉNL towards its BTS customers is reduced.

Transparency Obligations

- F.61 A lack of transparency in the market could make it difficult to demonstrate equivalence and present the opportunity for RTÉ to leverage its market power to prevent downstream competition.
- F.62 ComReg proposes that RTÉNL should publish information or data which a Downstream Broadcasters and Multiplex Operators may reasonably require to compete effectively based on RTÉNL's BTS. Provision of SLAs will provide assurance to potential entrants that RTÉNL will treat them to an agreed standard of service. Given that there is a potential for RTÉNL to provide a lesser quality of service to downstream competitors than to RTÉ, ComReg considers it proportionate and justified that the industry should be able to observe the range of SLAs provided by RTÉNL to RTÉ and other Downstream Broadcasters and Multiplex Operators.
- F.63 RTÉNL was subject to transparency obligation(s) for national terrestrial analogue radio and TV BTS under ComReg's 2004 Broadcasting Analysis so the impact of this transparency obligation should be unlikely to lead to the same level of burden that would otherwise occur if this was a completely new process to RTÉNL.
- F.64 Although ComReg acknowledges that these transparency obligations are likely to place some costs of compliance on RTÉNL in terms of time and resources dedicated to implementing these regulatory obligations ComReg views these as necessary to ensure a level playing field in the market. Given that RTÉ is a vertically integrated entity it is only under these conditions that one can ensure non-discrimination.

Accounting Separation Obligations

- F.65 As discussed in sections 6 to 8 of the BTS Consultation and in this Decision, there may be potential competition problems in this market

related to RTÉNL's pricing behaviour. Separated accounts help to reduce this potential problem by making wholesale prices and internal transfer pricing visible, thereby facilitating transparency. ComReg believes that this obligation is necessary in this particular Market A and proportionate in the context of a vertically integrated entity with SMP such as RTÉNL.

- F.66 These regulatory obligations are likely to impose some cost burden on RTÉNL in terms of its implementation but it will help ensure that RTÉNL does not behave in a discriminatory manner in terms of pricing by providing transparency to ComReg and the market itself. ComReg is mandating that RTÉNL prepares accounting documentation describing its cost accounting systems. ComReg is also mandating that RTÉNL submits detailed financial information to it as required by ComReg on a case by case basis. However, ComReg considers that much of the underlying information required for this remedy is already available in the books and records of RTÉNL and therefore the cost burden on RTÉNL should not be significant in this respect.

Price Control and Cost Accounting Obligations

- F.67 In light of the potential competition problems relating to discriminatory pricing behaviour discussed in sections 6 to 8 of the BTS Consultation and in this Decision, ComReg is mandating a price control and cost accounting obligation on RTÉNL to prevent possible excessive pricing and / or margin squeeze. As RTÉ competes with other Downstream Broadcasters in the retail market it may be concerned that it would lose audience market share to other Downstream Broadcasters and therefore lose the related advertising revenues it could otherwise command. Therefore, RTÉ has the incentive and, through RTÉNL, has the ability to engage in practices to minimise this potential competitive threat. RTÉ could reduce other Downstream Broadcaster's ability to compete with RTÉ for content and talent and retail audience market share by engaging in discriminatory pricing practices. This may also have the added effect of deterring potential market entry and expansion.
- F.68 Cost accounting supports the obligations of price control and accounting separation. A price control obligation will ensure that RTÉNL sets appropriate wholesale prices which enable effective competition. ComReg believes that these obligations are necessary and appropriate in the context of the ability and incentive of RTÉNL to set excessive prices and margin squeeze which would harm competition in downstream markets and ultimately end-users.
- F.69 The impact of such a move on RTÉNL is that it should constrain RTÉNL ability to harm actual or potential competitors by linking prices to actual costs and stopping the potential for discriminatory pricing. This therefore has the potential to reduce the amount of revenues RTÉNL might otherwise acquire were such an obligation not in place but allow a reasonable return to RTÉNL based on its efficient investment.
- F.70 ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well

as the need to ensure the incumbent should recover its efficiently incurred costs. ComReg considers that the aim of a price control is to maintain prices at an efficient level to the benefit of consumers and at a level which encourages ongoing efficient entry and investment decisions by BTS operator(s) by ensuring that the SMP BTS operator makes a reasonable return on its efficient investment.

Impact on competition

Access Obligations

- F.71 The proposed access obligations should improve the conditions for market entry and expansion to Market A which may otherwise be restricted due to the actions of RTÉNL arising from the perceived competitive threats to RTÉ in downstream markets. It is likely that under such conditions commercial DTT Multiplex Operator downstream entry could be more easily facilitated for example.
- F.72 Where such services were launched this would have the potential to impact the competitive conditions of the related downstream wholesale Market B. By removing restrictions of access to Market A there is the possibility that this could positively change the dynamic of competition in the downstream wholesale Market B in the long run.
- F.73 If commercial DTT Multiplex Operators were operational in the wholesale downstream Market B and providing the same DTT BTS to that which RTÉ provides, then RTÉs' customers such as TV3 and TG4 could, theoretically, switch to these commercial DTT Multiplex Operators.
- F.74 However, it is not certain whether; other, commercial DTT Multiplex Operators capable of constraining RTÉ will enter downstream Market B in the timeframe of this BTS Review. Therefore, irrespective of whether potential for the competitive conditions for access to Market A did improve; ComReg could not be assured that the competitive conditions of Market B would improve in tandem. This was assessed as part of the Three Criteria Test for Market B in the BTS Consultation and in this Decision.
- F.75 A condition of acting in good faith would mean that RTÉNL would be required to demonstrate that its approach to negotiations was in good faith and that any unmet requests for access can be shown to be unreasonable. This helps to give greater confidence and assurance to the market that RTÉNL will not have the potential to behave in such a manner as to be deliberately unreasonable in negotiations for access in order to limit entry and expansion in the market.
- F.76 A condition not to withdraw access to existing services prior to approval of ComReg helps to ensure that RTÉNL does not withdraw services upon which third parties rely for their business operations without valid reasoning for doing so and this, therefore, gives a level of protection to Downstream Broadcasters and Multiplex Operators reliant on RTÉNL's BTS.

- F.77 Granting access in a fair, reasonable and timely manner will help to ensure that there are no unnecessary delays in providing access which could otherwise constrain third party activity in the market.
- F.78 Provision of SLAs will help to ensure a defined quality of service provided to third parties. This is important because a reduced / inferior quality of service to third parties could affect their ability to compete at the retail level and from a Multiplex Operator perspective, its ability to attract Downstream Broadcasters to its own downstream platform.

Non-discrimination Obligations

- F.79 It is important that third parties are not discriminated against in either price or non-price terms by RTÉNL as this would reduce their ability to compete effectively in related markets and be a major consideration to any potential entrants and as such could contribute to foreclosing market entry and expansion. A non-discrimination obligation would help to ensure that RTÉNL treats RTÉ and third parties in a similar manner, thereby helping promote competition in the market.

Transparency Obligations

- F.80 Transparency obligations act as support for other regulatory obligations by ensuring that any potential anti-competitive behaviour contravening such regulatory obligations can be easily observed and therefore, allow appropriate enforcement action to be taken if needed. This reduces the ability for anti-competitive behaviour by RTÉNL. ComReg believes such a regulatory obligation tied to other regulatory obligations will ensure that competition is promoted in related markets.
- F.81 Publication of a reference offer would allow for a degree of certainty to enable Downstream Broadcasters and Multiplex Operators to plan and run their operations efficiently, enabling them to observe the detail of the wholesale offerings made available by RTÉNL. Publication of further information or data which Downstream Broadcasters and Multiplex Operators would require in order to compete in downstream wholesale and retail markets would further promote transparency and thereby help to encourage downstream market entry and expansion.
- F.82 Publication of SLAs will ensure that service level guarantees to all market players reliant on RTÉNL's BTS are observable and provide assurance to industry that there is no discrimination among market players in this area.
- F.83 Transparency in relation to the proposed obligations will provide clarity on services and costs to potential downstream entrants and therefore should help to encourage downstream market entry and expansion.

Accounting Separation Obligations

- F.84 In a vertically integrated market where possible price related problems may arise, accounting separation is very important as it ensures transparency in regards to allocation of costs across different services thereby ensuring that they are allocated correctly. This means that inappropriate pricing behaviour can be observed independently and reduces the potential for such practices.

- F.85 This regulatory obligation supports the regulatory obligations of transparency and non-discrimination. It also supports implementing price control and cost accounting obligations. As RTÉ is a vertically integrated entity, it should ensure that RTÉ makes transparent its wholesale prices and its internal transfer prices.
- F.86 ComReg has identified potential competition problems related to price discrimination in the BTS Consultation and this Decision. Separated accounts help disclose these competition problems and make visible the wholesale prices by facilitating transparency with regard to any potential misallocation of costs across different services. It is therefore considered justified to impose an obligation on RTÉNL to maintain separated accounts.
- F.87 This should help to promote the development of entry and expansion in downstream markets as entrants can be assured that price related discriminatory practices are observable.

Price Control and Cost Accounting Obligations

- F.88 Given the risk of price-related competition problems in Market A ComReg considers that the imposition of a price control and cost accounting obligation on RTÉNL is appropriate as this is the only way to ensure that prices are an actual reflection of cost and that they are non-discriminatory. For example, RTÉ through RTÉNL would have the ability to price excessively and / or margin squeeze to deter entry / expansion of Downstream Broadcasters and Multiplex Operators.
- F.89 A price control will ensure that RTÉNL sets wholesale prices at the appropriate level as there is the potential to engage in excessive pricing and margin squeeze. Cost accounting supports the obligations of accounting separation and price control and assists in monitoring non-discrimination. For a price control, cost accounting identifies and attributes relevant costs to services and products based on agreed accounting principles.
- F.90 ComReg is mindful that any cost recovery mechanism or pricing methodology that is imposed by ComReg should serve to promote efficiency and sustainable competition and maximise consumer benefits.
- F.91 These conditions should enable the promotion of competition in downstream wholesale and retail markets as they would prevent RTÉNL from engaging in discriminatory pricing practices against Downstream Broadcasters and Multiplex Operators reliant on its BTS. This, in turn, may enable Downstream Broadcasters and Multiplex Operators to provide greater quality of services and products to end-users and thus encourage Downstream Broadcasters and Multiplex Operators to compete to a greater extent in downstream wholesale and retail markets.

Impact on consumers

- F.92 Consumer satisfaction in the retail market is driven by price, quality and choice. The transition to DTT allows for more and quality content to end-

users. However, where an undertaking is designated with SMP it may have the ability to constrain effective competition to protect its own interests so that the end-user could suffer due to a lower level of quality and choice.

- F.93 In mandating these regulatory obligations ComReg has taken the impact on end-users into consideration and believes that without the appropriate obligations listed above, end-users would be worse off due to a lack of effective competition in the market.
- F.94 Each of the obligations outlined above is complementary to each other and, in ComReg's view, merited. Each obligation helps to support the other, promoting downstream market entry and expansion by ensuring that Market A does not tend towards foreclosure or other anti-competitive practices. This means that the utility of end-users should be increased through greater choice and quality of product and services.
- F.95 These regulatory obligations could possibly lead to conditions in which a commercial pay or hybrid pay DTT service is more easily established for example and thereby, a wider diversity of broadcasting content and talent made available, providing more quality and choice to retail end-users.

Step 5 - Assess the impacts and choose the best option

- F.96 ComReg has taken full account of its obligations under Regulation 8(6) of the Access Regulations (including that any proposed remedies are to be based on the nature of the problem identified), as well as its relevant objectives as set out under section 12 of the Communications Regulation Acts 2002 to 2011.
- F.97 Based on SMP assessment, the potential competition problems and ComReg's belief that there is a lack of effectiveness to current regulation in the BTS Consultation and this Decision, ComReg proposes that the imposition of a full suite of remedies is appropriate and justified in Market A. The option of imposing no remedies does not apply in Market A because, when there is a finding of SMP, ComReg is obliged to impose at least one remedy on the SMP undertaking.
- F.98 While these regulatory obligations may impose some costs on RTÉNL in terms of time and resources dedicated to compliance, it is ComReg's position that such regulatory obligations will promote competition to the benefit of end-users, thereby exceeding any costs associated with their implementation.
- F.99 ComReg will keep Market A under review to determine whether such remedies continue to be justified and proportionate in light of relevant developments in the market.

Market B - Regulatory Impact Assessment

- F.100 As discussed in the Market A RIA, the RIA ComReg's approach to RIA follows five steps:
- Step 1: Describe the policy issue and identify the objectives.

- Step 2: Identify and describe the regulatory options.
- Step 3: Determine the impacts on stakeholders.
- Step 4: Determine the impacts on competition.
- Step 5: Assess the impacts and choose the best option.

F.101 The consideration of regulatory impact provides a discussion of options, and the RIA should therefore be integrated within the overall analysis. This is the approach that ComReg has followed in the BTS Review. This is the final RIA of Market B having taken into account of Respondents' views to the BTS Consultation and comments from the CA and the European Commission.

Step 1 – Describe the policy issue and identify the objectives

F.102 The transition from analogue terrestrial TV to DTT was completed on 24 October 2012. The 2009 Act provides for two PSB DTT multiplex licences to RTÉ and the potential for up to four other commercial DTT multiplex licences to be issued to the BAI, to enable the broadcast of DTT signals to end-users. With the move to DTT ComReg believes that a market for DTT multiplexing services has been created which requires *ex ante* regulation i.e. Market B.

F.103 In this BTS review, ComReg has carried out an analysis of competition which indicates a high market share of 100% for RTÉ in Market B. In addition, RTÉ's ability to act independently of its customers is not sufficiently constrained by factors in the market, such as potential competition or countervailing buying power. ComReg's conclusion is that RTÉ has SMP in Market B. Following a finding of SMP, ComReg is obliged to impose at least one regulatory obligation on RTÉ. Not imposing a regulatory obligation is not an option under the Framework Regulations.

F.104 ComReg does not believe the competitive conditions of Market B will be substantially altered in the timeframe of this BTS review. RTÉ has the ability and incentives, notwithstanding section 130 of the 2009 Act, to engage in exploitative behaviour in this market in order to protect its audience share of the retail market and in turn the commensurate advertising revenues it can command. As RTÉ is the sole DTT Multiplex Operator in this market, Downstream DTT Broadcasters have no alternative to RTÉ for a DTT multiplexing service. This may mean that quality and choice is restricted in the retail market for end-users.

F.105 It is therefore, necessary and appropriate to impose regulatory obligation(s) on RTÉ in order to facilitate greater choice and quality to end-users and to ensure a level playing field at the wholesale level.

F.106 ComReg will keep Market B under review to determine whether such remedies continue to be justified and proportionate in light of relevant developments (such as commercial DTT Multiplex Operator entry) in Market B.

- F.107 For the reasons set out below, ComReg believes that it is necessary to impose remedies on RTÉ in this market.
- F.108 There are a number of considerations to take into account which ComReg considers require the introduction of these regulatory obligations. These include:
- The 2009 Act and ASO; and,
 - Concerns expressed by Broadcasters.

The 2009 Act and ASO

- F.109 The 2009 Act introduced a market demand for DTT in light of ASO. The Act provides for two PSB DTT multiplex licences to be issued by ComReg directly to RTÉ, and also provides for up to four commercial DTT multiplex licences to be issued directly to the BAI in order to allow for the provision of DTT.
- F.110 RTÉ is a vertically integrated entity and as such it is active in both retail and wholesale markets. RTÉ is the sole DTT Multiplex Operator active in Market B. ComReg believes it has the means and incentive to act in favour of its own interests at the expense of actual and potential customers and competitors.
- F.111 With digital BTS the potential for carriage of more Downstream Broadcasters has increased. With the potential for more competition from a greater number of Downstream Broadcasters and their programme services content, RTÉ would be concerned that this would dilute its own retail audience market share and the related commercial advertising revenues RTÉ can command. The greater the number of competing broadcasting programmes services in the downstream retail market, the further RTÉ's commercial advertising revenues would be diluted. As RTÉ is the sole DTT Multiplex Operator in Market B, RTÉ would have the ability to foreclose Downstream Broadcasters 'entry and expansion in the retail market by limiting access to RTÉ's own PSB DTT multiplexes.
- F.112 ComReg considers it unlikely that an alternative comparable DTT Multiplex Operator capable of constraining RTÉ will develop in the timeframe of this BTS review and so existing Downstream DTT Broadcasters are likely remain dependent on access to RTÉ's PSB DTT multiplexes in order to provide their own downstream retail market programme services.
- F.113 It is therefore important to ensure that access to RTÉ's PSB DTT multiplexes is not tactically foreclosed or limited and that access is appropriately priced as there are currently no alternative supply options available and therefore negotiation of reasonable prices by commercial means may be less likely.

Concerns expressed by Broadcasters

- F.114 In recent years concerns have been expressed to ComReg from some Downstream Broadcasters regarding the pricing of RTÉ's BTS. There are concerns that there is no transparency on BTS costs, and there are

concerns that the charges for carriage and use of the terrestrial BTS network are not related to costs. None of these tariffs have been subject to independent review. Such concerns could also occur in a digital context as well.

- F.115 The introduction of the obligations of price control and cost accounting would enable ComReg to assess the validity of any future complaints and provide transparency and / or assurances that the calculation of tariffs by RTÉ is reasonable.
- F.116 Having regard to the types of actual and potential competition problems identified in the market, ComReg is of the position that *ex ante* regulation is required in this market as discussed below.

Step 2 – Identify and describe the potential regulatory options

- F.117 Under Article 31 of the Universal Service Directive, if content of a broadcast was such that it might be considered to meet a general interest objective then it could be addressed under ‘must carry’ rules.
- F.118 Furthermore, under Article 12 of the Framework Directive, where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health or public security or to meet town and country planning objectives, Member States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network. Such sharing or co-ordination arrangements may include rules for apportioning the costs of facility or property sharing.
- F.119 In addition, there are legislative provisions made in the 2009 Act which may overlap with some elements of *ex ante* regulation.
- F.120 In terms of digital television, section 130 of the 2009 Act provides for periodic payments for access to an RTÉ national DTT multiplex, to be set by the Minister, and ensuring that the capacity employed by RTÉ is adequate to carry other Downstream Broadcasters’ programme services content. For TV3, TG4, the Houses of the Oireachtas Channel, the Irish Film Channel, and any channel deemed by the Minister to have the character of a public service Downstream Broadcaster which has a contract with the BAI, there would thus appear to be provisions in the 2009 Act that may confer some of the important elements of *ex ante* regulation with respect to the “national television multiplex”.
- F.121 Therefore, it would appear that for FTA Downstream Broadcasters, those with the character of a public service or those who have a sound broadcasting contract with the BAI, there are legislative provisions in place that confer rights of access which overlap with some of the important elements of *ex ante* regulation.
- F.122 However, while this may overlap with some of the important elements of *ex ante* regulation ComReg is of the opinion that these are not sufficient to cover the conditions or range of potential problems that may arise in the market such as transparency and non-discrimination. For example, to counter the potential for the SMP operator to employ a tactical refusal

of access ComReg can impose conditions which support the provision of timely and efficient access, such as the implementation of SLAs, and fair, reasonable and timely access. This can include the provision to have in place legally binding SLAs and to provide access to associated facilities on fair and reasonable terms. In addition, while section 130 of the 2009 Act provides for a particular form of price control, it may not necessarily one that would arise under the electronic communications regulatory framework. Given the particular issue of vertical integration in this sector in Ireland, this form of a price control would not be supported by appropriate cost accounting obligations. Nor would the resulting remedy necessarily address the requirement for transparency and non-discrimination, as there would be no requirement that RTÉ charge itself in the same manner.

- F.123 ComReg recognises that regulatory measures should be kept to the minimum necessary to address the identified market failure in an effective, efficient and proportionate manner. There are a range of potential regulatory options available to ComReg to address competition problems in this market.
- F.124 In this regard, regulation can be considered to be incremental, such that only obligations are imposed which are necessary and proportionate to the competition problems which have been identified. The lightest measure that can be imposed is the obligation of transparency. Should this be insufficient to address competition problems on its own, ComReg may apply a non-discrimination obligation. If this is still not sufficient, ComReg may next consider the imposition of an access obligation, generally supported by accounting separation obligations. The final measure to be considered is the imposition of a price control and cost accounting remedy.
- F.125 The question of regulatory forbearance and the incremental imposition of one or more of the above obligations are considered below.

Forbearance

- F.126 In sections 12 to 14 of the BTS Consultation, and in this Decision ComReg set out its view that Market B is neither effectively competitive nor likely to become effectively competitive within the timeframe covered by this BTS Review.
- F.127 As such, absent the imposition of any remedies, it is ComReg's position that this market would not be likely to operate in an effectively competitive manner. It is ComReg's position that the option of regulatory forbearance in this market is not, therefore, appropriate or justified.

Transparency Obligations

- F.128 Following ComReg's review of potential competition problems in the BTS Consultation, and this Decision ComReg is of the position that a transparency obligation is necessary in this market to facilitate the development of effective downstream competition.
- F.129 However, ComReg is of the view that transparency obligations, on their own, are not sufficient. While transparency obligations allow monitoring

and observation of actions, they do not directly affect the actions / behaviour of an SMP undertaking itself.

Non-Discrimination Obligations

- F.130 In light of the competition problems identified in the BTS Consultation and this Decision, ComReg is of the position that a non-discrimination obligation should be imposed on RTÉ. A non-discrimination remedy requires that RTÉ ensures Downstream Broadcasters being provided with the same terrestrial BTS are not treated differently, for example in a different manner to the services which RTÉ provides to itself.
- F.131 The transparency obligation is complementary to this non-discrimination obligation as it provides the means of observing that discrimination is not occurring. In view of potential issues of discriminatory treatment (on price or non-price terms), transparency obligations alone would not address such issues. Furthermore, a non-discrimination obligation itself (or coupled with transparency) does not specifically address what type of product or service should be offered, or how it should be offered. Recourse to a non-discrimination obligation tends to be on an *ex post* basis, so that an undertaking alleges a breach after the event.
- F.132 Thus, the operation of the non-discrimination and transparency obligations alone are considered inadequate by ComReg as a means of ensuring *ex ante* that RTÉ provides access, including requests for different types of access in a fair, reasonable and timely manner.

Access Obligations

- F.133 In its review of the potential competition problems in the BTS Consultation and in this Decision, ComReg identified issues related to denial of access. While a non-discrimination obligation would be a necessary supporting obligation to address these issues, it is ComReg's position that it would not on its own, or coupled with transparency obligations, be sufficient.
- F.134 An access obligation gives Downstream Broadcasters the right to request access and establishes the principles on which the relevant products and services should be made available. ComReg is of the position that an access remedy, and to do so in a fair, reasonable and timely manner (and to provide objective reasons where requests for access are refused); the requirement to negotiate in good faith; the requirement not to withdraw access to facilities already granted, is required in Market B.
- F.135 In an open competitive market there should be no restrictions that prevent undertakings from negotiating access as such agreements would be on a commercial basis and negotiated in good faith.
- F.136 However, as discussed in the BTS Consultation and this Decision such access may not be granted in Market B.
- F.137 ComReg believes that this access obligation is not imposing an unreasonable burden on RTÉ. In a competitively functioning market RTÉ would have the incentive to attract as many customers as possible

to increase its revenues. The imposition of an access obligation is not at the denial of RTÉ's rights to be allowed a reasonable return reflective of the costs it has incurred in granting access.

- F.138 In view of the competition problems identified in relation to a potential refusal to supply access, ComReg proposes that, it is justifiable to oblige RTÉ to meet reasonable requests for access to DTT multiplexing services, pursuant to section 130 of the 2009 Act. The aim of the access remedy is to ensure that Downstream Broadcasters can access wholesale products / services which will allow them to compete effectively in retail broadcasting markets.
- F.139 It is ComReg's position that the absence of such regulatory obligations would hinder the development of effectively competitive retail markets by restricting or distorting competition to the detriment of end-users.
- F.140 Access obligations are therefore considered necessary and appropriate in achieving the objectives of section 12 of the Communications Regulation Acts 2002-2011 and Regulation 16 of the Framework Regulations, namely the promotion of competition, and protecting the interests of end-users.

Accounting Separation Obligations

- F.141 ComReg is of the position that RTÉ should ensure its wholesale prices and its internal transfer prices are transparent in view of the potential competition problems identified in the BTS Consultation and this Decision.
- F.142 Separated accounts would make visible the wholesale prices and internal transfer prices of RTÉ's services, thereby facilitating transparency as regards any potential misallocation of costs across different services. It is therefore considered proportionate to impose an obligation on RTÉ to keep separated accounts to help disclose possible competition problems which might otherwise undermine the proposed access, non-discrimination, transparency and price control obligations.

Price Control and Cost Accounting Obligations

- F.143 In light of the review of competition problems in the BTS Consultation and this Decision ComReg's position is that it is necessary to ensure that wholesale charges for access should be subject to price control and cost accounting obligations. ComReg is imposing requirements that access is cost oriented, where the detailed nature underpinning the specific costing methodology will be subject to a separate pricing consultation.
- F.144 It is ComReg's position that RTÉ has SMP, there is limited constraint offered by actual competition, potential competition and countervailing buyer power and as a consequence, RTÉ's wholesale prices are not likely to be appreciably constrained in the absence of regulation. ComReg is of the view that transparency, non-discrimination and access obligations combined are not sufficient to address this potential market failure and therefore a price control and cost

accounting obligation is necessary to address the potential for discriminatory pricing.

Steps 3 & 4 – Determine the Impacts on Stakeholders and Competition

F.145 ComReg has proposed that regulatory forbearance is not an option and so it can be discounted when considering impacts on stakeholders.

F.146 ComReg will now identify the incremental impact of each obligation on stakeholders.

Impact on RTÉ

Access Obligations

F.147 ComReg's position is that services voluntarily provided by RTÉ may not exist in some cases absent regulation. Absent regulation, RTÉ would have the ability and incentives to refuse to supply access to its PSB DTT multiplexes tacitly or to supply them on discriminatory or unreasonable terms and conditions to its downstream competitors.

F.148 Therefore, ComReg has proposed access obligations be imposed on RTÉ. These relate to reasonable requests from Downstream DTT Broadcasters (subject to the provisions of section 130 of the 2009 Act) for the provision of access to RTÉ's PSB DTT multiplex(es) for the purpose of DTT multiplexing services which is required for sustainable downstream competition.

F.149 Given the range of potential competition issues discussed in the BTS Consultation and this Decision ComReg believes that the conditions of this obligation are proportionate and justified.

F.150 RTÉ is a vertically integrated entity and therefore it is relevant to consider the impact of this obligation on both its upstream and downstream operations. At the retail level RTÉ has the most viewed and listened to national television and radio programme services. RTÉ generally operates on a 50:50 public broadcasting model. This means that approximately 50% of their revenues are derived from commercial activities. Commercial revenues in the broadcasting sector are generally related to the amount and type of viewers / listeners a Broadcaster can reach i.e. based on every 1,000 of the population, and, type reached.

F.151 From a retail perspective, it could be expected that RTÉ may face more competition in the retail market. This could have the effect of reducing some of RTÉ's programme services viewing time, though the degree of impact depends on a number of factors such as the number of new entrants, and the type of content offered by a new entrant. For example, according to Nielsen / Tam Ireland¹⁷ TV viewership data, in 2012, RTÉ TV programme services had a 66% market share of viewers in Terrestrial TV Only Homes and 30%% across all TV platforms which

¹⁷ Nielsen TV Audience Measurement conducts this research on TAM Ireland's behalf.

have a greater number of competing TV programme services¹⁸. However, DTT does not provide a comparable number of TV programme services which are available via other TV platforms such as cable and satellite. The initial line up on DTT includes eight TV programme services compared to hundreds of TV programme services available on cable and satellite TV platforms for example. In any case, some reduction of viewership time would likely translate to a reduction in commercial revenues for RTÉ. However, given its popularity due to its position as the national PSB, its access to key content such as certain live sports and the fact that circa 50% of its revenue stream is publicly provided, the revenue impact on RTÉ is likely to be less than would otherwise be the case.

- F.152 From a wholesale perspective, RTÉ should experience an increase in revenue streams from the addition of more non RTÉ programmes services using its PSB DTT multiplexes. This means the net revenue impact on RTÉ should be lower. Furthermore, RTÉ's own costs may fall due to a greater sharing of common costs across the network.
- F.153 While ComReg acknowledges that the conditions of this access obligation, such as the requirement to provide SLAs might impose a burden on RTÉ in terms of time and other resources required to meet these conditions, ComReg does not believe these are unwarranted in the context of the need to ensure that RTÉ provides an agreed quality service to its customers.
- F.154 ComReg does not believe that the need to seek approval from ComReg before withdrawal of services, nor the need to negotiate in good faith, grant access in a fair and timely manner or the need to provide objective criteria for any refusal of access to its customers are inappropriate or unjustified in the context of the competition problems that may arise in Market B. These conditions are proposed to ensure that RTÉ operates in a fair and reasonable manner towards third parties.

Non-discrimination Obligations

- F.155 ComReg proposes that an obligation of non-discrimination should be imposed on RTÉ to ensure that it applies the same conditions in equivalent circumstances to Downstream Broadcasters as it does to its own operations. The provision of relevant information on services is only proposed to apply to Downstream Broadcasters who have agreed a reference offer with RTÉ as such information may be commercially sensitive and such information should be provided within a specified timeframe.
- F.156 The collation and provision of relevant information to Downstream Broadcasters may consume RTÉ time and other resources but ComReg does not see this as placing a majorly unnecessary burden on RTÉ.

¹⁸ This 'Consolidated' TV viewership data means Live + Timeshift data (any TV viewing that happens post Live broadcast). This is the data upon which TV advertising is traded.

Imposing this condition means that potential discriminatory behaviour by RTÉ towards its network users is reduced.

Transparency Obligations

F.157 A lack of transparency in the market could make it difficult to demonstrate equivalence and present the opportunity for RTÉ to leverage its market power to prevent competition.

F.158 ComReg proposes that RTÉ should publish information or data which an undertaking may reasonably require to compete effectively based on RTÉ's wholesale services. Publication of SLAs will provide assurance to potential entrants that RTÉ will treat them to an agreed standard of service which is not discriminatory. Given the potential for RTÉ to provide a lesser quality of service to downstream competitors than to itself, ComReg considers it proportionate and justified that the range of SLAs provided by RTÉ to other Downstream Broadcasters should be observable.

F.159 These conditions are likely to place some costs of compliance on RTÉ in terms of time and resources dedicated to implementing these obligations but ComReg views these as necessary to ensure a level playing field in the market. Given that RTÉ is a vertically integrated entity it is only under these conditions that one can ensure non-discrimination.

Accounting Separation Obligations

F.160 There may be potential competition problems in this market due to RTÉ's pricing behaviour. Separated accounts help to reduce this potential problem by making wholesale prices and internal transfer pricing visible facilitating transparency. ComReg believes that an obligation such as this is necessary and proportionate in the context of a vertically integrated entity like RTÉ. Otherwise RTÉ could engage in cross subsidization unless there is a robust accounting system that allocates costs, revenues and transfer charges in a clear and transparent manner.

F.161 This is likely to impose some cost burden on RTÉ in terms of its implementation but it will help ensure that RTÉ does not behave in a discriminatory manner in terms of pricing by providing transparency to ComReg and the market. ComReg is mandating that RTÉ prepares accounting documentation describing the cost accounting systems for this market. ComReg is also mandating that RTÉ submits financial information to it on the allocation of costs in this market. However, ComReg considers that much of the underlying information is already available in the books and records of RTÉ and therefore the cost burden on RTÉ should not be significant in this context.

Price Control and Cost Accounting Obligations

F.162 In light of the potential competition problems relating to discriminatory pricing behaviour, ComReg is mandating a price control and cost accounting obligation on RTÉ to prevent possible price discriminatory practices. As RTÉ competes with other Downstream Broadcasters in

the retail market it may be concerned that it would lose audience market share to other Downstream Broadcasters and therefore lose the related advertising revenues it could otherwise command. Therefore, RTÉ has the incentive and ability, as the sole PSB DTT Multiplex Operator in Market B, to engage in practices to minimise this potential competitive threat. RTÉ could reduce other Downstream Broadcaster's ability to compete with RTÉ for content and talent and retail audience market share by engaging in discriminating pricing practices. This may also have the added effect of deterring potential downstream market entry and expansion.

- F.163 Cost accounting supports the obligations of price control and accounting separation. A price control obligation will ensure that RTÉ sets appropriate wholesale prices to enable effective competition. ComReg believes that these obligations are necessary and appropriate in the context of the ability and incentive of RTÉ to engage in price discrimination which would harm competition in the retail market and therefore negatively impact end-users.
- F.164 The impact of such a move on RTÉ is that it would constrain its ability to harm actual or potential downstream competitors by linking prices to actual costs and stopping the potential for excessive pricing. This therefore has the potential to reduce the amount of revenues RTÉ might otherwise acquire were such an obligation not in place but allow a reasonable return to RTÉ based on its efficient investment.
- F.165 ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs. ComReg considers that the aim of a price control is to maintain prices at an efficient level to the benefit of consumers and at a level which encourages ongoing efficient entry and investment decisions by undertakings while also ensuring that the SMP operator makes a reasonable return on its efficient investment.

Impact on competition

Access Obligations

- F.166 The proposed access obligation should improve the conditions for downstream market entry and expansion which may otherwise be restricted due to the actions of RTÉ arising from perceived competitive threats. By imposing this obligation the potential for entry and expansion of non RTÉ programme services is increased thus improving the potential for competition among Downstream Broadcasters in the downstream retail market to the benefit of end-users. For example, by offering the potential for a more diverse range of content.
- F.167 A condition of acting in good faith would mean that RTÉ would be required to demonstrate that its approach to negotiations was in good faith and that any unmet access requests can be shown to be unreasonable. This helps to give greater confidence and assurance to the market that RTÉ will not have the potential to behave in such a

manner as to be deliberately unreasonable in negotiations for access in order to foreclose the market.

- F.168 A condition not to withdraw access to existing services prior to approval of ComReg helps to ensure that RTÉ does not withdraw services upon which third parties rely for their business operations without valid reasoning for doing so and this, therefore, gives a level of protection to undertakings reliant on RTÉ's wholesale services.
- F.169 Granting access in a fair, reasonable and timely manner will help to ensure that there are no unnecessary delays in providing access which could otherwise constrain third party activity in the market.
- F.170 Provision of SLAs will help to ensure a defined quality of service provided to third parties. This is important because a reduced / inferior quality of service to third parties could affect their ability to compete at the retail level.

Non-discrimination Obligations

- F.171 It is important that third parties are not discriminated against in either price or non-price terms by RTÉ as this would reduce their ability to compete effectively in the downstream retail market and be a major consideration to any potential entrants and as such could contribute to foreclosing market entry and expansion. As already discussed RTÉ may discriminate against potential downstream competitors. A non-discrimination obligation would help to ensure that RTÉ treats both itself and third parties in a similar manner, thereby helping promote competition in the market.

Transparency Obligations

- F.172 Transparency obligations act as support for other regulatory obligations by ensuring that any potential anti-competitive behaviour contravening such obligations can be easily observed and therefore, allow appropriate enforcement action to be taken if needed. This reduces the ability for anti-competitive behaviour by RTÉ. ComReg believes such an obligation tied to other obligations will ensure that competition is promoted in this market.
- F.173 Publication of a reference would allow for a degree of certainty to enable undertakings to plan and run their operations efficiently, enabling Downstream Broadcasters to observe the detail of the wholesale offerings made available by RTÉ. Publication of information or data which Downstream Broadcasters would require in order to compete in the market would further promote transparency and thereby help to encourage market entry and expansion.
- F.174 Publication of SLAs will ensure that service level guarantees to all market players reliant RTÉ's infrastructure equipment is observable and provide assurance to industry that there is no discrimination among market players in this area.

F.175 Transparency in relation to the proposed obligations will provide clarity of services and costs to potential entrants and therefore should help to encourage market entry and expansion.

Accounting Separation Obligations

F.176 In a vertically integrated market where possible price related problems may arise, accounting separation is very important as it ensures transparency in regards to allocation of costs across different services thereby ensuring that they are allocated correctly. This means that inappropriate pricing behaviour can be observed independently and reduces the potential for such practices.

F.177 This regulatory obligation supports the obligations of transparency and non-discrimination. It also supports implementing price control and cost accounting obligations. As RTÉ is a vertically integrated entity, it should ensure that RTÉ makes transparent its wholesale prices and its internal transfer prices.

F.178 ComReg has identified potential competition problems related to price discrimination. Separated accounts help disclose these competition problems and make visible the wholesale prices by facilitating transparency with regard to any potential misallocation of costs across different services. It is therefore considered justified to impose an obligation on RTÉ to maintain separated accounts.

F.179 This should help to promote the development of entry and expansion and in the retail market as entrants can be assured that price related discriminatory practices are observable.

Price Control and Cost Accounting Obligations

F.180 Given the risk of price-related competition problems in Market B, ComReg considers that the imposition of a price control and cost accounting obligation on RTÉ is appropriate as this is the only way to ensure that prices are an actual reflection of cost and that they are non-discriminatory.

F.181 A price control will ensure that RTÉ sets appropriate wholesale prices at the appropriate level as there is the potential for RTÉ to engage in excessive pricing. Cost accounting supports the regulatory obligations of price control and assists in monitoring non-discrimination. For a price control, cost accounting identifies and attributes relevant costs to services and products based on agreed accounting principles. The imposition of regulated prices should therefore ensure a level playing field during negotiations between RTÉ and other Downstream Broadcasters.

F.182 ComReg is mindful that any cost recovery mechanism or pricing methodology that is imposed by ComReg should serve to promote efficiency and sustainable competition and maximise consumer benefits.

F.183 These regulatory obligations should enable the promotion of competition in the market as they would prevent an SMP operator from engaging in

price discrimination in the market. This, in turn, may enable Downstream Broadcasters to provide greater quality of services and products and encourage Downstream Broadcasters to compete to a greater extent in the market.

Impact on consumers

- F.184 Consumer satisfaction in the retail market is driven by price, quality and choice. The transition to DTT should allow for more and better quality content to end-users. However, as has been already discussed, competition may be curtailed in this market such that the end-user could suffer due to a lower level of quality and choice.
- F.185 In mandating these regulatory obligations, ComReg has taken the impact on end-users into consideration and believes that without the appropriate obligations listed above, end-users would be worse off due to a lack of competition in the market.
- F.186 Each of the obligations outlined above is complementary to each other and in ComReg's view merited in this market. Each obligation helps to support the other, promoting market entry and expansion by ensuring that the market does not tend towards foreclosure or other anti-competitive practices. This means that the utility of end-users should be increased through greater choice and quality of products / services.

Steps 5 – Assess the impacts and choose the best option

- F.187 ComReg has taken full account of its obligations under Regulation 8(6) of the Access Regulations (including that any proposed remedies are to be based on the nature of the problem identified), as well as its relevant objectives as set out under section 12 of the Communications Regulation Acts 2002 to 2011.
- F.188 Based on SMP assessment, potential competition problems and ComReg's belief that there is a lack of effectiveness to current regulation, ComReg proposes that the imposition of a full suite of remedies is appropriate and justified in Market B. The option of imposing no remedies does not apply in this market because, when there is a finding of SMP, ComReg is obliged to impose at least one remedy on the undertaking with SMP.
- F.189 ComReg has assessed the potential impact of the regulatory obligations on RTÉ, on competition and on retail consumers. The proposed regulatory obligations are considered proportionate and justified based on the range of competition problems identified in this consultation paper. While these regulatory obligations may impose costs on RTÉ in terms of time and resources dedicated to complying with these proposed obligations, it is ComReg's view that such obligations will promote competition in the market to the benefit of end-users, thereby exceeding any costs associated with their implementation.
- F.190 ComReg will keep Market B under review to determine whether such remedies continue to be justified and proportionate in light of relevant developments in the market.

Appendix G Glossary of Frequently Used Terms

Acronym	Full Title
Individual Respondent	Response to Consultation from 'Ken Murray' ¹⁹ .
2003 Recommendation	EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to <i>ex ante</i> regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services ²⁰ .
2004 Broadcasting Analysis	ComReg's broadcasting market review in 2003 / 2004 ²¹ .
2004 Broadcasting Review	ComReg's 2004 Broadcasting Analysis and 2004 Remedies Decision.
2004 Remedies Decision	ComReg's Broadcasting Decision Notice in 2004 ²² .
2005 Accounting Separation and Cost Accounting	European Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory

¹⁹ A private citizen's Response to the BTS Consultation.

²⁰ EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

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

²¹ Consultation Paper "Market Analysis – Wholesale Broadcasting Transmission Services". ComReg Document No. 03/126, dated 22 October 2003. See <http://www.comreg.ie/fileupload/publications/ComReg03126.pdf>.

Response to Consultation "Market Analysis - Wholesale Broadcasting Transmission Services", ComReg Document No. 04/06, dated 3 February 2004. See <http://www.comreg.ie/fileupload/publications/ComReg0406.pdf>.

²² Decision Notice "Market Analysis – Wholesale Broadcasting Transmission Services". Decision No. D6/04, ComReg Document No. 04/47, dated 24 April 2004. See <http://www.comreg.ie/fileupload/publications/ComReg0447.pdf>.

Decision Notice "Wholesale Broadcasting Transmission Services Markets - SMP Obligations" Decision No. D16/04, ComReg Document No. 04/122, dated 24 December 2004. See <http://www.comreg.ie/fileupload/publications/ComReg04122.pdf>.

Recommendation	framework for electronic communications (2005/698/EC) ²³ .
2007 Recommendation	European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to <i>ex ante</i> regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services OJ L 344 ²⁴ .
2009 Act	The Broadcasting Act 2009 ²⁵ .
2010 Communication	European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the region on market reviews under the EU Regulatory Framework (3rd report), Brussels, 1.06.2010 SEC(2010) 659 ²⁶ .
Access Directive	Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, as amended by Directive 2009/140/EC ²⁷ .

²³EU Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/69/EC).

See <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:266:0064:0069:EN:PDF>.

²⁴European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services OJ L 344.

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

²⁵ The Broadcasting Act 2009.

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

²⁶European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGION on market reviews under the EU Regulatory Framework (3rd report), Brussels, 1.06.2010 SEC(2010) 659.

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0271:FIN:EN:PDF>.

²⁷Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, as amended by Directive 2009/140/EC.

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF>.

Access Regulations	European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 ²⁸ .
Act of 1926	The Wireless Telegraphy Act 1926 (No. 45 of 1926) as amended ²⁹ .
AFD	Additional financial data.
ASO	Analogue terrestrial television switch-off.
Authorisation Regulations	European Communities (Electronic Communication Networks and Services) (Authorisation) Regulations 2011 ³⁰ .
BAI	The Broadcasting Authority of Ireland.
BCI	The Broadcasting Commission of Ireland.
BEREC	Body of European Regulators for Electronic Communications ³¹ .
Broadcast Operator	For the purpose of the Market A Decision Instrument, Broadcast Operator means a multiplex contractor, a national sound broadcasting contractor and RTÉ.
Broadcaster	For the purpose of the Market B Decision Instrument, Broadcaster shall have the same meaning as under section 2 of the 2009 Act and for the purposes of the Market B Decision Instrument, the Broadcaster shall have the necessary statutory basis or Ministerial consent pursuant to section 130 of the Act of 2009, having regard to section 3.3 of the Decision Instrument.
BTS	Wholesale broadcasting transmission and distribution services.

²⁸ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011.

See <http://www.comreg.ie/fileupload/File/S.I.%20No.%20334%20of%202011%20Access%20Regs%20Final.pdf>.

²⁹ The Wireless Telegraphy Act 1926.

See <http://www.irishstatutebook.ie/1926/en/act/pub/0045/index.html>.

³⁰ European Communities (Electronic Communication Networks and Services) (Authorisation) Regulations 2011.

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

³¹ Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 established the Body of European Regulators for Electronic Communications (BEREC) and the Office.

BTS Consultation	ComReg's market review of broadcasting transmission services in Ireland ³² .
BTS Review	Market review of the BTS markets.
BU	Bottom up approach to costing.
CA	Competition Authority.
CCA	Current cost accounting.
Commercial Broadcaster	For the purpose of this Decision, Commercial Broadcaster means a non PSB broadcaster.
Commercial Multiplex(es)	For the purpose of this Decision, ComReg typically refers to multiplexes other than RTÉ's PSB multiplexes, as Commercial Multiplexes.
Communications Regulation Acts 2002-2011	Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act of 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (no. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) ³³ .
Competition Authority Opinion	The opinion of the Competition Authority on ComReg's definition of the Relevant BTS Market(s) and the assessment of competition within these markets.
ComReg	Commission for Communications Regulation.
DCENR	The Department of Communications, Energy and Natural Resources.
Decision	This Response to Consultation and Decision ³⁴ .
Downstream Broadcaster	For the purposes of this Decision, Downstream Broadcaster means a TV and radio programme service provider.
DTH satellite	Direct to the home satellite.

³² Consultation Paper and Draft Decision "Market Review – Broadcasting Transmission Services in Ireland". ComReg Document No. 12/77, dated 13 July 2012. See <http://www.comreg.ie/fileupload/publications/ComReg1277.pdf>

³³ Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act of 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (no. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

See <http://www.irishstatutebook.ie/2002/en/act/pub/0020/index.html>

³⁴ Market Review, Broadcasting Transmission Services in Ireland, Response to Consultation and Decision, ComReg Document 13/71, Decision Number D11/13, July 2013.

DTT	Digital terrestrial television.
EC	European Commission.
ECN	Electronic Communications Network as defined under the Framework Regulations.
ECNS Regulatory Framework	Electronic communications networks and services regulatory framework ³⁵ .
ECS	Electronic Communications Service as defined under the Framework Regulations.
ECTA	The European Competitive Telecommunications Association.
Eircom	Eircom Ltd.
End-user	Retail consumers.
EPG	Electronic Programme Guide.
ERG	The European Regulators Group ³⁶ .
EU	European Union.
European Commission Comments	Correspondence from the European Commission setting out comments pursuant to Article 7 of the Framework Directive.
European Commission's Notice on Market Definition	European Commission, Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5 (Commission Notice on Market Definition) ³⁷ .
Explanatory Note to the 2007 Recommendation	Commission Staff Working Document, Explanatory Note, Accompanying document to the Recommendation, SEC (2007) 1483, dated 13/11/2007 (the Explanatory Note) ³⁸ .

³⁵ Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, ERG (06)33, May 2006, available at http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf. Please note that BEREC is currently working on up-dating this ERG Common Position. No date for completion of this work has yet been announced.

³⁶ Pursuant to [Regulation \(EC\) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications \(BEREC\) and the Office](#) ERG was replaced with the Body of European Regulators for Electronic Communications (BEREC).

³⁷ European Commission, Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5 (Commission Notice on Market Definition).

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:372:0005:0013:EN:PDF>

³⁸ Commission Staff Working Document, Explanatory Note, Accompanying document to the Recommendation, SEC (2007) 1483, dated 13/11/2007 (the Explanatory Note).

See

http://ec.europa.eu/information_society/policy/ecomms/doc/implementation_enforcement/eu_consultation_procedures/sec_2007_1483_2.pdf.

FDC	Fully distributed cost pricing.
Framework Directive	Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC ³⁹ .
Framework Regulations	European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 ⁴⁰ .
FTA	Free to air.
FTA TV	FTA terrestrial and FTA satellite TV.
HCA	Historical cost accounting.
HD	High Definition refers to high resolution TV programme services.
HM	Hypothetical monopolist.
IP	Internet Protocol.
IPTV	Internet Protocol Television, used for the delivery of television programme content via an internet connection (usually via broadband phone line) for reception by a suitable to a television receiver.
ITU	International Telecommunications Union.
LNB	Low noise block downconverter.
LRAIC	Long run average incremental cost.
LRAIC plus	Long run average incremental cost plus.
LRIC	Long run incremental cost recovery.
Market A	The market for wholesale access to national terrestrial broadcast transmission services.
Market B	The market for wholesale access to DTT multiplexing services.
MEA	Modern equivalent asset.

³⁹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC.

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF>.

⁴⁰ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011.

See <http://www.comreg.ie/fileupload/File/S.I.%20No.%20333%20of%202011%20Framework%20Regs%20Final.pdf>.

MES	Minimum efficient scale.
MHz	Megahertz (1,000,000 Hertz).
MMDS	Multipoint Microwave Distribution Service.
MoU	Memorandum / Memoranda of Understanding.
Multiplex operator	This means RTÉ, as a multiplex licensee under section 132 of the 2009 Act and, separately, a holder of a multiplex contract entered into under section 131 of the 2009 Act.
Must offer	Section 77 (11) and (12) of the 2009 Act discusses RTÉ, TG4 and the TV service programme contractors' must offer obligations (which are applicable to transmission via cable and satellite networks).
NCA	National Competition Authority.
Nielsen TAM Establishment Survey	Nielsen TV Audience Measurement (TAM) Establishment Survey.
NRA	National Regulatory Authority.
NTM	National television multiplex.
Ofcom	UK Regulator.
Pay TV	Pay by subscription TV service over cable, satellite and IP platforms.
Programme services	TV and or radio content material distributed to end-users (i.e. a TV and or radio channel).
PSB	Public service broadcasting.
PSB Broadcaster	For the purpose of this Decision, PSB broadcaster means RTÉ, TG4, the Houses of the Oireachtas Channel and the Irish film Channel.
PSB Multiplex(es)	For the purposes of this Decision ComReg typically refers to RTÉ multiplexes as PSB multiplexes.
Reception Method	Reception Method is measurement of TV homes in Ireland. This measurement is different to that of Reception Type. Each TV home can have more than one method of reception. E.g. DTT and Cable, or Sky and Cable, etc. Each home is asked what is the reception method for their main TV set and up to a further 8 TV sets (9 in total). For this reason, the total for the Reception Methods adds up to more than 100% (as a home

	could use several Reception Methods for the same or different TV sets).
Reception Type	Reception Type is a measurement of TV homes in Ireland determined by the programme services the TV home receives. This is hierarchically defined and mutually exclusive. A home is classified once within a reception type and this is based upon the highest form of reception (being the reception method which allows for the most programme services to be received) available within the home. For example, Irish FTA terrestrial TV homes are those homes who received the most TV programmes via this platform.
Relevant BTS Markets	The markets for the provision of BTS.
Respondents	Those who made Submissions to the BTS Consultation.
Respondents' Submissions	Collective submissions received to the BTS Consultation.
RIA	Regulatory Impact Assessment.
RTÉ	Raidió Teilifís Éireann. As described in section 2 of the 2009 Act, RTÉ means the authority originally established under section 3 of the Broadcasting Authority Act 1960. It is a national public service broadcaster in Ireland. The principal objects and associated powers of RTÉ are described in section 114 of the Broadcasting Act 2009. RTÉ is a vertically integrated entity and self supplies terrestrial network services via its wholly owned subsidiary RTÉNL. RTÉ launched its DTT platform marketed as "Saorview" in May 2011. The spectrum used by RTÉ is licensed to it by ComReg.
RTÉ Response	RTÉ and RTÉNL joint response to ComReg consultation document number 12/77.
RTÉNL	RTÉ's wholly owned subsidiary, RTÉ Transmission Network Limited.
Saorsat	RTÉ's retail free to air satellite service ⁴¹ .
Saorview	RTÉ's retail free to air DTT service ⁴² .

⁴¹ Saorview. See <http://www.saorview.ie/news/saorsat/>

⁴² Saorsat. See <http://www.saorview.ie/what-is-saorview/>

SD	Standard Definition refers to standard resolution TV programme services.
SI	Statutory Instrument.
SMP	Significant market power.
SMP Guidelines	European Commission guidelines on market analysis and assessment of Significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03) ⁴³ .
SSNIP	Small but Significant Non-transitory Increase in Price.
SoR	Statement of Requirements.
Submission	Individual submissions received to the BTS Consultation.
TD	Top down approach to costing.
Terrestrial TV Only Homes	TV homes that use terrestrial TV as their sole viewing platform.
TFEU	Treaty on the Functioning of the European Union ⁴⁴ .
TG4	Teilifís na Gaeilge. As described in section 2 of the Broadcasting Act 2009, Teilifís na Gaeilge means the body, originally established by section 44 of the Broadcasting Act 2001. The objects of TG4 are discussed in section 118 of the Broadcasting Act 2009.
The Minister	Minister for Communications, Energy and Natural Resources.
Three Criteria Test	As noted in the European Commission's 2007 Recommendation: <i>"For markets not listed in this Recommendation national regulatory authorities should apply the three-criteria test to the market concerned...national regulatory authorities should have the power to apply the three-criteria test in order to assess whether, on the basis of national circumstances, a market is still susceptible to ex</i>

⁴³ European Commission guidelines on market analysis and assessment of Significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF>.

⁴⁴ Treaty on the Functioning of the European Union.

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

	<i>ante regulation</i> ". A market may have the characteristics which warrant <i>ex ante</i> regulation if the Three Criteria Test is satisfied. The three criteria are (1) the presence of high and non-transitory barriers to entry (2) a market structure does not tend towards effective competition over the relevant time horizon and (3) <i>ex post</i> competition law is insufficient to address the market failure(s) concerned.
TV	Television.
TV3	TV3 is the television programme service contractor as per section 70 of the 2009 Act. TV3 Television Network Limited trades as TV3. The BAI has entered into a television programme service contract with TV3 which gives TV3 the right and duty to establish and maintain the TV3 programme service under Section 70 of the 2009 Act. 3e is also provided under this television programme contract. For the purpose of this Decision ComReg refers to TV3 as also comprising the programme services of TV3 and the programme service of 3e, both of which are privately owned by Doughty Hanson and Co. (being a European private equity firm).
Universal Service Directive	Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal services and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC ⁴⁵ .
WACC	Weighted average cost of capital.

⁴⁵ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal services and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC.

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0051:0077:EN:PDF>