



Commission for  
**Communications Regulation**

## Response to Consultation

### **Response to Consultation: Market Analysis - Wholesale Broadcasting Transmission Services**

<b>Document No:</b>	<b>04/06</b>
<b>Date:</b>	<b>3 February 2004</b>

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## 1 Executive Summary

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

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<sup>1</sup> Regulations 26 and 27.

<sup>2</sup> 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*”).

<sup>3</sup> Explanatory Memorandum to the *Relevant Markets Recommendation*.

- 1.5 ComReg has taken utmost account of the *Relevant Markets Recommendation* in the assessment of markets in accordance with the principles of competition law and has taken the utmost account of the *SMP Guidelines*. The wholesale broadcasting transmission market contained in the *Relevant Markets Recommendation* comprises a number of different types of transmission services. As per the *SMP Guidelines*, it is appropriate to assess whether each type falls within the same market definition by starting with the smallest possible transmission market and then focusing on whether the closest possible substitute is in the same market. ComReg has therefore started with a number of narrow sets of products and assessed whether other products are substitutable for them, in order to determine the candidate markets in this sector.
- 1.6 ComReg has carefully considered the market for “**broadcasting transmission services, to deliver broadcast content to end-users**”, however, ComReg has decided to define markets appropriate to national circumstances that differ from the *Relevant Markets Recommendation*. The wholesale transmission markets which ComReg has defined are as follows:
- the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks
  - the wholesale market for radio broadcasting transmission services on local/regional analogue terrestrial networks
  - the wholesale market for television broadcasting transmission services on analogue terrestrial networks
  - the wholesale market for broadcasting transmission services on cable and satellite networks
- 1.7 The *Relevant Markets Recommendation* obliges ComReg in circumstances where national markets differ from the market recommended to apply three cumulative criteria prior to establishing whether such national markets are subject to ex-ante regulatory intervention. Following this exercise two markets have failed the criteria and are not subject, during this review, to further market analysis.
- 1.8 The **local/regional analogue terrestrial radio transmission market** is characterised by low barriers to entry where the majority of undertakings have ownership over their own transmission networks. New entrants also have the option of purchasing transmission services from the national transmission network operator, RTÉ Transmission Network Limited (RTNL) or existing mobile network operators. ComReg thus deems it unnecessary (under this review time frame) to undertake an assessment of effective competition in this transmission market.
- 1.9 Although the **cable and satellite broadcasting transmission market** is characterised by high barriers to entry, it displays some characteristics such that it will tend over time towards effective competition. The Freesat model gives broadcasters additional options with respect to choice of satellite operators and cable operators are now free to compete in other areas as exclusivity has now been removed. Further, given the level of interest already expressed in supplying services in the 12 GHz band, the deployment of such services is also possible within the timeframe of the current review. ComReg thus deems it unnecessary (under this review time frame) to undertake an assessment of effective competition in this transmission market, although

ComReg reserves the right to reassess the definition and competitive conditions of this market in the future if required.

- 1.10 ComReg has thus identified two relevant wholesale transmission markets on which to conduct an analysis of whether or not the market is effectively competitive by reference to whether any given undertaking or undertakings are deemed to hold significant market power (SMP) in that market :
- the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks
  - the wholesale market for television broadcasting transmission services on analogue terrestrial networks
- 1.11 ComReg has conducted an extensive market analysis on the relevant markets defined to assess whether an undertaking has Significant Market Power (SMP). ComReg has used a wide range of criteria including market share, countervailing buying power and barriers to entry and has also conducted a prospective analysis of the relevant markets
- 1.12 ComReg has reached the preliminary conclusion that RTNL should be designated as having SMP in the relevant market for the provision of wholesale national analogue terrestrial broadcasting transmission services for the provision of radio content to Irish end-users. In the short to medium term, considering foreseeable technological developments and anticipated customer behaviour, there is nothing to suggest to ComReg that the SMP enjoyed by RTNL will be diluted in any meaningful way in the absence of appropriate and proportionate *ex ante* regulatory measures. There is nothing to indicate that there exists sufficient countervailing market power to exert competitive pressure on RTNL.
- 1.13 ComReg has reached the preliminary conclusion that RTNL should be designated as having SMP in the proposed relevant markets for the provision of wholesale analogue terrestrial broadcasting transmission services for the provision of TV content to Irish end-users. There is nothing to indicate that there exists any countervailing market power such as to exert any competitive pressure on RTNL.
- 1.14 In light of ComReg’s identification of the relevant markets and its subsequent market analysis, ComReg takes the view that the most appropriate remedy to apply to RTNL, in accordance with the principles set forth in the *Framework* and *Access Directives* and the *Framework* and *Access Regulations*, is based on the principles of transparency and non-discrimination for charges and other conditions for the provision of wholesale analogue terrestrial TV and radio broadcasting transmission services. ComReg also reserves the right to impose an accounting separation remedy to ensure the efficacy of the above obligations<sup>4</sup>.
- 1.15 This document is a response to a consultation document on the market analysis of wholesale broadcasting transmission services in Ireland<sup>5</sup>. ComReg welcomed all comments that were submitted by interested parties on the questions that were posed

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

<sup>5</sup> ComReg doc no. 03/126

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in this market review, and has considered all comments in coming to its preliminary conclusions on market definition, market analysis and remedies. As required by Regulation 20 of the Framework Regulations, the draft measure is now being made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking a final decision.

## 2 Introduction

### Objectives under the Communications Regulations Act 2002

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

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

### The Regulatory Framework

2.2 Four sets of Regulations, which transpose into Irish law four European Community directives on electronic communications and services, entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the *Privacy Directive*, was transposed into Irish law on 6<sup>th</sup> November 2003<sup>6</sup>.

2.3 The new framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the *Framework Regulations*.<sup>7</sup> In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.<sup>8</sup> Where it concludes that the relevant market is not effectively competitive (*i.e.*, where there are one or more undertakings with significant market power (“SMP”)), the *Framework Regulations* provide that it must identify the undertakings with SMP on that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.<sup>9</sup> Alternatively, where it concludes that the relevant market is effectively competitive, the *Framework Regulations* oblige ComReg not to impose any new regulatory obligations on any undertaking in that relevant market, and withdraw any such obligations it may have imposed at an earlier stage.<sup>10</sup>

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

### Process to Date

2.5 ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services

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<sup>6</sup> S.I. No 535

<sup>7</sup> Regulation 26.

<sup>8</sup> Regulation 27.

<sup>9</sup> Regulation 27(4).

<sup>10</sup> Regulation 27(3).



(“ECNSs”), and from consumer surveys<sup>11</sup> commissioned by ComReg, in order to carry out as thoroughly as possible its market definition and market analysis based on established economic and legal principles, and taking the utmost account of the *Relevant Markets Recommendation* and the *SMP Guidelines*.

- 2.6 ComReg published an information notice on the market analysis process on 19 December, 2002. The first of the industry workshops held by ComReg took place on 23 January, 2003 and questionnaires were sent to broadcasting operators on 18 February. Following representations made by operators at ComReg’s first workshop, the industry was given until 15 April to respond to the questionnaire. ComReg held its second workshop on 25 February to discuss the questionnaires.
- 2.7 While the questionnaires included specific qualitative and quantitative questions designed to aid ComReg in defining and analysing the relevant wholesale broadcasting transmission market, the questionnaire also gave respondents the opportunity to provide any additional information that they felt would be useful to ComReg in performing this task. After all completed questionnaires had been received ComReg, where necessary, invited operators to meet and discuss the data that had been submitted to ensure clarity and certainty in preparation for the market definition and analysis process<sup>12</sup>. Further, as referenced above, market data was also obtained from consumer surveys carried out on ComReg’s behalf and from publicly available sources.
- 2.8 On 22 October 2003, ComReg issued a six week national consultation on its market analysis for wholesale broadcasting transmission. Interested parties were asked to submit comments by 3 December 2003 on a number of questions pertaining to the preliminary findings of the Market Definition section. ComReg received submissions from the five respondents listed below by the close of the consultation period. Submissions received after the closing date are not included in the response to consultation, in keeping with ComReg’s consultation procedures<sup>13</sup>.

The five respondents to the Consultation by the closing date were:

- Chorus Communications Ltd.
- Eircom Ltd.
- RTÉ
- Today FM
- TV3

- 2.9 ComReg thanks all respondents for their submissions. Having considered the views of all respondents, ComReg sets out in this document its proposals regarding the market analysis process. Comments relevant to each consultation question are addressed in the following sections (all questions are numbered as they were in the original

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<sup>11</sup> Take-up of Television Services Survey - ComReg Document No. 03/144E & TNSmrb Phonebus Survey, September 2003

<sup>12</sup> As part of this process ComReg met with RTÉ on 30th May 2003.

<sup>13</sup> ComReg Document Number 03/31: Future Regulation of Electronic Communications Networks and Services - ComReg Consultation Procedures

Wholesale Broadcasting Transmission Services – Response to Consultation consultation document). All responses received are available for inspection (with the exception of material supplied on a confidential basis) at ComReg’s office.

### **Liaison with Competition Authority**

2.10 There is a requirement on NRAs to co-operate with National Competition Authorities (NCAs) throughout the processes of market definition and analysis. In December 2002, ComReg signed a co-operation agreement with the Competition Authority for a period of three years.<sup>14</sup> To facilitate market review decision-making, a Steering Group including a representative from the Competition Authority was established by ComReg. Through this forum, the Competition Authority has been informed and involved throughout the market review decision-making process. The views of the Competition Authority are at Annex G.

### **Structure of the Document**

2.11 The remainder of this consultation document is structured as follows, taking consideration of the views expressed by respondents to the national consultation:

- section 3 discusses what services fall within the relevant wholesale broadcasting transmission market in Ireland;
- section 4 presents ComReg’s conclusions on the definition of the wholesale broadcasting transmission market in Ireland;
- section 5 presents ComReg’s market analysis of the wholesale broadcasting transmission market and presents the view on whether this market is effectively competitive;
- section 6 presents ComReg’s view on those undertakings with significant market power;
- section 7 outlines a range of possible, as well as likely proposed remedies, under the new regulatory framework; and
- section 8 outlines the conclusions of the regulatory impact assessment, conducted in relation to any proposed regulatory intervention.

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<sup>14</sup> ComReg Document No. 03/06.

### 3 The Relevant Markets

- 3.1 According to the *Relevant Markets Recommendation*, there are, in the electronic communications sector, at least two main types of relevant markets to consider: markets for services or products provided to end users (retail markets), and markets for the inputs which are necessary for operators to provide services and products to end users (wholesale markets). Within these two types of markets, further market distinctions may be made depending on demand and supply side characteristics.
- 3.2 The Commission recommends, in its *Relevant Markets Recommendation*, that NRAs should analyse the relevant wholesale market for “**broadcasting transmission services, to deliver broadcast content to end-users**”. The Commission has based its conclusion on several factors,<sup>15</sup> including:
- whether services broadcast over different transmission systems can be considered to constitute effective demand substitutes in terms of price and product for a significant number of end-users;
  - the coverage or availability of the different transmission networks;
  - the existence of demand and supply substitution conditions that enable end-users (or a significant portion of them) to switch between broadcasting or transmission platforms; and
  - the existence and coverage of digitally capable broadcasting transmission platforms.

#### Background to the Irish Broadcasting Sector

- 3.3 When compared to the other Member States, Ireland has a relatively small and highly concentrated broadcasting sector, with 1.3 million TV homes<sup>16</sup> of which two-thirds subscribe to pay television services (Pay TV). The dynamics of the Irish broadcasting sector are outlined below and the broadcasting supply chain is presented in Figure 3.1. The main players in the broadcasting sector (further details are contained in Annexes B & C) include:
- ntl Incorporated
  - Chorus Communications Ltd
  - BSkyB Ltd
  - EUTELSAT
  - SES ASTRA
  - RTÉ
  - TG4
  - TV3
  - Casey Cablevision.

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<sup>15</sup> Explanatory Memorandum to the Relevant Markets Recommendation.

<sup>16</sup> Figure is based on 2002 CSO estimate of approximately 1.3 million households with a TV

- 3.4 There are four platforms over which broadcasting transmission services in Ireland are provided, namely, **satellite**, **cable/MMDS**<sup>17</sup> (hereafter referred to as ‘**cable**’ unless differentiating between the two types of transmission), **deflector** and **analogue terrestrial**. At the retail level, channel distribution is provided by the platform operator to the end user via an aerial (in the case of analogue terrestrial transmission, MMDS and deflectors), a cable connection, a satellite-dish (in the case of DTH satellite) and/or via a set top box (for MMDS, digital cable and DTH satellite reception).
- 3.5 SES ASTRA and Eutelsat both operate **satellites**, whose footprint includes Ireland, for the delivery of TV and radio services.
- 3.6 BSkyB is both a producer and provider of programme services distributed to end users via satellite (Direct to Home) and cable. It leases transponder capacity from SES ASTRA and Eutelsat to broadcast its services to end users. BSkyB’s own programme services are uplinked to the ASTRA and Eutelsat satellites from the UK. However, BSkyB<sup>18</sup> also subleases transponder capacity to RTÉ, TG4 and TV3 which are uplinked in Ireland.
- 3.7 Also available on the satellite platform are unencrypted programme services, which now include the BBC programme services (a type of service known as “Freesat”).
- 3.8 Cable, terrestrial analogue and deflector network operators also provide retail broadcasting services to end users.
- 3.9 ntl, Chorus Communications, Casey Cablevision<sup>19</sup> and a number of small independent cable providers operate localised and at present non-overlapping (at the retail level) **cable** networks, all of which have analogue and some of which have digital capabilities. Cable operators have obligations under the Broadcasting Act 2001 to transmit the ‘must carry’ programme channels provided by RTÉ, TV3 and Today FM (programme service contractors). Under the *Broadcasting Act 2001* the list of entities with “must carry” status could be extended to include community/local TV channels that enter into a new contract regime with the BCI.
- 3.10 There are twenty seven **deflector** operators which deliver services to rural parts of Ireland (using UHF frequencies). Fourteen deflector systems operate in Donegal, one in Cork, two in Waterford, five in Mayo, one in Sligo, one in Louth, one in Tipperary, one in Offaly and one in Galway. Currently, there are over 21,000 deflector subscribers, however such networks are fragmented, many of the systems are small (with less than 1,000 subscribers) and the transmitters are low powered and thus have low coverage capacity.
- 3.11 Deflector operators are restricted to providing only four television services which are usually UK programme services (BBC1, BBC2, ITV and Channel 4). New entrants may consider providing services using the 12 GHz frequency band, which would offer increased capacity and thus in the longer term could be regarded as a substitute for services available on cable and satellite platforms. Because of their small scale and

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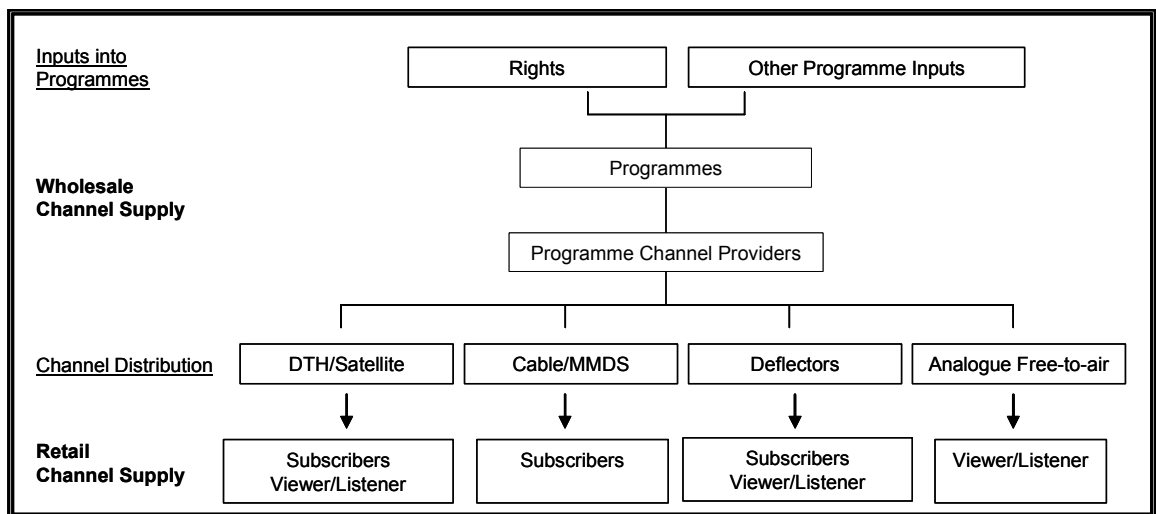
<sup>17</sup> Multi-point Microwave Distribution Systems (MMDS)

<sup>18</sup> For the purposes of this review, ComReg is differentiating between Sky’s transmission providing arm and its programme providing ‘broadcaster’ arm.

<sup>19</sup> Casey Cablevision, a small regional operator, do not provide MMDS services

limited geographical reach, deflector operators will not be considered further in this review. The possibility that deflector operators or others might enter the market via MMDS services in the 12GHz band will be considered in the appropriate sections of this document.

- 3.12 There are twenty-seven independent **local and regional radio stations** operating in specified franchise areas. The majority of local radio stations (60%) provide their own transmission with the remaining (40%) leasing transmission from third parties. Of those which lease transmission, one operator is fully supplied and approximately 20% are partially supplied by RTNL, to ensure coverage of all of their franchise area. Mobile network operators and cable operators also provide some local radio programme service providers with access to sites for analogue terrestrial transmission services.
- 3.13 Terrestrial services in Ireland are provided by RTÉ and by independent broadcasters who have entered into contractual arrangements with the Broadcasting Commission of Ireland (the “BCI”). The spectrum used by RTÉ is licensed by ComReg to the RTÉ Authority in accordance with the Broadcasting Act, 1960<sup>20</sup> while that used by the independent sector is licensed to the BCI in accordance with the Radio and Television Act, 1988<sup>21</sup>. The BCI licenses and regulates independent broadcasting content services including the national television programme service (TV3), a national radio service (Today FM) and local/regional radio services. National analogue terrestrial transmission services are provided by RTNL to TV3 and Today FM.
- 3.14 RTÉ, the Public Service Broadcaster operates the **national analogue terrestrial transmission** platform through its network division, RTNL.



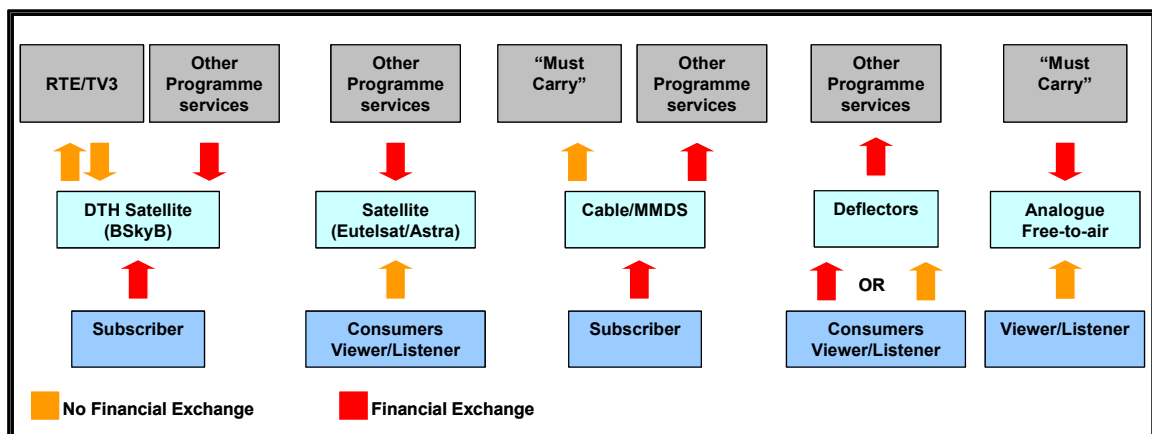
**Figure 3.1: Broadcasting Supply Chain**

<sup>20</sup> <http://www.comreg.ie/sector>

<sup>21</sup> *ibid*

*Broadcasting Value Flows*

- 3.15 The payment flows for broadcasting transmission services are outlined in Figure 3.2 below.
- 3.16 **National Analogue Terrestrial Transmission:** In the Irish market, unlike other member states, RTÉ, the state owned public service broadcaster, wholly owns the national TV and Radio analogue terrestrial transmission network. RTNL charges TV3 and Today FM for national transmission services while Irish national radio and television programme services can be accessed via analogue terrestrial transmission on a free to air basis. RTÉ’s radio and TV programme services are principally funded from advertising, sponsorship and a TV licence fee while TV3’s and Today FM’s income to date is dependent on advertising and sponsorship and has not been supplemented by the licence fee.
- 3.17 **Local Analogue Terrestrial Transmission:** While the majority of local radio stations provide their own transmission the remaining purchase transmission services from third parties such as RTNL, ntl, Chorus and mobile operators in exchange for payment. Local and regional radio stations provide local radio broadcasting services with their income mainly derived from advertising and sponsorship.
- 3.18 At the retail level revenue is earned by cable, satellite and deflector operators from end users via installation fees, payment for programme packages and pay per view charges (PPV is not available via deflectors).
- 3.19 **Deflectors** are fairly unique to the Irish market. Deflector operators pay the UK BBC, ITV and Channel 4 for the rights to re-transmit their services. Revenue is earned from end users (in some cases on a voluntary basis) by means of an annual subscription fee.
- 3.20 **Cable** operators (unlike several other Member States) generally pay programmers a fee per subscriber for the rights to carry their channels. No fee is paid or received for carriage of the must carry channels.



**Figure 3.2: Broadcasting Transmission Payment Flows**

- 3.21 Programme service providers normally pay **satellite** operators directly (Eutelsat or SES ASTRA) for transponder capacity (e.g. BBC) or indirectly through subleasing from a third party such as BSkyB. A ‘barter’ like arrangement exists between RTÉ, TV3 and BSkyB, under which no charges are paid by either party for the transmission

Wholesale Broadcasting Transmission Services – Response to Consultation of the RTÉ programme services and TV3 on the satellite platform. Satellite operators are not subject to the “must carry” obligations of the Broadcasting Act 2001.

### *Alternative Delivery Platforms*

#### xDSL

- 3.22 Under the new Framework Regulation, which has been transposed by the Minister for Communications Marine and Natural Resources, operators providing services (not using spectrum) no longer require a licence to provide broadcasting transmission services. This presents an opportunity for operators to provide programme services via technologies such as xDSL.
- 3.23 Radio listeners can acquire access to radio streamed over the Internet over both dial-up and always-on connections. Also, the very recent introduction of flat rate charging has increased the incentives at the retail level for listeners to listen to radio in this manner.
- 3.24 However, the internet has not yet been successfully deployed (in Ireland or elsewhere) to deliver programme services. There are capacity constraints on the use of radio over the internet as it is limited by the number of simultaneous streams a server can support. Further, fixed streamed services will not support mobile and portable reception. Internet streamed radio services are most appropriate for static reception. ComReg considers that it is unlikely that Internet streamed radio services will be widely accessed by mobile listeners during the timeframe of this review. Currently, less than 1% of adult radio listeners listen to the radio via the internet<sup>22</sup>. As a result, radio broadcasters are not likely to regard fixed stream services (over xDSL) as a viable substitute for analogue terrestrial transmission and will thus not be considered further in this review.

#### 12 GHz Frequency Band

- 3.25 In August 2002, ComReg sought expressions of interest for programme services distribution systems in the 12 GHz band. Use of this band would permit potential new entrants, existing MMDS operators and/or deflector operators to provide the transmission services necessary to provide retail broadcasting services to end users. By the closing date, 13 September 2002, expressions of interest were received from 3 parties and further interest has been expressed by other operators. In November 2003, MMDS Regulations were signed by the Department of Communications, Marine and Natural Resources providing a legal mechanism to license operators to provide broadcasting distribution services in the 12 GHz band.<sup>23</sup> ComReg is now proceeding with the initial expressions of interest, with the potential to extend the scheme to other interested parties at a later stage.

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<sup>22</sup> MRBI Joint National Listenership Research (JNLR) - June 2003

<sup>23</sup> SI529 of 2003

3.26 However, it is not expected that new radio and TV broadcasting transmission services will become significant players within the timeframe of this review. If significant players do enter the market and exert competitive pressure within the timeframe of this review, ComReg will revisit the situation.

#### DTT & DAB

3.27 Possible sources of competition in the terrestrial transmission sector at a national level are digital terrestrial television (DTT) and digital audio broadcasting (DAB). Presently, DTT and DAB do not exist in Ireland and it is not expected that such platforms will have had a material impact on the sector at national level within the timeframe of the review.

#### Mobile

3.28 In Ireland, TV programme services are not available on any mobile platform. Radio services are provided using the VHF band. Current capacity constraints and technical limitations of the GPRS networks mean that they do not support the delivery of TV broadcasting services of commercial quality. However, with the advancement of mobile capabilities and the introduction of 3G technology, these issues may be reduced. In Japan, terrestrial digital TV broadcasting received via 3G was planned to commence in December 2003 in major metropolitan areas of Tokyo, Nagoya and Osaka districts. However, it is not clear that such services will be introduced and become established in Ireland within the timeframe of this review.

### **Scope of this review**

3.29 The services under examination in this review are those for television and radio wholesale broadcasting transmission. As such, this review will consider whether, and the extent to which, the various television and radio wholesale broadcasting transmission services currently supplied and acquired in Ireland fall within the same relevant market(s). In this respect, it considers television and radio broadcasting transmission services provided over terrestrial, satellite, cable/MMDS and deflector networks, using analogue and/or digital technology.

3.30 Member States have discretion with respect to the analysis of the market for Conditional Access Systems to digital television and radio services broadcast in accordance with Article 6(3) of the Access Directive. Under the new framework all service operators who provide conditional access services to digital TV and radio broadcasters must offer these services on a fair, reasonable and non-discriminatory basis (FRND). This FRND obligation has been carried over from Directive 95/47/EC where it was introduced to ensure that a wide variety of programming and services was available in the nascent digital television industry. The obligation applies to any current provider of conditional access services to broadcasters in Ireland, and to any undertaking wishing to do so in the future. If a Member State sees this obligation as inappropriate and wishes to amend or withdraw this obligation, then Article 6(3) of

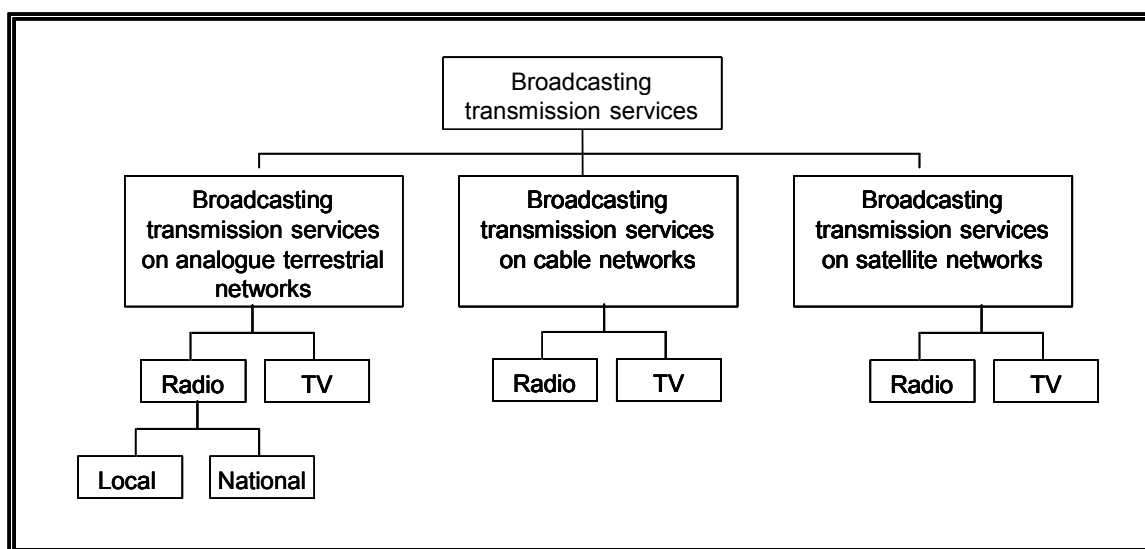


Wholesale Broadcasting Transmission Services – Response to Consultation the Access Directive<sup>24</sup> provides that Member States may permit their NRAs to review the market for conditional access systems to digital television and radio services broadcast, irrespective of the means of transmission. ComReg considers that the existing FRND requirements, which currently apply to all providers of conditional access systems in Ireland, continues to be appropriate and proportionate and that it is unnecessary to undertake a review of this obligation. ComReg reserves the right to revisit this in the future if it feels it is necessary to do so.

### Wholesale Broadcasting Transmission Services

3.31 Currently, end users, depending on their particular circumstance, may receive radio and television broadcasting via terrestrial, cable or satellite transmission networks. This is illustrated in figure 3.3, below, which gives an overview of the various broadcasting transmission services in Ireland that make up the **wholesale market for broadcasting transmission services to deliver content to end users**:

- i. analogue terrestrial radio transmission networks<sup>25</sup>
- ii. analogue terrestrial television transmission network
- iii. cable television and radio transmission networks
- iv. satellite television and radio transmission networks.



**Figure 3.3: Wholesale Broadcasting Transmission Services**

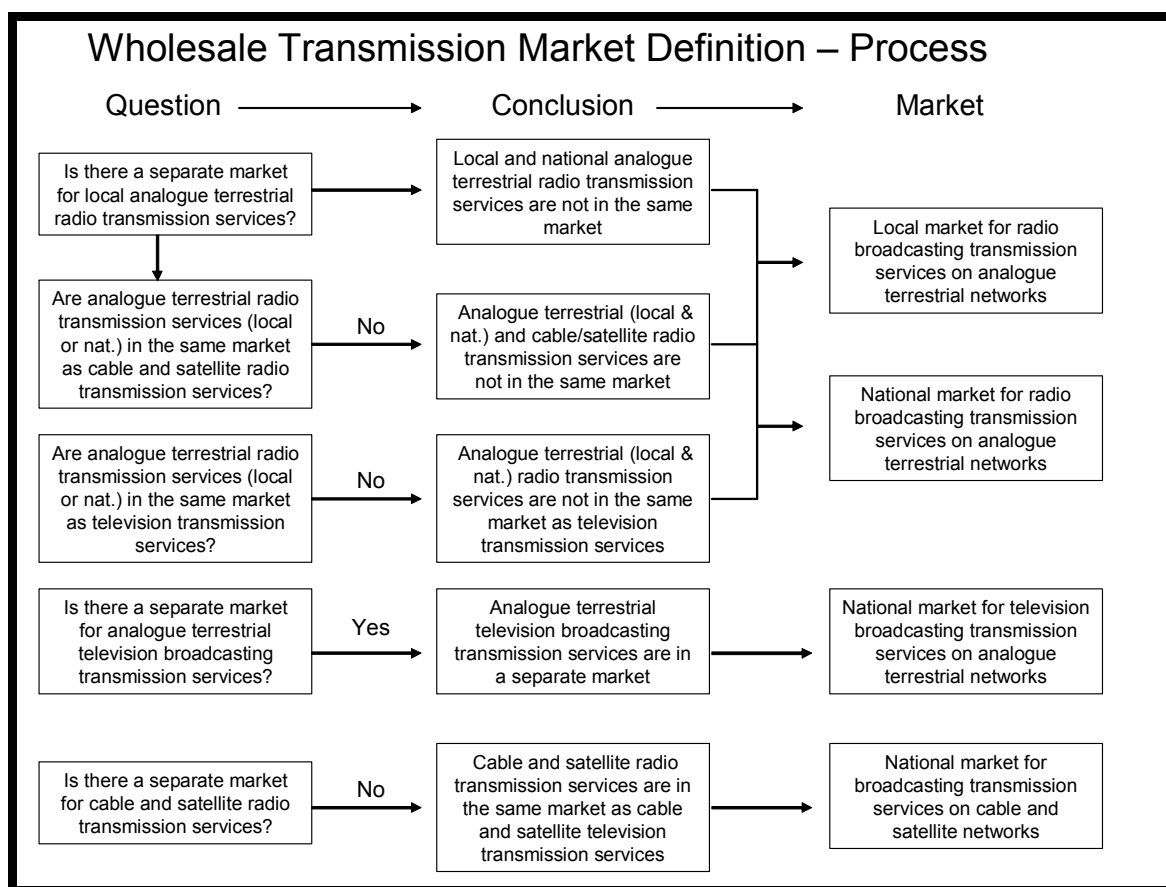
<sup>24</sup> Regulations 7(7) and 7(8) of the European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003 give ComReg the discretion in relation to the conduct of market analysis in relation to the market for conditional access to digital television and radio services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

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

3.32 In section 4, the level of substitutability between the various types of transmission services listed above is analysed (beginning with analogue terrestrial radio) to assess the boundaries of the relevant broadcasting transmission market in Ireland.

## 4 Market Definition

- 4.1 ComReg carried out this market definition exercise in accordance with the principles of competition law and has taken the utmost account of the *Relevant Markets Recommendation*, as well as the *SMP Guidelines*. Where necessary, this exercise should be read in conjunction with the original consultation document which sets out some of the arguments and supporting information in greater detail.
- 4.2 As indicated in the Scope of this Review, for Ireland, the wholesale broadcasting transmission market that is included in the *Relevant Markets Recommendation* comprises a number of different types of transmission services. As per the *SMP Guidelines*, it is appropriate to assess whether each type falls within the same relevant market by starting with the smallest possible transmission market and then focusing on whether the closest possible substitute is in the same market. Figure 4.1 below sets out the structure of the five step approach that was taken when assessing the boundaries of the relevant broadcasting transmission market in Ireland.



**Figure 4.1: Market Definition – Process**

- 4.3 As illustrated in figure 4.1, ComReg's preliminary conclusions on market definition have yielded four candidate markets. It has also been found that two of these markets may be potentially susceptible to *ex ante* regulation. Each of the five steps in this approach are set out below, and views of respondents are then addressed as part of the national consultation process.

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

### **Step 1: Local and National Analogue Terrestrial Radio Transmission Services**

- 4.5 According to settled case-law, the relevant product market comprises all those products that are sufficiently interchangeable or substitutable and the exercise of defining the relevant product market involves grouping together those products that are used by consumers for the same purpose (end use).<sup>26</sup> It was first assessed whether local and national analogue terrestrial radio transmission services were in the same market.

#### *Demand-side substitutability*

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

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<sup>26</sup> *SMP Guidelines* para 44.

local radio station will only purchase local transmission, and a national radio station (e.g. Today FM) will only purchase national transmission. From a demand point of view, the two markets are distinct.

*Supply-side substitutability*

- 4.9 National analogue terrestrial radio transmission services supplied by RTNL provide coverage for all five national broadcasters to over 95% of the population. Local analogue terrestrial network operators might be able to collectively provide transmission services to achieve national coverage, in theory. At the wholesale level, local and national networks do not provide coverage on homogeneous conditions: local transmission networks and national transmission networks do not supply national transmission services in a manner that is functionally substitutable or on terms and conditions that are comparable. Due to the differences between local and national transmission networks (including the area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters co-located at sites), there are complex technical barriers which would have to be overcome by the local terrestrial network operators before they could provide a substitutable service. Further, a national radio broadcaster choosing to purchase transmission services from several independent local radio transmission operators (acting collectively) would have to overcome substantial logistical problems. Consequently, it is very unlikely that the local analogue terrestrial network operators would be able to act collectively and exert competitive pressure on the national terrestrial network operator.

***The relevant geographic market for analogue terrestrial radio transmission***

- 4.10 ComReg considers that the relevant geographic market for the national analogue radio transmission network is national in scope. The network has national coverage and radio broadcasters seeking and acquiring broadcasting transmission services on the network are seeking or acquiring national reach that is functionally homogeneous, on terms and conditions that are homogeneous. ComReg does not believe that the local analogue networks providing radio broadcast transmission services fall within the same geographic market. They do not provide coverage on homogeneous conditions. The relevant geographic market for local radio is defined by the fact that each franchise is local. Entities seeking transmission services on local networks do so on terms or conditions that are consistent with their contracts with the BCI. These terms differ for each franchise. Therefore, although both local analogue terrestrial radio transmission services (when taken together) and national analogue terrestrial radio transmission services geographically cover the entire State, ComReg does not believe that they fall within the same product market and thus do not fall within the same relevant market.

*Conclusion*

- 4.11 At the retail level, the demand for content on national and local networks differs. As such, local and national networks do not provide the same service. At the wholesale level, local and national networks do not provide coverage on homogeneous

conditions: local radio stations will purchase local transmission, national radio stations will purchase national transmission and the two are not substitutable. Due to the differences between local and national transmission networks (including the area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters co-located at sites), there are complex technical barriers which would have to be overcome by the local terrestrial network operators before they could provide a substitutable service. Therefore, although both local analogue terrestrial radio transmission services (when taken together) and national analogue terrestrial radio transmission services geographically cover the entire State, ComReg does not believe that they fall within the same product market and thus do not fall within the same relevant market.

- 4.12 When assessing the level of wholesale substitutability with transmission on other platforms (e.g. cable), many of the factors apply similarly to both local and national analogue terrestrial radio networks. Accordingly, the following analysis focuses on substitutability with ‘analogue terrestrial radio transmission services’.

## **Step 2: Analogue Terrestrial Radio and Cable and Satellite Radio Transmission Services**

- 4.13 It was then assessed whether analogue terrestrial radio transmission services and cable and satellite radio transmission services fall within the same market.

### *Demand side substitution*

- 4.14 As few as 2% of Irish radio listeners listen to radio via cable or satellite platforms on a daily basis.<sup>27</sup> ComReg believes that it is a likely result of the importance placed on the mobility and portability afforded by analogue terrestrial transmission systems by radio end users, as discussed below.
- 4.15 There is a significant difference in retail pricing for analogue terrestrial and cable satellite radio services. Radio content broadcast over the analogue terrestrial radio networks is broadcast free to listeners. However, on the cable and satellite platforms, subscription services do not separate charges for TV and radio service (see Annex E).
- 4.16 Given the various different types of relationships and revenue flows in the broadcasting sector, and the range of factors other than price that impact on the attractiveness of a transmission platform, it is difficult to isolate the impact of a rise in price by a hypothetical monopolist on the behaviour of broadcasters. In particular, transmission services on the national analogue terrestrial network provide access to virtually all listeners, unlike such services on all other platforms (whether as a result of network coverage or mobility and/or portability limitations). The following analysis considers the complementarity of, the access characteristics of, and technical differences between particular networks on the behaviour of particular types of broadcasters currently operating in Ireland:

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<sup>27</sup> TNSmrbi Phonebus Survey September 2003. Sample size 1000, representative of the adult population (15+)

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

4.17 In light of these relationships, this demand side analysis will consider the significant relevant demand side factors at the wholesale level and, in view of their impact on the wholesale level, at the retail level, as a surrogate for the SSNIP test.

4.18 Identifying the functional coverage of each platform, *i.e.*, the extent to which an end-user can receive transmissions on the platform, is an important consideration for a radio broadcaster's choice of provider. For example, transmissions on local and national analogue radio platforms can be received by end-users with nothing more than an antenna (which may be integrated into the radio set). Transmission on analogue cable platforms can be received by FM tuner or by an adapted portable radio, however, the receiver can only be used in a fixed position when attached to the cable network. In contrast, transmissions on digital satellite platforms can only be received with a dish and a set-top-box (with or without conditional access). Similarly, transmissions on digital cable platforms require a set-top-box to be received.

4.19 Analogue terrestrial platforms (both national and local) allow listeners to listen while mobile and on portable radios. If a digital terrestrial platform is introduced, it will also allow mobile reception and reception on portable sets. Transmissions over both cable and satellite cannot be received by mobile listeners. In addition, cable transmissions and encrypted satellite transmissions cannot be received on portable sets. JNLR data indicates that 17% of radio listeners listen to the radio in cars (at drive time on week days). These listeners can only be listening to signals transmitted by an analogue terrestrial radio network.

4.20 As outlined above, broadcasters' revenue is earned from advertising, subscription and/or public funding such as government grants or the license fee. Additionally, publicly funded broadcasters have universal services obligations. In Ireland audience research is used as a basis for planning schedules and selling advertising time. Therefore, radio broadcasters' revenue is directly related to audience share set against the cost of being carried on that platform (although there are no costs involved in being carried on the cable platforms). As mentioned above, few Irish radio listeners listen to radio via cable or satellite platforms on a daily basis.

4.21 Radio broadcasters wishing to reach the widest radio audience would take these factors into account when deciding on the most appropriate platforms on which to be carried. Leaving the analogue terrestrial transmission network for cable and satellite would thus not appear to be an option for these broadcasters.

*Supply side substitution*

4.22 Wholesale supply-side substitution could come most easily from existing networks that are currently used to supply other services. However, as noted above, cable/satellite radio services will not support mobile and portable reception. ComReg takes the view that analogue terrestrial radio is not a substitute for cable and satellite radio at the retail level which suggests that there are separate markets at the wholesale level.

*Conclusion*

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

**Step 3: Analogue Terrestrial Radio Transmission Services and Television Transmission Services**

4.24 ComReg went on to assess whether analogue terrestrial radio transmission services are in the same market as analogue terrestrial or cable and satellite television transmission services.

*General*

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

***a) analogue terrestrial television transmission services:***

*Demand side substitution*

4.26 Along with lack of substitutability at the retail level, there are technical barriers to radio broadcasters using an analogue terrestrial radio transmission system as opposed



Wholesale Broadcasting Transmission Services – Response to Consultation  
to an analogue terrestrial television transmission system (set out below) which further  
limits the level of demand side substitutability at the wholesale level and vice versa.

*Supply side substitution*

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

***b) Cable and satellite television transmission services:***

*Demand side substitution*

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

*Supply side substitution*

4.29 Wholesale supply-side substitution could come most easily from existing networks that are currently used to supply other services. However, providers of cable and satellite transmission would not constitute a viable alternative to an analogue terrestrial transmission network, due to the absence of mobility and portability afforded to end users.

*Conclusion*

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

4.31 On the basis of the discussion in steps one to three above, it seems clear that there are two distinct wholesale analogue terrestrial radio broadcasting transmission markets in Ireland:

- the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks;
- the wholesale market for radio broadcasting transmission services on local/regional analogue terrestrial networks;

#### **Step 4: Analogue Terrestrial and Cable and Satellite Television Transmission Services**

4.32 It is clear from the preceding analysis that analogue terrestrial radio transmission services (both local and national) do not fall within the same market as analogue terrestrial television or cable and satellite transmission services, so it is then appropriate to assess whether there is a separate market for analogue terrestrial television transmission services.

#### **Demand side substitution**

4.33 As discussed in the context of Step 2 above, the various different types of wholesale relationships and revenue flows in the broadcasting sector, and the range of factors other than price that impact on the attractiveness of a transmission platform, make it difficult to isolate the impact of a rise in price by a hypothetical monopolist on the behaviour of broadcasters. It is also likely that broadcasters seeking access to the largest available number of viewers will treat platforms as complements.

4.34 For television broadcasters dependent on advertising revenues (*e.g.*, TV3), if a hypothetical monopolist transmission services provider were to increase transmission charges, such a broadcaster would consider the impact of the increase relative to any change in coverage and audience share and advertising revenues that would result from switching platforms. Such broadcasters would also consider the balance between the value that is attributed to their intellectual property rights and the value attributed to transmission services. These relative values might net out in favour of either the broadcaster or the platform operator or be zero sum. The broadcaster will assess any change to this balance that results from an increase in transmission charges.<sup>28</sup>

4.35 For television broadcasters funded in part through a government grant or the licence fee (*e.g.*, Network 2), if a hypothetical monopolist transmission services provider were to increase transmission charges, such a broadcaster would consider the impact of such an increase relative to the coverage of alternative platforms (bearing in mind the public service obligations that attend funding mechanisms of these types) and the potential for increases in grants or licence fees to off-set the transmission charge increase.

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<sup>28</sup> Some broadcasters using this business model also generate advertising revenues. Accordingly, their 'assessment' of the impact of an increase in transmission charges entails the all of the factors listed in this paragraph.

4.36 In light of these relationships, the following analysis will consider the significant relevant demand side factors at the wholesale level and, in view of their impact on the wholesale level, at the retail level, as a surrogate for the SSNIP test.

4.37 A broadcaster wishing to deliver broadcast content to end-users in Ireland using television broadcasting transmission services can acquire such services from a number of providers over a number of platforms (*i.e.*, terrestrial, cable and satellite). The choice of provider is based on a number of factors, including:

- coverage and penetration;
- technical aspects, including degree of digitisation;
- capacity availability and limitations;
- legal and regulatory requirements/barriers; and
- cost differentials and impact on revenues of acquiring transmission on particular platforms.

4.38 Broadcasters are generally carried on multiple platforms. The decision whether or not a particular broadcaster is carried on a particular platform may be dictated by must-carry rules. Where it is not, broadcasters may decide whether or not they wish to be carried on an additional platform based on the incremental number of consumers that it reaches, offset against any associated cost or revenue generated from being carried on that platform and/or taking into account the incremental advertising revenues from the extra consumers reached.

***(a) Coverage and Penetration***

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

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

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

4.41 At the end of June 2003, approximately 55% of Irish TV households were passed by digital cable platforms, and 85% of Irish TV households were passed by analogue

cable platforms. Approximately 43% of all TV households subscribed to analogue cable services, slightly below the 48% reported in 2001. Approximately 6.5% of all TV households had subscribed to digital cable services, an increase from 3% over the previous 12 months. Digital cable subscriptions are expected to continue rising for at least the short term.

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

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

4.44 A broadcaster seeking to assess the current reach of the alternative platforms would, therefore, consider TV household coverage and penetration rates of:<sup>29</sup>

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

4.45 As such, a broadcaster considering each platform could lose penetration of between 85% and 92% of TV households if it acquires transmission services only on the digital cable platforms and is not carried on the terrestrial analogue platform. Similarly, such a broadcaster will lose penetration of over 75% of TV households if it acquires transmission services only on a digital satellite platform and is not carried on the terrestrial analogue platform.

**(b) Technical Aspects including Degree of Digitisation**

*Digitisation*

4.46 Satellites broadcasting TV content into Ireland are digitised. Approximately 55% of TV households are passed by digitised cable platforms providing broadcasting transmission services in Ireland. The national terrestrial television broadcasting network is analogue, and it is not clear that it will be digitised during the timeframe of this review.<sup>30</sup>

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<sup>29</sup> These figures reflect the position as at June 2003.

<sup>30</sup> A process to introduce digital terrestrial television ("DTT") on a commercial basis was launched and halted in 1999. A separate process for the award of a DTT licence (and the part sale of RTÉ's transmission network) was advertised in 2001. However, the single

*Bi-directional Functionality*

- 4.47 The RTNL analogue terrestrial platform has no return path or ‘interactive’ capability. As such, the platform cannot support the provision of ‘interactive’ or ‘enhanced’ TV content<sup>31</sup> and would be technically unsuitable for broadcasters seeking a platform able to deliver such services to end-users. Both the cable and satellite platforms are capable of providing some level of interactive services.

*Technical Requirements to Switch Platforms*

- 4.48 There are few technical impediments to consumers switching, at the retail level to acquire transmission services solely on the analogue terrestrial network. Virtually all TV households can receive such transmissions incurring minimal, if any, equipment-related switching costs. However, from the point of view of broadcasters, there are capacity constraints on the analogue terrestrial network which limit switching capability. These are discussed in the next section.
- 4.49 The digital cable platforms are currently operated as closed systems. As such, although these are pay-TV services, broadcasters do not enter into direct retail relationships with end-users. Cable subscribers pay a monthly rental charge for the set top box although the ownership of the set-top-box remains with the operators. The monthly rental charged to end-users combines programming, transmission and set-top-box price components that are not itemised. As a result, it is difficult to get an understanding of the level of subsidy costs incurred (if any) by the operators. There is no direct relationship between the provision of such set-top-boxes and the broadcasters. However, a broadcaster entering into a transmission arrangement with a digital cable platform operator must consider the likely effect of the need for their end-users to have access to such a set-top-box and the costs of re-authoring any interactive services before entering into any such transmission arrangement with a cable platform operator.
- 4.50 There are a number of satellites on which broadcasters could acquire TV broadcasting transmission services. There are three SES ASTRA satellites and one Eutelsat satellite in the 28.5 degrees east orbital slot. As such, broadcasters could switch between acquiring transponder capacity on any of these satellites, without requiring end-users to acquire new dishes or to reorient their dishes. Broadcasters that become part of the programme bouquet of an entity with established relationships with end-users do not need to ensure that their end-users acquire set-top-boxes. However, such broadcasters lose control of the subscriber relationship with the end-user (if they are

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bidder withdrew its application in October 2002. While other avenues to ensure the introduction of DTT are currently being explored, it appears unlikely that a National DTT network could be providing full commercial services within the next two years.

<sup>31</sup> The scope of the ‘broadcast content’ services contemplated in the Recommendation is not defined. However, services that constitute television programmes intended for reception by the public that do not amount to the provision of items of information or other messages on individual demand are defined as television broadcasting by the Television Without Frontiers Directive. As such, ComReg’s analysis of transmission services acquired to deliver broadcast content is focussed on television programmes, enhanced TV services and, where they are not provided on demand, interactive TV services.

subscription broadcasters), and the end-users effectively pay for their set-top-boxes over time (as part of their subscription charges). Broadcasters who maintain direct relationships with end-users and whose end-users have already acquired set-top-boxes that are compatible with their systems do not need to rely on end-users acquiring new set-top-boxes. However, those whose end-users have not acquired such set-top-boxes must acquire one to follow a broadcaster who moves to a satellite platform.

**(c) Capacity Availability and Limitations**

- 4.51 Capacity in the terrestrial TV broadcasting bands is constrained, due to the inherent limitations resulting from the available spectrum. There are currently four national TV programme services on the analogue terrestrial network. Whilst one frequency channel serves an area, typically, transmissions from adjacent areas of the same programme service, renders three other frequency channels unusable, due to interference. Thus, a national TV programme service, with acceptable coverage on one frequency channel in an area, effectively accounts, at any single location, for 4 frequency channels. As a result, in order to ensure interference free national coverage for national TV programme services, the four national TV programme services effectively account, at any single location, for 16 frequency channels out of the 45 available. A further 24 frequency channels at any location are effectively reserved for future DTT channels (six national multiplexes). This leaves scope for one or, possibly, two further TV signals (either analogue or digital) at any single location.
- 4.52 It is understood that both SES ASTRA and Eutelsat have unused transponder capacity with a footprint that extends over Ireland. BSkyB lease transponder capacity directly from SES ASTRA and currently sub-lease some of this capacity to third party broadcasters broadcasting into either or both Ireland and the United Kingdom.
- 4.53 There is little unused capacity on the cable platforms for TV programme services. Currently, cable operators are sharing capacity between their digital and analogue services. To increase the number of digital services beyond what is now available, they would have to remove analogue programme services. In this context, a single 8 MHz frequency channel can carry one analogue programme service or five to eight digital programme services. The addition of a new analogue programme service would also require the removal of existing programme services (*e.g.*, either one analogue programme service or five to eight digital programme services). It appears unlikely, with the growth of digital services, that cable platforms would readily consider offering an additional analogue service unless required to so by regulatory obligation.
- 4.54 In the case of MMDS, which currently only operates in the 2.5 GHz band, there are alternative uses for this frequency band. CEPT has designated the 2500 – 2690 MHz as the main expansion band for UMTS/IMT-2000 services (also known as 3G). At this point in time it is unclear how much of this spectrum would be required by Irish mobile telecom operators to provide additional capacity in urban (hotspot) areas for UMTS/IMT-2000. The band can also be used for the provision of Fixed Wireless Access services. In a recent response to consultation<sup>32</sup> ComReg stated that it proposed to review the feasibility of Fixed Wireless Access ("FWA") being provided within the

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<sup>32</sup> ComReg Document No 03/105: Use and Development of Radiocommunications Services in the 2500 – 2690 MHz Bands - Responses to Consultation Document 03/70

MMDS spectrum in the context of encouraging broadband roll-out and spectrum efficiency. Since the frequency plans for 3G services in the 2.5 GHz band are scheduled to be completed by the end of 2004, ComReg intends to carry out a more detailed consultation based on the proposal to divide the 2500 – 2690 MHz band between UMTS/IMT-2000 and MMDS. MMDS operators have been requested to present a case to ComReg by 30 June 2004 detailing the extent of their requirements for continuing use of the 2.5 GHz band.

**(d) Regulatory Barriers and Restrictions**

- 4.55 The *Broadcasting Act 2001* sets out the existing Irish ‘must carry’ obligations as detailed in the original consultation. In addition, RTÉ is required to endeavour that, insofar as it is reasonably practical to do so, its services are available to the whole community in Ireland.<sup>33</sup> However, RTÉ is not expressly required to use its affiliated network to do so, to the extent that another platform provides it with the means to reach ‘the whole community’.
- 4.56 It is difficult to foresee any circumstances in which RTÉ, TG4 and TV3 would leave the national analogue transmission network. At least 34% of TV households would have to incur considerable installation costs in order to receive those programme services. In addition, existing pay TV subscribers would incur additional costs if they sought to receive these programme services on multiple TV sets. It is unlikely that this would be a viable option during the timeframe of this review.
- 4.57 ComReg has taken into account the impact of these regulatory requirements on the commercial behaviour of the affected providers of wholesale TV broadcasting transmission services in its analysis.

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

*Costs*

- 4.58 As noted above, it is difficult to quantify the exact costs of acquiring transmission capacity on the various platforms available to a broadcaster seeking to provide broadcast content to Irish end-users because of the different financial models and the existence of “barter” agreements. There is a range of agreements in place for such acquisition, varying on both an inter-platform and an intra-platform basis. In addition to the effect of statutory and other regulatory obligations, it is important to note that the nature of the transmission arrangements in large part reflect the business models of the entities. Where the broadcaster’s content becomes part of the ‘programme bouquet’ offered to subscribers by the platform operator, there is effectively an exchange of value (*i.e.*, a license of the intellectual property rights held by the broadcaster in exchange for transmission and access to the platform operator’s installed base of end-users).
- 4.59 Such an exchange of value may lead to a ‘barter’ arrangement, under which no charges are paid by either party, to an arrangement under which the transmission

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<sup>33</sup> Section 5(5).

platform operator pays a net charge for the content or to an arrangement under which the transmission platform operator is paid for transmission services. Barter can also include conditional access, API licence and EPG placement costs. Where the broadcaster broadcasts in its own right and maintains its own relationships with end-users, there is no ‘exchange of value’ with the platform operator, in that the broadcaster does not license its intellectual property rights.

- 4.60 The analogue terrestrial network has historically charged TV3 and TG4 for the supply of transmission services. The platform operator was not structurally separated from its related broadcasters (*i.e.*, RTÉ 1 and NET 2). Accordingly, it did not charge or record accounting value for the transmission services provided to these entities.
- 4.61 It is anticipated that the accounting separation of the transmission and broadcasting arms of RTÉ will be complete and implemented within the timeframe of the current review. Accounting values will be given to the supply of transmission services to RTÉ 1 and NET 2.
- 4.62 Cable operators do not currently receive payment for carriage of RTÉ 1, NET 2, TG4 or TV3.<sup>34</sup> In addition, cable operators pay for the right to provide other TV programme services to their subscribers.
- 4.63 There are a number of different ways in which a broadcaster can acquire TV transmission services on a satellite. A broadcaster could lease transponder capacity on an SES ASTRA satellite or a EUTELSAT satellite directly from either operator or could sub-lease capacity from another entity with unused capacity on such a transponder. A transponder has an average digital capacity of approximately 38 Mbps, carrying approximately 8 to 10 digital programme services, using Statistical Multiplexing. As such, there is a minimum economic scale for an entity leasing a transponder in its own right (either in relation to its own programme services or programme services of other entities).
- 4.64 It is not usually financially viable for a broadcaster seeking satellite transmission capacity for a single programme service to lease capacity (and acquire the necessary multiplexing and other equipment). Such broadcasters generally either sub-lease capacity from an existing transponder lessee or lease capacity (and acquire the necessary equipment) with a view to providing a multi-channel service including programme services from other broadcasters.
- 4.65 Pricing for transmission provided by satellite operators is in the region of €1 to €6 million per annum for a transponder capable of transmitting into Ireland, depending on a range of factors, including individual satellite type, orbital position, inclination of the orbit, footprint of the transponder and the services carried on other transponders on the same satellite. Some entities with unused leased transponder capacity sub-lease such capacity to broadcasters.

#### *Impact on Revenue of Selecting or Switching Platforms*

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

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<sup>34</sup> See discussion of statutory obligations in section (d), above.



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

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

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

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

***(f) Retail Market Considerations***

4.69 The number of TV programme services that end users receive by analogue terrestrial TV transmission is currently limited to four national programme services.<sup>35</sup> In

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<sup>35</sup> RTÉ 1, Network 2, TG4 and TV3

contrast, there are many more channels available on cable and satellite, including some devoted to specialist programmes, exclusive live coverage of many sporting events and films shown significantly in advance of their analogue terrestrial TV transmission.

- 4.70 The four national programme services on the analogue terrestrial transmission platform are free-to-air. Analogue terrestrial pay-TV services are not available. Cable and satellite services are normally available through subscription (with the exception of Freesat) in addition to the TV licence fee (a feature also referred to in the EC Decision on *Bertelsmann/Kirch/Premiere*, Case No IV/M.993, OJ (1999) L53/1). In addition, ComReg has noted that digital cable and satellite have similar retail pricing. See Annex E for information on pricing of cable and satellite packages. In relation to multi-room viewing, additional costs can be incurred by the cable and satellite end user when seeking to acquire access to subscription services in more than one room.
- 4.71 ComReg also notes (a feature also referred to in the UK by the Competition Commission “*NTL Incorporated and Cable & Wireless Communications plc: A report on the proposed acquisition*”, Cm4666, 2000) that the normal concept of substitutability is not applicable since, before consumers subscribe to cable or satellite, they must purchase TV sets (and the associated licences), which automatically allow access to analogue terrestrial TV programme services. It seems likely that if consumers choose to acquire satellite or cable it is because they want a service that is different from and additional to analogue terrestrial TV, rather than a substitute for it.
- 4.72 It therefore seems unlikely that a monopolist supplier of all cable and satellite services would be prevented from sustaining prices that are 5 to 10 per cent above competitive levels by the existence of analogue terrestrial TV.
- 4.73 A consumer survey<sup>36</sup> conducted on behalf of ComReg indicates that the amount and type of content available on cable and satellite platforms is a highly relevant factor for end-users in deciding whether to acquire only broadcasting services delivered over cable or satellite networks. For example, 41% of respondents who have not subscribed to pay TV state that they have never subscribed to cable or satellite services because they are happy with the range of Irish and/ or British programme services that are available to them without subscription. This would indicate that analogue terrestrial television is not in the same market as cable and satellite television.

### **Supply-side substitutability**

- 4.74 Supply-side substitution is said to occur when, in response to a rise in the price of a particular product or service, suppliers of other products or services switch, without the need for significant new investments, to supplying the product whose price has risen within a reasonable timeframe (thereby rendering the price increase unprofitable). ComReg is adopting the one year timeframe that is generally considered to be appropriate under competition law. It has, therefore, considered whether there are means by which supply-side substitution can occur. ComReg has considered whether a competing supplier would in fact be forthcoming (mere

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<sup>36</sup> Take-up of Television Services Survey - ComReg Document No. 03/144E

hypothetical supply-side substitution will not be sufficient), and has concluded that this is an unlikely scenario in the absence of other forms of regulatory intervention.

- 4.75 Wholesale supply-side substitution could come most easily from existing networks that are currently used to supply other services. In this respect, ComReg notes the launch of unencrypted BBC programme services on satellite (a service known as “Freesat”), using transmission capacity on an SES ASTRA satellite. It appears possible that other broadcasters might also decide to provide unencrypted services on satellite (using the Freesat model), either using capacity leased directly from SES ASTRA or Eutelsat or sub-leased capacity, during the timeframe of the current review.<sup>37</sup> Due to the characteristics of the national analogue terrestrial transmission network, with sunk costs and network effects, it is highly unlikely that it could be economically replicated.
- 4.76 In addition, ComReg is aware of the possibility of potential competition through TV broadcasting transmission services on xDSL networks and using spectrum in the 12 GHz band. However, it is unclear that such services will be effectively and immediately available.
- 4.77 Finally, as noted previously, it is uncertain that national digital terrestrial TV transmission services will be introduced in Ireland during the timeframe that is the subject of this review. It appears that there is a separate product market for wholesale analogue terrestrial television broadcasting transmission services, for the following reasons:
- the analogue terrestrial television broadcasting platform provides different coverage and penetration to cable and satellite platforms;
  - the service provided to broadcasters via the analogue terrestrial network is different to that provided by cable and satellite platforms, in terms of the degree of digitisation and bi-directional functionality. At the retail level, there would be switching costs for consumers in moving from terrestrial TV to cable or satellite reception (though these switching costs would not arise if consumers moved in the other direction);
  - at the wholesale level, there are capacity constraints on the analogue terrestrial network which limit switching capability;
  - RTÉ is obliged to make its services available to the whole community, and to provide transmission to TV3;
  - broadcasters currently carried on the analogue terrestrial transmission network are unlikely to move away from it, as they would lose access 44% of consumers who do not have pay-TV;
  - as analogue terrestrial television is free-to-air and requires only the payment of a TV licence fee, it does not act as a constraint on the pricing of cable and satellite television services; and

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<sup>37</sup> ComReg is aware of the potential for copyright-derived issues that prevent the broadcasters of particular channels from showing programmes for which the right to broadcast in Ireland is already held by another entity and from availing themselves of this platform.

- there are no operators or platforms not currently providing analogue terrestrial television services which are likely to do so within a reasonable timeframe (in this case, a year or so).

### **The relevant geographic market**

4.78 A relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.<sup>38</sup> In Ireland, TV broadcasters acquire wholesale analogue terrestrial transmission services on a national basis. ComReg thus takes the view that the relevant geographical market for wholesale broadcasting services on analogue terrestrial platforms in Ireland is national in scope.

### **Conclusion**

4.79 It appears that there is a separate national wholesale market for television broadcasting transmission services on analogue terrestrial networks.

### **Step 5: Radio and Television Transmission Services on Cable and Satellite Networks**

4.80 It is clear from the preceding analysis that analogue terrestrial broadcasting transmission services do not fall within the same market as transmission services on cable and satellite networks (for both radio and television), so it is then appropriate to assess whether there is a separate relevant market for radio and television transmission services on cable and satellite networks.

4.81 As outlined in Step 4, cable and satellite platforms are seen as substitutable by a broadcaster wishing to deliver broadcast content to end-users in Ireland using television broadcasting transmission services when the following factors below are examined:

- coverage and penetration;
- technical aspects, including degree of digitisation;
- capacity availability and limitations;
- legal and regulatory barriers;
- cost differentials and impact on revenues of acquiring transmission on particular platforms; and
- Retail market considerations.

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<sup>38</sup> See the Commission Notice on Market Definition, SMP Guidelines, ComReg's Market Data Information Notice (ComReg Document No. 02/117) and United Brands v. Commission, [1978] ECR 207, for additional guidance.

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

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

4.83 ComReg has considered whether cable and satellite radio services are in the same market as cable and satellite television transmission services.

4.84 At the retail level virtually all pricing for cable and satellite subscription services does not separate charges for TV and radio services. Almost all packages available to end users include both radio and TV services (see Annex D). Coverage and household penetration of TV and radio broadcasting transmission services available for delivery of broadcasting content to end-users on cable and satellite platforms are comparable, as outlined above. The coverage on both platforms is the same for the transmission of radio and TV services.

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

4.86 Radio and TV broadcasters are funded in similar ways, *i.e.*, advertising revenues, subscription, a government grant or the licence fee, or for a licence to the broadcasters' intellectual property rights.

4.87 Currently, both cable and satellite platform operators are sharing capacity between digital radio services, digital TV services and, in the case of cable, analogue TV services (due to simulcasting)<sup>39</sup>. However, unlike digital, analogue radio services on cable networks are only available in the dedicated FM band which can not be used by analogue TV services, but analogue radio services represent only a small proportion of the total transmission capacity used on a cable network.

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

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<sup>39</sup> Satellite platform operators do not provide analogue transmission services in Ireland

## Relevant Geographic Market

4.89 A relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.<sup>40</sup>

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

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

## Conclusion

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

## Conclusions of Market Definition

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

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

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<sup>40</sup> See the Commission Notice on Market Definition, SMP Guidelines, ComReg’s Market Data Information Notice (ComReg Document No. 02/117) and United Brands v. Commission, [1978] ECR 207, for additional guidance.

Wholesale Broadcasting Transmission Services – Response to Consultation  
draft measure in accordance with Regulation 20 of the *Framework Regulations* and  
Article 7 of the *Framework Directive*.

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

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

### Consultation Question

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

#### *Response to Question 5.1*

- 4.95 ComReg has assessed whether each type of transmission service falls within the same defined market by starting with the smallest possible transmission market and then focusing on whether the closest possible substitute is in the same market. None of the respondents to this consultation disagreed with this approach to defining the market, while four of the five respondents agreed with ComReg's conclusions concerning the relevant market boundaries for wholesale broadcasting transmission services in Ireland.
- 4.96 One respondent, disagreed with these findings stating that the market definition is too narrow and that the original market for '**broadcasting transmission services and distribution networks in so far as they provide the means to deliver broadcast content to end users**', that was listed in the *Relevant Markets Recommendation*, is the market definition most appropriate to national circumstances. While, the respondent argued that the markets proposed in the Consultation are too narrow (that the original market defined in the *Relevant Markets Recommendation* is appropriate), it also stated that there is a disparity in the competitive conditions for the provision of 'sites, masts and antennae' and the provision of 'transmitters and channel combiners'. It is thus unclear whether the respondent is arguing that the provision of these services are in separate markets, i.e. there is also the implication that there could be an even narrower market definition than that envisaged by ComReg.

- 4.97 The respondent goes on to describe three models used for the provision of analogue transmission to third parties:
1. “Equipment Hosting”: Space is leased on towers and masts to a third party to install its own antennae systems.
  2. “Equipment Hosting with Maintenance”: Equipment hosting and equipment maintenance is provided to a third party.
  3. “Full Service Provision”: A fully managed service is provided to a third party for an annual fee consisting of a capex charge (to cover capital cost of equipment, spread over duration of contract), an index linked opex charge (for operational costs and access) and power costs.
- 4.98 The existence of the three transmission models is cited as illustrating the existence of potential competition in the wholesale terrestrial broadcasting transmission services market. It is argued that the three models described for the provision of terrestrial transmission services to third parties were available to TV3 and Today FM when entering into transmission agreements in 1999 and 1998, respectively. It is also argued that broadcasters who opted for the “Full Service Provision” had the option to self-supply and entered into fair and reasonable agreements which “promote competition in the television and radio broadcasting market.” Furthermore, it is argued that the ten year duration of these contracts, “ensures certainty and continuity in the provision of transmission services” and gives independent broadcasters the opportunity to spread out the agreed fee over a period of time.
- 4.99 The respondent further argues that **local radio broadcasters could act collectively** to compete with RTNL in providing national analogue terrestrial transmission services. It is also argued that ComReg may not have taken adequate account of the need to define the market prospectively, citing DTT and DAB as future technological developments which would affect the boundaries of this market.
- 4.100 Furthermore, ComReg’s analysis of the existence of **switching costs** is criticised by this respondent. The respondent indicates that there are in fact low switching costs. It argues that, to be consistent with the *Relevant Markets Recommendation*, the wholesale market that should be defined is the original recommended market for ‘broadcasting transmission services and distribution networks in so far as they provide the means to deliver broadcast content to end users’, in the absence of some limitation on switching between platforms. To support its view, the respondent has made specific references in its response to the manner in which the Office of Fair Trading (the “OFT”) identifies switching costs across different sectors and has also commented that the level of switching in a market is not necessarily a reliable indicator of the presence or importance of switching costs.
- 4.101 ComReg also notes a comment made by one respondent that more emphasis should be given to broadcast radio content to end-users, as provided for in the Commission’s *Relevant Markets Recommendation*. However, another respondent questions why ComReg is looking at the retail market at all when considering the wholesale market(s).



***ComReg’s Position***

- 4.102 ComReg, following due consideration of the issues raised by respondents, retains the conclusions regarding market definition set out in its Consultation. It appears to ComReg that all three models listed above require the use of RTNL sites, masts and antennas where, according to one respondent, there is probably an existing bottleneck. Further, ComReg accepts, in theory, the respondent’s view that there is the possibility of self-supply because these three models exist, but in practice only the third model, the full purchase of all RTNL national transmission services, is utilised.
- 4.103 The first two models give new entrants the option to self supply or purchase from a third party, part of the required transmission network and services, while the sites, masts and antennas are provided by RTNL. Within the analogue terrestrial broadcasting transmission ‘sector’ some local radio broadcasters avail of the first two models (signifying low barriers to entry, as noted in the Consultation) while all national TV and radio broadcasters use the third model, where RTNL retain total control of all network functions.<sup>41</sup> All national analogue terrestrial wholesale broadcasting transmission services in Ireland, including the provision of transmitters, channel combiners, sites, masts and antennas are thus provided by RTNL.
- 4.104 ComReg, while accepting that the option to self supply may have been theoretically possible, notes that the Full Service Provision model is “the preferred model” and it is not clear whether or not this option was made available to the national broadcasters at the time the contracts were entered into. Furthermore ComReg notes that contracts entered into were for a total of 10 years, which seems an excessive timeframe if broadcasters felt that there were, or would be, viable transmission alternatives in the short to medium term.
- 4.105 ComReg does not believe that it would be economically viable for a single channel (e.g. TV3 or Today FM) to self-supply. Further, another respondent has indicated that, at set-up, RTNL was the only viable national transmission provider because no other company existed to provide an alternative service or tender and that this situation has not changed in the interim. The same respondent also maintains that, while it may be possible to source alternative providers of transmitters and maintenance (thus availing of model 1 or model 2), logistically they do not consider this a viable option, nor do they consider it commercially viable to set up their own network<sup>42</sup>. This, ComReg believes, is evidence that it was not commercially viable for national broadcasters to build part, or all, of their own analogue terrestrial transmission network (self-supply) or to purchase transmission services from third-parties for a period of up to ten years (2008/2009) and that RTNL are indeed the sole option for broadcasters seeking analogue terrestrial transmission services in Ireland during the timeframe of this review.
- 4.106 ComReg does not agree with the argument made that **local radio broadcasters could act collectively** to compete with RTNL in providing national analogue terrestrial transmission services. As stated in the Consultation, due to the differences between local and national transmission networks (including the area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of

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<sup>41</sup> RTÉ have stated that this is their “*preferred model*” when entering into negotiations

<sup>42</sup> This would appear to render the provisions of Section 16 of the Radio and Television Act 1988 (as quoted by RTÉ) irrelevant within the context of this market definition exercise.

interference between transmitters co-located at sites), there are complex technical barriers which would have to be overcome by the local terrestrial network operators before they could (combine to) provide a substitutable national service. This view is supported by another respondent who stated that other transmission sites could not be combined to form a national network. Further, there are obvious logistical barriers to purchasing national transmission services from multiple independent sources including staffing, consistent quality of service, multiple suppliers, etc. Thus, while both local analogue terrestrial radio transmission services (when all such services are taken together) and national analogue terrestrial radio transmission services cover the entire State, ComReg does not believe that they fall within the same relevant product market and, thus, do not fall within the same relevant market.

- 4.107 ComReg also considers that adequate account has been taken of the need to define the market prospectively and that it has considered future technological developments such as national DTT and national DAB which could affect the boundaries of the relevant markets within the timeframe of this review. ComReg, however, considers that national DAB or DTT will not constitute viable supply-side substitutes or sources of potential competition at national level in the current review timeframe (*i.e.*, the next two years). Neither service currently exists in Ireland and commercial national services are unlikely to emerge within the time frame of the review. ComReg notes that, if the market changes significantly during the two year review timeframe, the market can be the subject of an earlier review.
- 4.108 ComReg accepts that, according to the *Relevant Markets Recommendation*, in the absence of some limitation on **switching** between platforms, the wholesale market that is identified is broadcasting transmission services and distribution networks in so far as they provide the means to deliver broadcast content to end users. However, ComReg also notes that the *Relevant Markets Recommendation* also states that demand and supply substitution conditions between the different delivery platforms may be such that the feasibility of switching between platforms is limited. In such circumstances, a hypothetical monopolist on one platform may not necessarily be constrained by the activities of operators of other platforms. In the Consultation ComReg identified the existence of such conditions within the wholesale broadcasting transmission sector in Ireland, necessitating the definition of the narrower markets set out in the Consultation.
- 4.109 Different types of switching costs have been quoted from the OFT report including compatibility costs, psychological costs and shopping costs. ComReg notes that the 'OFT' report is not a report written by the OFT, but a report written by NERA for the OFT and the Department of Trade and Industry (DTI) and “do not necessarily reflect the views of the OFT or DTI” (Preface). Further, ComReg does not believe that the examples taken from the report are necessarily relevant to the current broadcasting market definition exercise. As required by the *Relevant Markets Recommendation*, ComReg must ultimately be consistent with the *SMP Guidelines* when undertaking this market definition exercise. The *SMP Guidelines* have made it clear that switching costs exist, whether at the retail or wholesale level, where customers of existing providers may be ‘locked in’ by long-term contracts or by the prohibitively high cost of switching (and implicitly, acquiring) equipment.
- 4.110 ComReg agrees that the level of switching in a market is not necessarily a reliable indicator of the presence or importance of switching costs. However, ComReg’s

analysis of the level of switching costs is not based on the actual level of switching. Rather, it identifies the costs of switching to another supplier or self-supply, should any such switching develop within the timeframe of this review. Thus a national broadcaster wishing to change transmission supplier would be forced to acquire transmission on a cable or satellite platform, absorbing the eventual substantial cost of losing access to viewers within the State that are unwilling to make the move from terrestrial to cable or satellite platforms. This switching cost is directly related to the lack of demand and supply-side substitution at the wholesale level. Further, there may be compensatory (or other) costs associated with early termination of one of the existing 10 year transmission contracts with RTNL.

- 4.111 Finally, ComReg does not feel that more emphasis should be given to broadcast radio content to end-users. ComReg notes that the market included in the *Relevant Markets Recommendation* is for **broadcasting transmission services and distribution networks in so far as they provide the means to deliver broadcast content to end users**. As such, ComReg considers it appropriate to provide a brief characterisation of retail services, in order to help define wholesale markets. ComReg has taken the utmost account of the *Relevant Markets Recommendation* when defining the relevant wholesale markets. The assertion that the retail radio market is competitive and represents one market (local and national) overlooks the fact that, even if this was the case,<sup>43</sup> it does not in any way predetermine the analysis at the wholesale level. RTNL is the sole provider of national analogue terrestrial radio transmission services and there is no substitution between local and national analogue terrestrial transmission services.

### *Conclusion*

- 4.112 To conclude, there is no evidence of partial or full self-supply of national analogue terrestrial transmission services in Ireland, as an alternative to the existing RTNL transmission network. There is no evidence of alternative technologies providing adequate substitutes to part, or all, of the RTNL network under this review timeframe. RTNL is the sole supplier of national analogue terrestrial transmission services in Ireland and will be for the foreseeable future. ComReg, thus, sees no reason to change its preliminary conclusions regarding market definition set out in its Consultation.

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<sup>43</sup> ComReg believes that this is not the case. At the retail level, the demand for content differs as national and local networks do not provide the same content. Local radio is a principal source of local news whereas national radio is often regarded as a major source of national and international news.

### **Threshold for ex-ante regulatory intervention**

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

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

4.114 Paragraph 16 of the *Relevant Markets Recommendation* indicates that when identifying electronic communications markets as justifying possible *ex ante* regulation, the above three criteria should be applied cumulatively, so that failing any one means that the market should not be identified as justifying possible *ex ante* regulation. ComReg below assesses the four wholesale broadcasting transmission markets that have been identified against these criteria, as the threshold for determining whether market analysis is appropriate. In response to comments submitted on the findings of this assessment, further supporting arguments are given in the following section.

4.115 The **local/regional analogue terrestrial radio transmission market** is characterised by low barriers to entry where up to 60% of undertakings have ownership over their own transmission networks, with a further 20% providing at least part of their own transmission requirements. It appears that it is relatively easy for new entrants to self-supply in this market. Further, some existing local operators purchase part or all of their local transmission requirements from RTNL or existing mobile and cable network operators. It appears that the substantial technical and logistical barriers discussed previously (e.g. area of coverage, emission power, location, logistics) that prevent local radio transmission operators from combining to provide national coverage do not prevent national networks from providing some local transmission requirements. ComReg thus deems it unnecessary (in this review time frame) to undertake an assessment of effective competition in this transmission market.

4.116 Although the **cable and satellite broadcasting transmission market** is characterised by high barriers to entry, this market displays some characteristics such that it will tend over time towards effective competition. The Freesat model gives broadcasters additional options with respect to choice of platforms and cable operators are now free to compete in other areas as exclusivity has now been removed. While

the investment required to duplicate existing cable networks may not be commercially viable, the same does not necessarily apply to MMDS. Entities other than BSkyB, such as the BBC or Turner Broadcasting Systems Europe Ltd, could become alternative sources of transmission capacity, potentially through sub-leasing capacity acquired from satellite operators such as SES Astra or Eutelsat, during the timeframe of the current review.

- 4.117 Furthermore, ComReg is aware that there is interest in supplying services in the 12 GHz band, and Regulations have been signed which permit potential entrants or existing MMDS or Deflector operators to use frequencies in this band to provide MMDS-like transmission services necessary to provide retail broadcasting services to end users.
- 4.118 Thus, the dynamics of this market are such that ComReg deems it unnecessary (under this review time frame) to undertake an assessment of effective competition in this transmission market. In addition, unlike analogue terrestrial transmission services, Irish broadcasters do not currently have a financial outlay for cable and satellite transmission services. It is not expected that this situation will change during the timeframe of this review, but if it does, ComReg may be required to reassess the definition and/or competitive conditions in this market.
- 4.119 Both of the **national analogue terrestrial radio and television broadcasting transmission markets** are characterised by high and non-transitory entry barriers. These barriers have persisted for some time and both markets display characteristics such that they will not tend over time towards effective competition. There are currently no alternatives to RTNL’s national analogue terrestrial transmission network. There has never been an alternative national terrestrial transmission network and it would not appear financially viable for an existing operator to construct an alternative network within the review timeframe.
- 4.120 Further, it appears that competition rules are insufficient of themselves (absent *ex ante* regulation) to address the lack of effective competition in the relevant market for national analogue terrestrial TV or national analogue terrestrial radio transmission services. As a general rule, competition rules find it difficult to address the competitive harm which can occur in wholesale market relationships in the context of a network industry. Where such competition law-based investigations have taken place, they have tended to be subject to lengthy delays. Accordingly, ComReg consider that *ex ante* regulation is best positioned to address the competitive failures arising from provision of national analogue terrestrial transmission services, and should at the very least be considered to be an appropriate complement to competition law in the short to medium-term.

### *Conclusion*

- 4.121 ComReg thus deems it unnecessary (during the timeframe of this review) to undertake an assessment of effective competition in the following transmission markets, although ComReg reserves the right to reassess the competitive conditions in these markets in the future if required:
- the wholesale market for radio broadcasting transmission services on local analogue terrestrial networks

- the wholesale market for broadcasting transmission services on cable and satellite networks

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

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

These analyses are set out in Section 5.

### **Consultation Questions**

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

#### ***Response to Question 5.2***

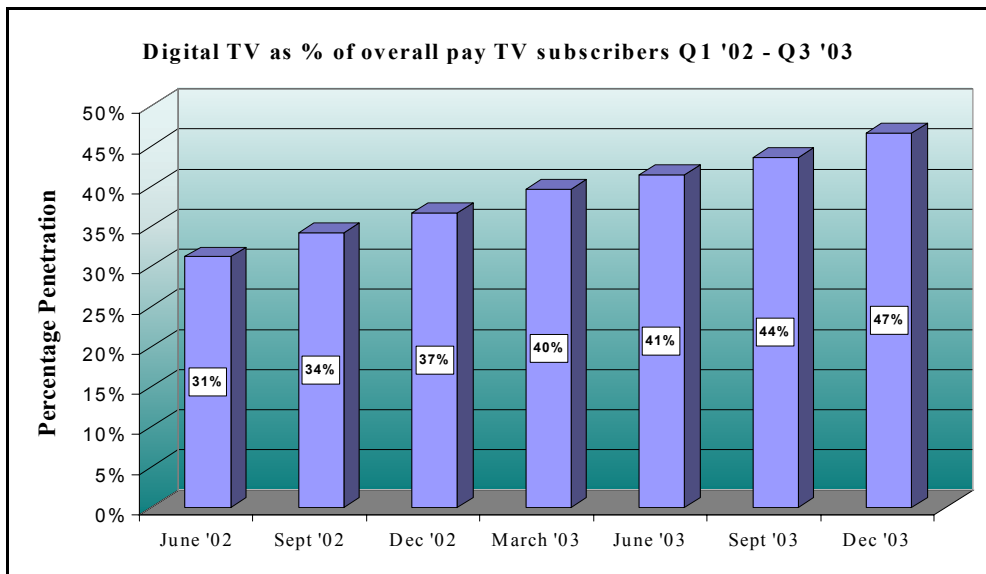
- 4.123 Comments were made by two respondents in relation to their perception of the existence of uneven retail and wholesale competitive conditions between BSkyB and cable. It is believed by these respondents that the uneven competitive conditions arise out of the dual competitor/customer relationship between cable/MMDS and BSkyB, the lower (UK) VAT rates imposed on BSkyB and the ‘must carry’ obligations that are imposed on cable operators but not on BSkyB.
- 4.124 One respondent has also stated that the analogue terrestrial transmission markets and the cable and satellite market are subject to the same long-run competitive forces and that it is necessary for ComReg to undertake an assessment of effective competition in the cable and satellite transmission market. Another comment was made relating to cross-border programme rights issues arising in relation to satellite transmission.

#### ***ComReg’s Position***

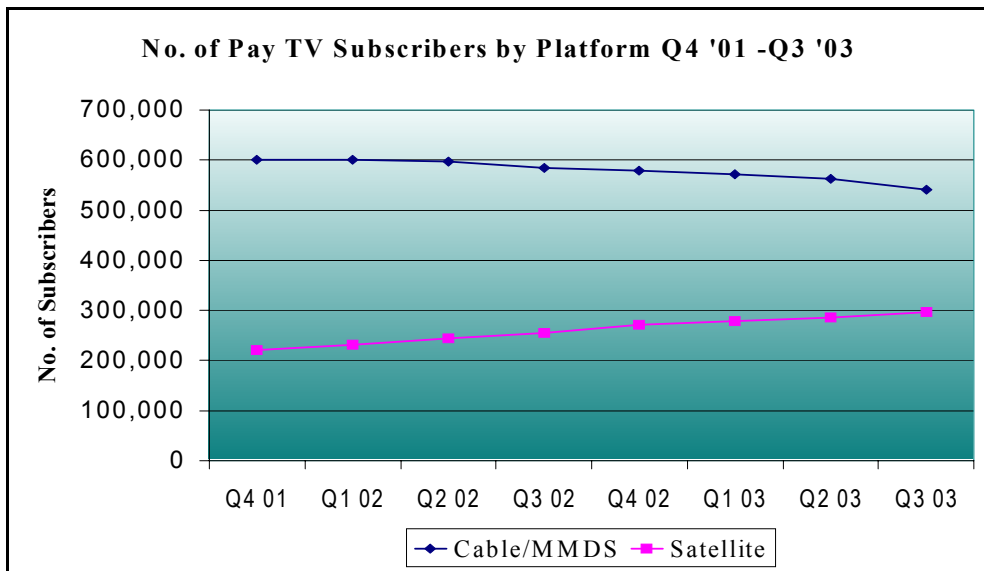
- 4.125 ComReg has taken note of the comments on uneven competitive conditions, but does not consider that the concerns that have been put forward to support such a view can be addressed through the current review.
- 4.126 ComReg maintains its position that the relevant market for the provision of cable and satellite wholesale transmission tends towards effective competition (thus failing the second criteria) and that it is not, therefore, necessary to conduct an assessment of effective competition in this market. While the cable and satellite broadcasting

transmission market is characterised by high barriers to entry, it does display some characteristics such that it will **tend over time towards effective competition**. The fact that Irish broadcasters currently do not pay for transmission on the BSKyB satellite platform (unlike broadcasters in other territories), demonstrates that this wholesale market has shown signs of competition with a platform dropping wholesale charges to secure ‘must-have’ content so that they can compete with other platforms at the retail level. There is also the potential for operators other than BSKyB to offer services on the satellite platform. The Freesat model illustrates additional options with respect to choice of platform provider. While other broadcasters do not currently sub-lease capacity to TV broadcasters, they could theoretically do so during the timeframe of the current review. Alternatively, broadcasters could lease transponder capacity directly from SES Astra or Eutelsat.

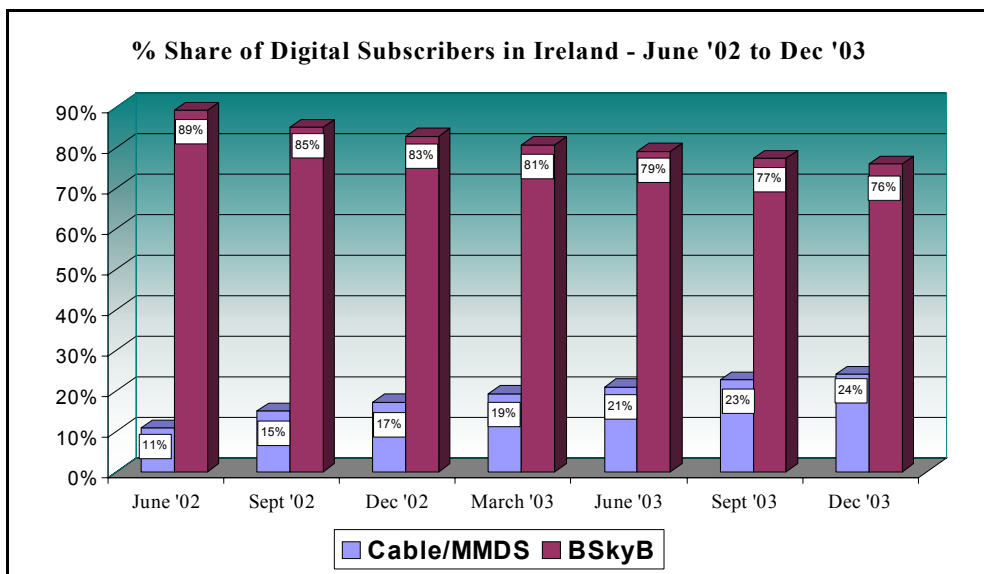
4.127 There are three main providers of Pay TV services on cable and satellite platforms in Ireland, Ntl, Chorus and BSKyB. Although, Ntl and Chorus (taken together) account for 65% all Pay TV subscribers (as of Q3 2003), the highest share of any one platform is only 41% and declining. The changing platform shares over time between the cable operators (ntl and Chorus) and BSKyB may be indicative of the lack of market power at the wholesale level (see figures 4.2 and 4.3 below). Thus, it appears to ComReg that the dynamics at the retail level indicate that the wholesale market is tending towards competition.



**Figure 4.2 Digital TV as % of overall TV subscribers**



**Figure 4.3 Platform Share of all subscribers at the Retail Level**



**Figure 4.4 Platform Share of digital subscribers at the Retail Level**

4.128 Traditionally, cable and MMDS operators were granted in-platform exclusivity as part of their licence. This meant that other operators were not licensed to provide television distribution services via cable or MMDS in an area already licensed for those services. However, in 2002, these exclusivity rights were removed and operators are generally no longer limited to where they offer services.<sup>44</sup> Operators,

<sup>44</sup> A restriction remains in providing MMDS at 2.5GHz in certain key urban areas as this frequency has been designated as a potential expansion band for 3G services. "For the time being, and mindful of the need to maintain a flexible approach in relation to the 3G expansion spectrum, the Commission proposes to maintain the current prohibition on the provision of MMDS services in the main urban areas of Dublin, Cork, Limerick, Galway



deliver services via MMDS where it is more economical to do so, usually in rural areas. While the investment required to duplicate existing cable networks might not be commercially viable, the same is not necessarily true for MMDS.

- 4.129 In August 2002, ComReg sought expressions of interest for programme services distribution systems in the 12GHz band. Use of this band would permit potential new entrants, existing MMDS operators and/or deflector operators to provide the transmission services necessary to provide retail broadcasting services to end users. By the closing date, 13 September 2002, expressions of interest were received from 3 parties and further interest has been expressed by other operators. In November 2003 MMDS Regulations were signed by the Department of Communications, Marine and Natural Resources providing a legal mechanism to license operators to provide broadcasting distribution services in the 12 GHz band<sup>45</sup>. ComReg is now proceeding with the initial expressions of interest, with the possibility of extending the scheme to other interested parties at a later stage.
- 4.130 ComReg is of the view that, given the level of interest already expressed in supplying services in the 12 GHz band, the deployment of such services is possible within the timeframe of the current review. Presently in Ireland there are number of small deflector operators which provide broadcasting services in their locality, usually on an informal basis. However, deflector operators have been limited to offer a small number of programme channels (usually three or four) and, until very recently, were not permitted to receive retail payment for such services in urban areas<sup>46</sup>.
- 4.131 **Market shares** are often used as a proxy for market power. It is unlikely that a firm without a significant share of the relevant market would be in a dominant position. According to established case law, very large market shares in excess to 50% are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. According to the *SMP Guidelines*, the criteria to be used to measure the market share of an undertaking concerned will depend on the characteristics of the relevant market. It is for the NRA to decide on which are the criteria most appropriate for measuring market presence.
- 4.132 Overall, using a number of assumptions (See Annex F for methodology), ComReg estimates that there is a cable and satellite market of 369 TV programme channels. The data shows that the average number of digital programme channels capable of being provided on an Irish cable network is 109<sup>47</sup>. Market shares, calculated by reference to transmission capacity, are as follows; SES ASTRA would have a market share of 43%, EUTELSAT of 7%, BSkyB of 20% and the cable network operators (ntl and Chorus) a share of 30%. It should be noted that these market shares include capacity that is used to transmit programme services, some of which are aimed at Irish end-users only and some of which are transmitted (by satellite) to more than one

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and Waterford. (Reference Number : 03/105 Use and Development of Radiocommunications Services in the 2500 – 2690 MHz Bands - Responses to Consultation Document 03/70)

<sup>45</sup> SI529 of 2003

<sup>46</sup> This position is now set to change under the recently enacted Wireless Telegraphy (UHF Television Programme Retransmission) Regulations 2003 (SI No. 675 Of 2003).

<sup>47</sup> 43 frequency channels are capable of supporting 43 analogue TV channels or approximately 258 digital TV channels or a proportionate combination of analogue and digital channels.

country, including Ireland. Further, these market shares, so calculated, have only been considered along with all of the other relevant indicia of market power in this wholesale market, as outlined above.

- 4.133 The large number of players in this market and the fact that the highest market share reaches only 43% would appear to lend credence to the ComReg belief that there are no competition concerns with this market under the current review timeframe. This analysis is not expected to change during this review timeframe, but if it does ComReg may deem it necessary to reassess the definition and dynamics of this market in the future.

### *Conclusion*

- 4.134 The dynamics of this wholesale market (taking into account both retail and wholesale considerations) are such that ComReg believes that it will tend towards effective competition over time and therefore fails the second criteria. It must also be noted that Irish national broadcasters do not currently have a financial outlay for cable and satellite transmission services which may of course limit the necessity (and relevance) of considering the level of competition in this market under the review timeframe. Thus, ComReg considers it to be unnecessary to undertake an assessment of effective competition in this market. It does not expect that this situation will change during the timeframe of this review, but if it does, ComReg reserves the right to reassess the definition and/or competitive conditions in this market if required.

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

### *Response to Question 5.3*

- 4.135 Four of the five respondents to this consultation agreed with ComReg's finding that it is appropriate to undertake market analyses to assess the level of effective competition in the national analogue terrestrial radio and television broadcasting transmission markets. Two respondents indicated that this is essential, as the absence of any viable alternative provider of services which constitute a large part of their overall costs is of major concern. In contrast, another respondent does not believe it is appropriate to undertake these market analyses and argues that ComReg may not have undertaken a sufficiently detailed application of the three cumulative criteria. In relation to the **dynamic criterion**, this respondent has listed three factors which it believes ComReg should have assessed in determining whether a market will tend towards effective competition, namely, market share volatility, falling prices and new technologies.

***ComReg's Position***

- 4.136 ComReg is of the view that there are substantial structural and some regulatory **barriers to entry** to the markets for the provision of wholesale national analogue terrestrial radio and television transmission services. As mentioned in the response to comments on Question 5.1 above, ComReg does not believe that it would be financially viable for an existing operator to construct an alternative transmission network within the review timeframe. Two respondents have indicated that it was, and still is, not an option to construct part, or all of a transmission network, or purchase partial transmission from a third party. Another respondent has stated that a bottleneck probably exists in the provision of sites, masts and antennas, but ComReg believes that this bottleneck extends to the entire RTNL transmission network. There are substantial financial costs involved in the establishment of a national terrestrial TV or radio transmission network and the current attitudes to masts together with the costs would make the proposition unattractive to potential new entrants. As RTNL is a national provider, is well established in the market and has long term contracts with broadcasters, it would be difficult for a new entrant to offer a service that would attract broadcasters away from RTNL.
- 4.137 In relation to the **dynamic criterion**, ComReg notes that RTNL's market share in both markets has historically remained stable at 100%. These markets have been characterised by a steady increase in prices since the two national broadcasters entered into contract with RTÉ. As noted in the response to comments on Question 5.1 above, ComReg does not believe that there will be technological developments within this review timeframe (e.g. national DTT and DAB) that would make these markets tend towards effective competition within the current review timeframe. But ComReg reserves the right to review these markets again if significant developments take place during the time frame of the current review.
- 4.138 In relation to the **sufficiency of competition law**, ComReg has taken the view that competition law remedies alone are unlikely to reduce let alone remove the high and persistent barriers to entry that have been identified or to create an effectively competitive market. As noted, RTNL's conduct indicates that the threat of *ex post* competition law remedies has not constrained and does not constrain pricing. In other instances across Europe, particularly in the context of pricing behaviour, cases involving France Telecom (FT), Deutsche Telecom (DT) and KPN (the Dutch incumbent fixed line operator) have been lengthy and have created a high degree of legal uncertainty in the relevant markets.

***Conclusion***

- 4.139 ComReg sees no reason to change its conclusion that both of the national analogue terrestrial transmission markets fail all three criteria and that these markets are potentially susceptible to ex-ante regulation, requiring market analyses.

## 5 Market Analysis

- 5.1 ComReg has considered, below, the existence of SMP in each of the proposed Article 7 markets identified, starting with the proposed market for wholesale national analogue terrestrial radio transmission services followed by the proposed market for wholesale national analogue terrestrial TV transmission services. The views of respondents on the preliminary conclusions that were expressed as part of the national consultation process are set out and considered, below.

### **Wholesale National Analogue Terrestrial Radio Broadcasting Transmission Market**

#### *Market Share*

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

#### *Barriers to Entry*

- 5.4 The proposed national market for the supply of wholesale broadcasting services on the analogue terrestrial platform to supply retail radio broadcasting services to end-users in Ireland is characterised by high and non-transitory entry barriers.
- 5.5 There are substantial financial costs involved in the establishment of a national terrestrial radio transmission network and the current public resistance to the construction of masts for radio communications either in centres of population or in scenic rural areas together with the costs would make the proposition unattractive to potential new entrants. As RTNL is a national provider, has long term contracts with radio broadcasters and is well established in the market, it would be difficult for a new entrant to offer a service that would attract radio broadcasters away from RTNL

#### *Countervailing bargaining power*

- 5.6 ComReg is of the preliminary view that there is limited countervailing buyer power, at the wholesale level, as regards the proposed relevant wholesale market for analogue terrestrial national radio transmission services for the provision of radio content to end-users in Ireland.
- 5.7 ComReg has noted that “barter like” negotiations occur between broadcasters and platform operators at the wholesale level in relation to the carriage of and rights to broadcast programme services. However this relationship does not appear to exist in the national analogue terrestrial radio transmission market.
- 5.8 RTÉ’s transmission company, RTNL, is obliged under the Broadcasting Acts 1960 to 2001 to transmit, by analogue means, sound broadcasting services on behalf of the Authority.

- 5.9 Today FM, the only national radio programme service contractor, has no alternative national analogue transmission network it can use, and RTNL does not purchase services from it. Accordingly, it cannot credibly threaten not to purchase from RTNL, or to retaliate against it. ComReg is of the view, therefore, that countervailing buyer power does not exist such as to render RTNL non-dominant in this market.

Potential Competition

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

Evidence of market behaviour

- 5.16 Identifying evidence of market behaviour or anti-competitive behaviour in relation to the market under examination requires consideration of the impact of the particular dynamics of the ‘value’ exchanged between the provider(s) of transmission services and those acquiring such services.
- 5.17 For example, the identification of unfairly high prices requires the application of a test of ‘unfairness’ based on the relationship between the price and the “economic value”

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of the services provided.<sup>48</sup> Economic value is to be assessed by reference to the costs of the relevant services supplied or by reference to prices for comparable services.

- 5.18 At present, RTÉ does not have separate accounting systems for its broadcasting (RTÉ) and transmission (RTNL) divisions. It is, therefore, difficult to understand the operating costs of managing the network and to match costs with the price charged for transmission to third parties. For example, it is possible that the price of leasing transmission services can rise substantially, and still be non-discriminatory due to a proportionate increase in operating costs. This lack of transparency makes it difficult to assess whether transmission services are currently provided on a fair, reasonable and non-discriminatory basis.
- 5.19 ComReg, while accepting that the option to self supply for national broadcasters may have been theoretically possible, notes that the Full Service Provision model is “the preferred model” and it is not clear whether or not this option was made available to the national broadcasters at the time the contracts were entered into. Furthermore ComReg notes that contracts entered into were for a total of 10 years, which seems an excessive timeframe if it was felt that there were, or would be, viable transmission alternatives in the short to medium term.
- 5.20 In the future, as and when prices and costs become more transparent (*e.g.* in accordance with the new structural separation and accounting publication in relation to the national terrestrial analogue radio transmission network), it may be possible to conduct assessments of the fairness of prices.
- 5.21 In essence, price discrimination consists of not treating like cases alike or of treating different cases in the same manner. However, there are many factors that can lead to the payment of different prices for the same or similar services. In addition, it is important to ensure that ‘like’ is being compared with ‘like’.

### **Conclusions**

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

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<sup>48</sup> Case 26/75 General Motors v. Commission [1975] ECR 1367.

## **Wholesale National Analogue Terrestrial Television Broadcasting Transmission Market**

### Market Share

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

### Barriers to Entry

- 5.27 The proposed wholesale market for the supply of wholesale broadcasting services on the analogue terrestrial platform to supply TV broadcasting services to end-users in Ireland is characterised by high and non-transitory entry barriers.
- 5.28 There are substantial financial costs involved in the establishment of a national terrestrial TV transmission network and the current attitudes to masts together with the costs would make the proposition unattractive to potential new entrants. As RTNL is a national provider, with long term contracts with broadcasters and is well established in the market, it would be difficult for a new entrant to offer a service that is sufficiently differentiated to attract broadcasters away from RTNL.
- 5.29 Capacity in the terrestrial TV broadcasting bands is finite. There are currently four national TV programme services on the analogue terrestrial TV network.

### Countervailing Bargaining Power

- 5.30 ComReg is of the preliminary view that there is limited countervailing buyer power, at the wholesale level, as regards the proposed relevant wholesale market for analogue terrestrial national television transmission services for the provision of television content to end-users in Ireland.
- 5.31 ComReg has noted that “barter like” negotiations occur between broadcasters and platform operators at the wholesale level in relation to the carriage of and rights to broadcast programme services. However, this relationship does not appear to exist in the national analogue terrestrial television transmission market.
- 5.32 The Transmission Company, RTNL, is obliged under the Broadcasting Acts 1960 to 2001 to transmit, by analogue means, the television programme contractor services on behalf of the RTÉ Authority.
- 5.33 TV3, the only national television programme service contractor, has no alternative national analogue transmission network that it can use, and RTNL does not purchase services from it. Accordingly, it cannot credibly threaten not to purchase from RTNL, or to retaliate against it. ComReg is of the view therefore, that countervailing buyer power does not exist.

Potential Competition

- 5.34 There is and has only been one national player active in the analogue terrestrial TV transmission market and ComReg is not aware of any new party planning to enter the market at national level.
- 5.35 ComReg considers that it is unlikely that a DTT platform capable of providing substitutable national transmission services for TV content will be established within the timeframe of this review.
- 5.36 ComReg considers that it is unlikely that the potential for supply of TV broadcasting transmission services over xDSL platforms (as streamed video and audio or otherwise) provides an alternative national transmission service for the provision of television content to end-users within the timeframe of this review.

Evidence of Market Behaviour

- 5.37 The nature of the transactions involving the acquisition of broadcasting transmission capacity to provide TV content to end users is similar in nature to the radio broadcasting transmission market which is discussed in section 4 above. Lack of transparency, makes it impossible to accurately breakdown and compare the prices charged for such transmission services and, therefore, ComReg cannot ascertain whether or not those charges are fair, reasonable and non-discriminatory. ComReg, while accepting that the option to self supply for national broadcasters may have been theoretically possible, notes that the Full Service Provision model is “the preferred model” and it is not clear whether or not this option was made available to the national broadcasters at the time the contracts were entered into.
- 5.38 When prices and costs become more transparent (*e.g.*, in accordance with the new structural separation and accounting publication obligations), it may be possible to conduct more quantified assessments of the fairness of prices.

**Conclusions**

- 5.39 RTNL should be designated as having SMP in the proposed relevant market for the provision of wholesale analogue terrestrial broadcasting transmission services for the provision of TV content to Irish end-users.
- 5.40 There is no evidence indicating that there is any countervailing market power that constrains the behaviour of RTNL.

**Forward Look**

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



## Consultation Questions for Market Analysis

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

### *Response to Question 6.1*

- 5.43 Four of the five respondents to the Consultation agree with ComReg's market analysis conclusions, with no further comment. One respondent did not agree with the conclusions that both national analogue terrestrial broadcasting transmission markets should be designated as not being effectively competitive. This respondent does not agree with ComReg's analysis in relation to three of the five criteria addressed within the Consultation. More particularly, it takes issue with ComReg's analysis of countervailing bargaining power, potential competition and barriers to entry.
- 5.44 The respondent has quoted J. K. Galbraith (1952) and the Competition Authority in arguing that **countervailing buyer power** could exist in each of the broadcasting markets that are being assessed. The respondent argues that, when the three conditions identified in Galbraith's (1952) book exist *simultaneously*, countervailing power is most likely to benefit consumers: The three conditions cited are as follows:
- when upstream supply functions are elastic;
  - when buyers can bring substantial power to bear on the pricing of monopolistic suppliers; and
  - when those same buyers face substantial price competition in their end (downstream) product markets.
- 5.45 The respondent maintains that all three conditions exist in both of the markets under review. It argues that the first condition exists because RTNL masts and sites are capable of accommodating more transmission capacity. The respondent asserts that the second condition exists because TV3 and Today FM are owned partly by larger players (including Granada<sup>49</sup> and Scottish Radio Holdings) which the respondent maintains would be capable of bringing substantial buyer power to bear on the pricing of RTNL. It states that the third condition is met because there is strong price competition at the retail level for both TV3 and Today FM.
- 5.46 The respondent also argues that there is a threat from **potential competition** in these markets which keeps prices down, preventing entry by an alternative wholesale supplier. The point is made that while no actual entry has occurred this does not mean that there is no potential competition. It is argued that potential competition exists in the form of self-supply, third party partial suppliers, combined local radio operators, DTT and DAB.
- 5.47 Finally, the respondent argues that **barriers to entry** are relevant only to the 'sites, masts and antennas' part of the transmission network and not to the other elements. It

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<sup>49</sup> To be known as ITV PLC on completion of the merger between Granada PLC and Carlton Communications PLC in February 2004

argues that TV3 and Today FM could have opted for Models 1 and 2 (as described in the response to Question 5.1) when entering into their contractual relationships with RTNL for transmission services. Alternative sources of supply of the particular additional services, to render Models 1 and 2 effective, that are referred to include self-supply, third party partial supply, aggregation of transmission services supplied by local radio operators, DTT and DAB.

- 5.48 The respondent anticipates that accounting separation, which ComReg has indicated should occur within the timeframe of this review, will help to clarify price and cost information regarding the provision of wholesale broadcasting transmission services by RTNL and, will illustrate the fair and correct functioning of the relevant market.

### *ComReg's position*

- 5.49 ComReg agrees that **countervailing buyer power** can exist and does exist in certain markets. However, ComReg does not believe that it exists in the relevant product markets under review and believes that the respondent has overlooked certain important characteristics of the relevant markets that impact on the existence of countervailing buyer power.
- 5.50 As was stated earlier, there were and still are, no viable alternative analogue terrestrial transmission options available to national broadcasters in these markets. An increase in the price of wholesale transmission services will not result in an increase in supply by other operators.
- 5.51 The respondent claims that TV3 and Today FM have substantial buyer power because they are “owned by growing players in the Irish broadcasting industry”. However, evidence of such buyer power has not been provided by the respondent to support this view.
- 5.52 Finally the respondent argues that countervailing bargaining power exists because the buyers of transmission services face substantial price competition in their end product market. The example provided by the respondent to illustrate that such rivalry exists is that between RTE’s talk show *The Late Late Show* and TV3’s *The Dunphy Show* which were broadcast during the same time slot. The respondent states that this is a “microcosm of the competition that obtains the market”.<sup>50</sup>
- 5.53 ComReg takes the view that the impact of competition in viewing shares and/or advertising revenue at the retail level on countervailing buyer power in the wholesale transmission market is limited. RTNL, as the sole supplier of wholesale national transmission, could not have considered the retail market share of independent broadcasters when negotiating the contracts with such entities since the entities were then new entrants with no market share. As a result, independent broadcasters cannot exert countervailing buying power as a result of greater market share at the retail level. ComReg considers that, regardless of the market share of the independent broadcasters at the retail level, TV3 and Today FM can only exert limited power on RTNL and the prices that it charges for broadcasting transmission. As outlined in one

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<sup>50</sup> Subsequent to respondent’s submission, TV3’s programme *The Dunphy Show* has been discontinued, as the station said it was “impossible to continue broadcasting the show because of current marketplace conditions”

respondent's submission, the fee for transmission services is based on three elements; capex to cover cost of equipment, opex for access services and power costs. This charge is fixed, subject to CPI indexation and increases in cost of power. There is no link between the independent broadcasters' market share at the retail level and the charges.

- 5.54 Countervailing buyer power might exist where customers have the ability, within a reasonable timeframe, to resort to credible alternatives (e.g., not to purchase or to retaliate) if the supplier decides to increase prices or to deteriorate the conditions of delivery. The two markets under review are characterised by high barriers to entry. As was stated in the Consultation, and reiterated by two of the respondents, there is no current alternative to RTNL for a national broadcaster wishing to purchase a full national terrestrial transmission service in Ireland. The potential lock-in effects from ten year contracts could also lead to switching costs which can weaken buyer power. A threat by a customer, such as TV3 or Today FM, to change supplier lacks credibility if that customer would incur significant costs in doing so or has no alternative supplier to which it can switch.
- 5.55 In conclusion, ComReg considers that RTNL customers do not have the ability to credibly threaten to take their custom away from RTNL and that they will not be able to develop such a credible threat over the timeframe of this review. Today FM and TV3 are the only independent national radio and television programme service providers. Currently, neither has an alternative national analogue transmission network that it can use without incurring substantial switching costs. No evidence has been provided to suggest that either TV3 or Today FM could credibly threaten not to purchase from RTNL, or retaliate against RTNL. Accordingly, ComReg confirms its preliminary conclusion that there is no countervailing buyer power in these markets.
- 5.56 ComReg does not consider that there is a credible threat of **potential competition** in these markets that would constrain the behaviour of RTNL. One respondent indicated that they believed potential competition existed through self-supply, third party partial suppliers, combined local radio operators, DTT and DAB.
- 5.57 ComReg accepts, in theory, the respondent's view that there is the possibility of self-supply because these alternatives can exist. However, in practice, only the third approach, the full purchase of RTNL national transmission services, is utilised. As stated previously, all national TV and radio broadcasters use this approach.<sup>51</sup> All national analogue terrestrial wholesale broadcasting transmission services in Ireland, including the provision of transmitters, channel combiners, sites, masts and antennas are, thus, provided by RTNL.
- 5.58 ComReg notes that the Full Service Provision model is RTNL's "preferred model" and that it is not clear whether or not this option was made available to the national broadcasters at the time the contracts were entered into. Furthermore, ComReg notes that contracts entered into were for a total of 10 years, which seems an excessive timeframe if broadcasters felt that there were, or would be, viable transmission alternatives in the short to medium term. Further, one respondent has indicated that, at set-up, RTNL was the only viable national transmission provider because no other company existed to provide an alternative service and no alternative has developed in the interim. The same respondent also maintains that, while it may be possible to source alternative providers of transmitters and maintenance (thus availing of model 1

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<sup>51</sup> RTÉ has stated that this is their "preferred model" when entering into negotiations

or model 2), it does not consider this to be a logistically viable option, nor does it consider it to be commercially viable to set up its own network<sup>52</sup>. This, ComReg believes, confirms that it was not commercially viable for national broadcasters to build part, or all, of their own analogue terrestrial transmission network (self-supply) or to purchase transmission services from third-parties for a period of up to ten years (2008/2009) and that RTNL is the sole supplier for broadcasters seeking analogue terrestrial transmission services in Ireland during the timeframe of this review.

- 5.59 As stated in the Consultation, the differences between local and national transmission networks (including the area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters co-located at sites) mean that there are complex technical barriers which would have to be overcome by the local terrestrial network operators before they could (combine to) provide a substitutable national service. A respondent confirmed that this is the case, stating that other transmission sites could not be combined to form a national network. In addition, there are obvious logistical barriers to purchasing national transmission services from multiple independent sources, including staffing, consistent quality of service and multiple suppliers. Thus, while both local analogue terrestrial radio transmission services (when all such services are taken together) and national analogue terrestrial radio transmission services are provided across the entire State, ComReg does not believe that they fall within the same relevant product market and, thus, do not fall within the same relevant market.
- 5.60 ComReg considers that national DAB or DTT will not constitute viable supply-side substitutes or sources of potential competition at national level in the current review timeframe. Neither service currently exists in Ireland and national services are unlikely to become fully established within the timeframe of the review. However, ComReg notes that, if the market changes significantly during the two year review timeframe, it will review the market.
- 5.61 It, thus, appears to ComReg that there is no viable threat of potential competition to RTNL in the provision of national radio and television analogue terrestrial transmission services, within the timeframe of this review.
- 5.62 As maintained in the response to Question 5.1, ComReg is of the view that both of the national analogue terrestrial transmission markets under review are characterised by high and non-transitory **entry barriers**. ComReg does not believe that it would be economically viable for a single channel (e.g. TV3 or Today FM) to construct an alternative analogue terrestrial transmission network and self-supply within the review timeframe. Two of the respondents have indicated that it is not feasible to construct part, or all, of a transmission network, or purchase partial transmission from a third party. Another respondent has stated that a bottleneck probably exists in the provision of sites, masts and antennas. Further, ComReg believes that there are substantial financial costs involved in the establishment of national terrestrial transmission networks and the current Community attitudes to construction of masts, together with the costs, would render the construction of a new network unattractive to potential entrants.

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<sup>52</sup> This would appear to render the provisions of Section 16 of the Radio and Television Act 1988 (as quoted by RTÉ) irrelevant within the context of this market definition exercise.

***Conclusion***

5.63 To conclude, ComReg welcomes all comments on this section of the Consultation, but having considered them, is not minded to amend its preliminary conclusions regarding the market analyses.

## 6 Designation of Undertakings with Significant Market Power

6.1 Having regard to the sections above, particularly sections 4 and 5, ComReg is of the view that, in accordance with the Framework Regulations:

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

6.2 A reference in this section to any given undertaking shall be deemed to include that undertaking and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, the undertaking in question and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant markets defined in section 4.

### Consultation Questions for Designation of Undertakings with SMP

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

#### *Response to Question 7.1*

6.3 Four of the five respondents agree with ComReg's findings regarding the designation of an entity as having SMP on two relevant markets. One respondent has indicated that it believes that ComReg's Market Definition and Analysis preliminary conclusions are incorrect, and that RTNL should not be designated as possessing SMP in the two relevant markets. As noted in the previous two sections, this respondent believes that the original broad recommended market is the market most appropriate to Irish circumstances and that the provision of analogue terrestrial transmission services in Ireland (excluding sites, masts and antennas) is competitive.

#### *ComReg's position*

6.4 Having considered all responses to Question 7.1, for the same reasons as set out in the previous two sections, ComReg is not minded to amend its preliminary conclusions regarding the designation of SMP in the two relevant markets.

## 7 Proposed Market Remedies

- 7.1 ComReg is obliged by the Framework Regulations to impose an obligation on undertakings with significant market power<sup>53</sup>. ComReg also has the obligation under Regulation 6<sup>54</sup> to act in pursuit of its statutory obligations to ensure adequate access, interconnection and interoperability of services without prejudice to any measures which may be imposed on undertakings designated as SMP operators and subject to obligations listed in Regulation 10 to 14 of the Access Regulations<sup>55</sup>. The obligations are:

### *Obligation of Transparency*

- 7.2 Regulation 10 sets out the requirements with regard to the obligation of Transparency and covers the following;
- a. Publication of information such as accounting information, technical specifications, network characteristics, terms and conditions of supply and use and prices in relation to interconnection and/or access;
  - b. Publication of a sufficiently unbundled reference offer;
  - c. The Regulator's power to specify the precise information to be made available in the reference offer with regards to the level of detail and the manner of publication;
  - d. The Regulator's power to make changes to the reference offer and to direct the operator designated as having significant market power to publish the reference offer with such changes.

### *Obligation of Non-discrimination*

- 7.3 Regulation 11 lays down the requirements with regard to the obligation of Non-discrimination and covers the following;
- a. Regulator's power to impose non-discrimination in relation to interconnection and/or access;
  - b. Such non-discrimination shall ensure that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and shall ensure that the operator provides services and information to

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<sup>53</sup> Framework Regulation 27(4) states 'Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with significant market power in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate'

<sup>54</sup> Framework Regulation 6(1-5)

<sup>55</sup> Access Regulation 9(1) states 'Where an operator is designated as having a significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 26 of the Framework Regulations, the Regulator shall impose on such an operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate'

others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners.

*Obligation of Accounting Separation*

- 7.4 Regulation 12 sets out the requirements with regard to the obligation of Accounting Separation and covers the following;
- a. Regulator's power to impose accounting separation on an operator in relation to specified activities related to interconnection and/or access;
  - b. Regulator's power to make a vertically integrated company to make transparent its wholesale prices and its internal transfer prices to ensure compliance with any obligation imposed under Regulation 11 and to prevent unfair cross-subsidy.

*Obligation of access to, and use of, specific network facilities*

- 7.5 Regulation 13 lays down the requirements with regard to the obligation of access to and the use of specific network facilities and covers the following;
- a. Regulator's power to impose on an operator obligations to meet reasonable request for access;
  - b. Regulator's power to attach conditions of fairness, reasonableness and timeliness to the obligation to meet reasonable request for access;
  - c. Regulator's obligation to review the imposition of meeting reasonable requests for access against a number of factors to ensure proportionality.

*Price control and cost accounting obligations*

- 7.6 Regulation 14 sets out the requirements with regard to the obligation of Price control and cost accounting and covers the following;
- a. Regulator's power to impose cost orientation of prices and obligations concerning cost accounting systems for the provision of interconnection and/or access where a market analysis indicates that a lack of effective competition means that an operator might sustain prices at an excessively high level or apply a price squeeze;
  - b. Regulator's obligation that the operator is able to earn a reasonable rate of return on adequate capital employed following the imposition of cost oriented prices;
  - c. Regulator's obligation to ensure that the cost recovery mechanism serves to promote efficiency and sustainable competition and maximise consumer benefits;
  - d. Regulator's power to direct an operator to provide full justification for its prices and to require prices to be adjusted;
  - e. Clarification that the burden of proof is place upon the operator show that charges are derived from costs including a reasonable rate of return;
  - f. Regulator's obligation to ensure that where implementation of a cost accounting system is imposed under this Regulation, a description of the system is made



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publicly available, verified as appropriate and a statement regarding compliance published annually.

- 7.7 It should be noted that NRAs may be justified in imposing remedies other than those set out above or, in exceptional cases remedies that *go beyond* what is prescribed in the Access Regulations provided that the approval of the European Commission is first obtained<sup>56</sup>.

## Remedies proposed

### *Wholesale national analogue terrestrial radio broadcasting transmission services*

- 7.8 In light of ComReg’s identification of the relevant market and its subsequent market analysis, ComReg takes the view that the most appropriate remedy to apply to the undertaking listed in Section 6 of this Consultation, in accordance with the principles set forth in the *Framework* and *Access Directives* and the *Framework* and *Access Regulations*, is based on the principles of transparency and non-discrimination for charges and other conditions for the provision of wholesale analogue terrestrial radio broadcasting transmission services. ComReg will consider whether it is appropriate and proportionate to impose an accounting separation obligation in addition to the obligations that it already intends to impose on RTNL, in order to ensure the efficacy of the transparency and non-discrimination obligations. ComReg is aware that under its Broadcasting Charter, RTNL will be obliged to produce some level of accounting separation. ComReg is of the view that any separated accounts should, at a minimum, allow relevant parties to compare a detailed breakdown of the amounts charged for transmission to RTÉ’s retail end against the amounts charged to other broadcasters. ComReg will assess, when the information becomes available, whether this is sufficient for the purposes set out above and reserves the right to impose such an obligation in accordance with the principles set forth in the *Framework* and *Access Directives* and the *Framework* and *Access Regulations*.

- 7.9 In proposing transparency and non-discrimination for charges for such services, ComReg will take into account the following factors:<sup>57</sup>

1. The transparency requirement will apply to all of the conditions for the provision of such services, not only price, providing a means to simplify and accelerate negotiation, reduce potential disputes and give confidence that such conditions are not discriminatory.

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<sup>56</sup> Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services. See paragraphs 21 and 116. See also Regulation 9 (5) of the Access Regulations.

<sup>57</sup> Regulation 9(5) of Access Directive allows, where in exceptional circumstances ComReg intends to impose on operators with SMP obligations for access or interconnection other than those set out in Regulations 10 to 14, ComReg shall submit to the European Commission a request for permission, to impose such other obligations.

2. The transparency requirements will specify the manner in which the various conditions are to be made available, the identity of the entities to which such conditions must be made available and the form in which such conditions are provided, taking into account the nature and purpose of the various conditions.
3. ComReg will structure the non-discrimination obligation to ensure that RTNL does not distort the competitive dynamics at the wholesale level through the conditions of supply of wholesale analogue terrestrial radio broadcasting transmission services.

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

*Wholesale national analogue terrestrial television broadcasting transmission services*

7.10 In light of ComReg’s identification of the relevant market and its subsequent market analysis, ComReg takes the view that the most appropriate remedy to apply to the undertaking listed in Section 6 of this Consultation, in accordance with the principles set forth in the *Framework and Access Directives* and the *Framework and Access Regulations*, is based on the principles of transparency and non-discrimination for charges and other conditions for the provision of wholesale analogue terrestrial TV broadcasting transmission services. ComReg will consider whether it is appropriate and proportionate to impose an accounting separation obligation in addition to the obligations that it already intends to impose on RTNL, in order to ensure the efficacy of the transparency and non-discrimination obligations. ComReg is aware that under its Broadcasting Charter, RTNL will be obliged to produce some level of accounting separation. ComReg is of the view that any separated accounts should, at a minimum, allow relevant parties to compare a detailed breakdown of the amounts charged for transmission to RTÉ’s retail end against the amounts charged to other broadcasters. ComReg will assess whether this is sufficient for the purposes set out above and reserves the right to impose such an obligation in accordance with the principles set forth in the *Framework and Access Directives* and the *Framework and Access Regulations*.

7.11 In proposing transparency and non-discrimination for charges for such services, ComReg will take into account the following factors:

1. The transparency requirement will apply to all of the conditions for the provision of such services, not only price, providing a means to simplify and accelerate negotiation, reduce potential disputes and give confidence that such conditions are not discriminatory.
2. The transparency requirements will specify the manner in which the various conditions are to be made available, the identity of the entities to which such conditions must be made available and the form in which such conditions are provided, taking into account the nature and purpose of the various conditions.
3. ComReg will structure the non-discrimination obligation to ensure that RTNL does not distort the competitive dynamics at the wholesale level through the

Wholesale Broadcasting Transmission Services – Response to Consultation conditions of supply of wholesale analogue terrestrial TV broadcasting transmission services.

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

### **Consultation Questions for Proposed Market Remedies**

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

#### ***Response to Question 8.1***

7.12 Four of the five respondents agree with ComReg's proposals as regards the imposition of obligations on operators designated as having SMP in a relevant market. One of these respondents also believes that ComReg should impose price control and cost accounting obligations on RTNL. One respondent has disagreed with the need to impose any obligations at all, repeating arguments put forward in previous sections, such as the option for national broadcasters to partial self-supply and the existing (Broadcasting Charter) obligation on RTNL to introduce accounting separation. It believes that, for these reasons, the imposition of obligations by ComReg would be disproportionate. Another respondent has indicated that it believes that it is unlikely that a competitor to RTNL can be found for wholesale national transmission services and that the proposed obligations will increase fairness and transparency.

#### ***ComReg's position***

7.13 ComReg is aware of the existing obligation on RTNL to provide accounting separation and agrees that accounting separation should not be imposed as an end in itself. ComReg will consider whether it is appropriate and proportionate to impose an accounting separation obligation in addition to the obligations that it already intends to impose on RTNL, in order to ensure the efficacy of the transparency and non-discrimination obligations. ComReg believes that the proposed obligations set out above would be sufficient to ensure that RTNL does not distort the competitive dynamics at the wholesale level through the conditions of supply of wholesale analogue terrestrial TV or radio broadcasting transmission services. Thus, ComReg does not consider that the imposition of additional price control or cost accounting obligations on RTNL would be appropriate or proportionate.

7.14 As stated previously, ComReg is of the view that RTNL should be designated as having SMP in the relevant markets for the provision of national analogue terrestrial transmission services for radio and TV. As such, any obligations should relate to the RTNL national transmission networks.

7.15 ComReg is, thus, not minded to amend its preliminary conclusions regarding the imposition of obligations on RTNL. ComReg intends to consult fully on its proposals regarding obligations in a subsequent Consultation.

## 8 Regulatory Impact Assessment

### Introduction

8.1 This assessment reviews the regulatory impact of the decisions relating to the measures put forward in this paper and the previous consultation<sup>58</sup>. ComReg has, in undertaking this assessment, had regard to the general legislative environment including the regulatory objectives as set out by Section 12 of the Communications Regulation Act 2002 and the Ministerial Directions of February 2003<sup>59</sup>. The assessment is set out in general terms, where appropriate, relating to the general objectives of Section 12 including the promotion of competition, the development of the internal market and the promotion of the interests of users within the community.

### Legislative Basis

8.2 Regulation 9(1) of the Access Regulations states “*Where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate*”. ComReg is therefore obliged to impose at least one obligation where an undertaking is designated to have SMP.

8.3 ComReg can impose any or a combination of obligations from those obligations listed in Regulation 10 to 14 of the Access Regulations<sup>60</sup>. Under Regulation 9(6) of the Access Regulations, obligations need to be ‘based on the nature of problem identified, proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations’.

8.4 The regulatory impact assessment is required to assess whether the range of obligations proposed are proportionate and justified and meet the objectives of ComReg in terms of the promotion of competition, the development of the internal market and the promotion of the interests of end-users.

### Consultation Questions on Regulatory Impact Assessment

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

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<sup>58</sup> Market Analysis – Wholesale Broadcasting Transmission Services; ComReg Document No. 03/126

<sup>59</sup> Directions by the Minister for Communications Marine and Natural Resources to the Commission for Communications Regulation under s.13 of the Communications Regulation Act 2002, 21 February, 2003

<sup>60</sup> European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003, S.I No. 305 of 2003

**Response to Question 9.1**

- 8.5 Four out of the five respondents gave their views on whether the proposed remedies were proportionate and justified and what factors ComReg should consider in completing its regulatory impact assessment. One respondent agreed that a thorough and comprehensive RIA should be undertaken in advance of the imposition of obligations and cited examples and guidelines of best practice. Another respondent stated that once the objectives of price transparency and non-discrimination are established with adequate safeguards against possible off-setting measures, the regulatory impact of the measures should be positive from a competition point of view. Another respondent felt that the remedies were proportionate but would like RTÉ to provide information on charges for each RTÉ programme channel, charges for engineering services, charges for consultative services, comparative charges on capital outlay and charges for the supply of power to the sites.
- 8.6 Only one respondent believed the remedies proposed were disproportionate, particularly given the scope for competition in the markets under consideration (as it chose to define them), and the presence of existing regulatory requirements imposed by other State bodies on operators within the market, namely on the State Broadcaster, RTÉ, and in turn on RTNL. The respondent added that ComReg should proceed with remedies only if the anticipated benefits materially exceeded the anticipated costs and ComReg should carefully measure the costs and benefits of remedies proposed. The respondent believed the regulatory impact assessment should guard against the risk that ComReg may impose an unnecessarily onerous cost of further accounting separation which may risk imposing disproportionate costs to the market.
- 8.7 The respondent further added that the appropriate focus should be on bottleneck facilities and remedies should not be applied to areas of the market that were effectively competitive. The respondent concluded that remedies should only be imposed if there was an expected material net benefit in doing so.

***ComReg's position***

- 8.8 ComReg notes the respondents' comments above and continues to believe that the remedies proposed in Section 7 are proportionate and justified. Although one respondent has disputed ComReg's conclusions on market definition, ComReg considers that no valid reason has been given which would lead it to change its views on the relevant markets, as outlined in previous sections. ComReg believes that the remedies it proposes are the least intensive which would remedy the competition problem identified (i.e. the ability to distort the competitive dynamics at the wholesale level through the conditions of supply of wholesale transmission services). In addition, ComReg has considered the existing regulatory requirements imposed by other State bodies on RTNL, and has taken them into account in shaping its proposed remedies. It considers that these requirements can support the obligations imposed under the regulatory framework for electronic communications.
- 8.9 As previously outlined, ComReg intends to carry out a more detailed consultation on the remedies to be imposed in this market. In specifying the final forms of remedies, ComReg will, insofar as is possible, consider all information provided by RTÉ as part of its stated commitment to the accounting separation of its transmission and programme-producing arms. ComReg notes the respondent's concerns over ComReg

imposing “additional rules that overlap with existing requirements for accounting separation”. The respondent stated that there is a danger of imposing unnecessary costs if several varieties of separated accounts are required. ComReg considers that its stated intention (to assess whether the form of accounting separation which RTNL will be obliged to produce under its Broadcasting Charter is sufficient for its purposes before deciding whether or not to impose further obligations under the Access Regulations) is entirely reasonable and proportionate.

- 8.10 To decide, before having seen the form of accounting separation produced under the Broadcasting Charter, not to impose any further accounting separation obligation on RTNL would be to run the risk of imposing ineffective remedies which did not actually address the competition problems outlined in section 5. To decide in advance to impose obligations which might duplicate or cut across the requirements of the Broadcasting Charter, would indeed be to run the risk of imposing an unnecessary cost of further accounting separation. ComReg, thus, considers that a “wait-and-see” approach on accounting separation is the only one which is both proportionate and justified in the context of the current market.
- 8.11 ComReg has, therefore, taken into account in drafting its remedies public commitments made by RTÉ, in reference to the Public Service Broadcasting Charter, to provide transparency and separated accounts. Therefore ComReg does not consider that any additional costs through the imposition of the remedies would be significant. ComReg also considers that any costs involved would be outweighed by the benefits of introducing transparency and non-discrimination into the markets.
- 8.12 ComReg considers that the nature of the competition problem is such that remedies need to be imposed in order to prevent the exercise of market power to the detriment of competition and consumers. ComReg has considered whether a requirement of **transparency** only would suffice. Such an obligation serves to speed-up negotiation, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms<sup>61</sup>. However, while it would allow the basis for costing of national analogue terrestrial transmission services to be made clear and predictable, it would not overcome the basic competition problem, i.e. the ability to distort the competitive dynamics at the wholesale level through the conditions of supply of wholesale transmission services. Since there is already the requirement for RTNL to charge RTÉ for national analogue terrestrial transmission services, ComReg considers that a **non-discrimination** obligation can serve as a proxy for the efficient costing of these services (for all broadcasters) and ensure that RTÉ does not distort competition in view of the fact that it is a vertically integrated organisation which supplies services to undertakings with which RTÉ itself competes on downstream markets<sup>62</sup>.
- 8.13 ComReg has also considered whether transparency and non-discrimination would work without an **accounting separation** obligation. Accounting separation allows internal price transfers to be rendered visible, and allows national regulatory authorities to check compliance with obligations for non-discrimination where applicable<sup>63</sup>. ComReg thus feels that the efficacy of the aforementioned transparency

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<sup>61</sup> See Recital 16 of Access Directive

<sup>62</sup> Recital 17 of Access Directive

<sup>63</sup> Recital 18 of Access Directive

and non-discrimination obligations is reliant on the introduction of some level of accounting separation. Further, to facilitate the verification of compliance with these obligations of transparency and non-discrimination, ComReg has the power to require that accounting records, including data on revenues received from third parties, are provided by RTNL on request. However, as stated above, ComReg will undertake a “wait-and-see” approach on any accounting separation obligation.

- 8.14 In addition, ComReg has considered whether a remedy of **cost-orientation** should be imposed in order to ensure that users of wholesale analogue terrestrial TV and radio transmission services are charged an efficient price. However, given the uncertainty surrounding the future of the national analogue transmission networks, with the advent of DTT and DAB along with the costs and time frame required to develop such a costing model, ComReg has concluded that it would be disproportionate to impose such a requirement at this time.

#### *The Promotion of Competition*

- 8.15 ComReg believes that the effect of its decisions on the promotion of competition in both of these wholesale markets will be neutral to positive. As outlined in the market analysis section, at present, RTNL is the only supplier in the markets for wholesale national analogue terrestrial television transmission and wholesale national analogue terrestrial radio transmission and therefore has 100% market share. Due to the characteristics of the national analogue terrestrial transmission network, with sunk costs and network effects, it is highly unlikely that it could be economically replicated. It is also highly unlikely that the local analogue terrestrial network operators would be able to act collectively and exert competitive pressure on the national terrestrial network operator. Further, ComReg considers that it is unlikely that a DTT or DAB platform capable of providing substitutable national transmission services for TV or radio content will be established within the timeframe of this review. One of the objectives of regulation, as is the case in markets with a structure such as these, is to constrain the exercise of market power. Therefore, by imposing the above obligations on RTNL, ComReg is attempting to replicate the effects of competition in the provision of services to users of RTNL’s networks (i.e. independent broadcasters).

#### *The Promotion of the Interests of Users within the Community*

- 8.16 ComReg considers that the proposed remedies promote the interests of users within the community. The market analysis presented in Section 5 argues that the level of dominance enjoyed by RTNL could lead to excessive pricing of access to both analogue TV and Radio. This could affect the quality of programming that can be made available to consumers and also increase costs for advertisers. Further, independent broadcasters can be regarded as users in the context of these wholesale markets. The implementation of these remedies will allow internal price transfers to be rendered visible while removing the ability to distort the competitive dynamics at the wholesale level through the conditions of supply of wholesale transmission services to independent broadcasters. Thus, the remedies of non-discrimination and transparency, coupled with limited accounting separation will allow the minimum of protection against any excessive pricing or discrimination in non-price terms and conditions.

*The Development of the Internal Market and other Technological Issues*

- 8.17 ComReg believes that the effect of its decision on the development of the internal market will be neutral, as the basis for the assessment and proposed remedies is consistent with the terms of the new framework. The development of the internal market requires the regulator to ensure that there is no discrimination in the treatment of undertakings providing electronic communications networks and services. ComReg considers that the proposed measure does not discriminate in terms of treatment. It is aimed at ensuring that RTNL does not distort competition in view of the fact that it is a vertically integrated organisation which supplies services to undertakings with which RTÉ itself competes on downstream markets. All national analogue terrestrial broadcasters will thus be on a level playing field in relation to the purchase of wholesale transmission services aimed at providing broadcasting content to end users.
- 8.18 Furthermore, the review also takes account of any potential technological developments in the market, particularly with regard to distribution at 12 GHz, xDSL, DTT, DAB and to digitalisation generally.



## Annex A – Notification of Draft Measures Pursuant to Article 7(3) of the Directive 2002/21/EC

Under the obligation in Article 16 of the Directive 2002/21/EC, ComReg, has conducted an analysis of the markets for wholesale national analogue terrestrial broadcasting transmission services for both radio and television in Ireland.

Under Article 6 of the Directive 2002/21/EC, ComReg has conducted a national consultation, contained in ComReg document 03/126. This consultation ran from 22 October 2003 and ended 3 December 2003. The responses to this consultation have been taken into consideration and ComReg has now reached preliminary decisions in market definition, designation of SMP and regulatory obligations, which is contained in ComReg document 04/06.

ComReg's hereby notifies the Commission of its proposed remedies and obligations consistent with Article 7(3) of Directive 2002/21/EC. These remedies and obligations are set out in the attached summary notification form. Under Regulation 27(1), ComReg is required to liaise with the Competition Authority in its definition and analysis of markets. The views of the Competition Authority are attached.

## Section 1 - Market Definition

Please state where applicable:

1.1	<p>The affected relevant product/service market (s).</p> <p>Is this market mentioned in the Recommendation on relevant markets?</p>	<p>1) the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks</p> <p>2) the wholesale market for television broadcasting transmission services on national analogue terrestrial networks</p> <p>The market for <b>wholesale broadcasting transmission services for the purpose of delivering broadcasting content to end users</b> that was included in the <i>Relevant Markets Recommendation</i> has been found, in the Irish case, to consist of four candidate markets, two of which have been found to be candidates for an analysis of the effectiveness of competition (see above)</p>	<p>Pages 43-45</p> <p>Page 38</p>
1.2	The affected relevant geographic market (s)	Ireland	Pages 21, 36, 37
1.3	A brief summary of the opinion of the national competition authority where provided;	The Authority supports the approach and findings of this market definition and analysis exercise.	Page 91
1.4	A brief overview of the results of the public consultation to date on the proposed market definition (for example, how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it)	In total five responses were received by the closing date. Four respondents agree broadly with the findings in this consultation while one respondent disagrees (suggesting that the original broad recommendation market definition is correct)	Pages 38-39, 45, 49, 56-57, 61, 66, 68
1.5	Where the defined relevant market is different from those listed in the recommendation on relevant markets, a summary of the main reasons which justified	As mentioned above, the products and services that make up the market for <b>wholesale broadcasting transmission services for the purpose of delivering broadcasting content to end users</b> included in the	Page 18

	<p>the proposed market definition by reference to Section 2 of the Commission's Guidelines on the definition of the relevant market and the assessment of significant market power<sup>64</sup>, and the three main criteria mentioned in recitals 9 to 16 of the recommendation on relevant markets and Section 3.2 of the accompanying Explanatory Memorandum<sup>65</sup>.</p>	<p><i>Relevant Markets Recommendation</i> has been found, in the Irish case, to consist of four candidate markets, two of which are found to be relevant for the purposes of competition analysis. These markets have been defined taking the utmost account of Section 2 of the <i>SMP Guidelines</i>. The two candidate markets (listed in 1.1 above), as required in order to justify competition analysis, have passed all three of the main criteria mentioned in recitals 9 to 16 of the <i>Relevant Markets Recommendation</i>, while the remaining two markets (listed below) have not:</p> <ol style="list-style-type: none"> <li>1) the wholesale market for radio broadcasting transmission services on local/regional analogue terrestrial networks;</li> <li>2) the wholesale market for broadcasting transmission services on cable and satellite networks</li> </ol>	
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## Section 2 - Designation of undertakings with significant market power

Please state where applicable:

2.1	<p>The name(s) of the undertaking(s) designated as having individually or jointly significant market power. Where applicable, the name(s) of the undertaking(s) which is (are) considered to no longer have significant market power</p>	<p>RTNL has been designated as having SMP in the national markets for radio and TV analogue terrestrial broadcasting transmission services.</p> <p>A reference in this section to any given undertaking shall be deemed to include that undertaking and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, the undertaking</p>	Page 61
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<sup>64</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services, OJ C 165, 11.7.2002, p. 6.

<sup>65</sup> Commission Recommendation of 11.2.2003 on Relevant Product and Service Markets with 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 ECNs and ECSs, C (2003) 497

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		in question and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant markets defined in section 4.	
2.2	The criteria relied upon for deciding to designate or not an undertaking as having individually or jointly with others significant market power	<ul style="list-style-type: none"> <li>• Market Share</li> <li>• Barriers to Entry</li> <li>• Absence of Countervailing Bargaining Power</li> <li>• Lack of Potential Competition</li> <li>• Evidence of Market Behaviour</li> </ul>	Pages 51-55
2.3	The name of the main undertakings (competitors) present/active in the relevant market.	RTNL has the only national analogue terrestrial broadcasting transmission networks for both radio and TV.	Pages 51, 54
2.4	The market shares of the undertakings mentioned above and the basis of their calculation (e.g., turnover, number of subscribers)	100% in both markets, RTNL is the only supplier	Pages 51, 54

### Please provide a brief summary of:

2.5	The opinion of the national competition authority, where provided	The Authority supports the approach and findings of this market definition and analysis exercise.	Page 91
2.6	The results of the public consultation to date on the proposed designation(s) as undertaking(s) having significant market power (e.g., total number of comments received, numbers agreeing/disagreeing)	Four of the five respondents agree that RTNL should be designated as having SMP in these markets. One respondent does not agree, suggesting that the market definition findings are incorrect and thus would not lead to a finding of SMP	Page 61

## Section 3 - Regulatory Obligations

### Please state where applicable:

3.1	The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9 to 13 of Directive 2002/19/EC (Access Directive))	<p>The following obligations are proposed:</p> <ul style="list-style-type: none"> <li>• Transparency – Regulation 10</li> <li>• Non-discrimination (on conditions of supply) – Regulation 11</li> <li>• Accounting Separation (dependent on sufficiency of existing</li> </ul>	Pages 64-65
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		accounting separation obligation under broadcasting charter in ensuring efficacy of previous two obligations) – Regulation 12	
3.2	The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found	Such information can be found in Sections 7 & 8 of this document. In short there is no information available on how much RTNL charges for transmission of RTÉ owned or affiliated programming.	Pages 64-71
3.3	If the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC (Access Directive), please indicate which are the ‘exceptional circumstances’ within the meaning of Article 8(3) thereof which justify the imposition of such remedies. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found	Not applicable	

**Section 4 - Compliance with international obligations**

**In relation to the third indent of the first subparagraph of Article 8(3) of Directive 2002/19/EC (Access Directive), please state where applicable:**

4.1	Whether the proposed draft measure intends to impose, amend or withdraw obligations on market players as provided for in Article 8(5) of Directive 2002/19/EC	Not applicable	
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Wholesale Broadcasting Transmission Services – Response to Consultation

	(Access Directive)		
4.2	The name(s) of the undertaking(s) concerned	Not applicable	
4.3	Which are the international commitments entered by the Community and its Member States that need to be respected	Not applicable	

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

8.19 When compared to the other Member States, Ireland has a relatively small and highly concentrated broadcasting sector, with 1.3 million TV homes<sup>66</sup> and two-thirds of all TV households subscribing to pay television services (Pay TV). Operators in the broadcasting sector include:

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

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

8.21 **Chorus Communication Limited**, previously known as Princes Holdings Limited, was formed between 1990 and 2000, through a process of consolidation of a number of privately owned cable operators in Ireland (Irish Multichannel, Suir Nore Relays, and CMI Cable), and adopted its current branding on 2nd October 2000. Until recently Chorus was a venture between Independent News and Media plc, Liberty Media Corporation and BCI International Investments, LLC. On 29 January 2004 it was announced that Liberty Media had agreed to take 100% ownership of Chorus following agreement to acquire Independent News and Media's 50% stake in the Company.

8.22 Liberty Media Corporation holds interests in a number of entertainment networks such as Discovery Channel, USA Interactive, QVC, Encore, and STARZ! Liberty's assets also include interests in international video distribution businesses; international telephony and domestic wireless telephony; plant and equipment manufacturers; and other businesses related to broadband services. Liberty Media is a major shareholder in News Corporation with a total equity interest of approximately 17%. Chorus offers

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<sup>66</sup> Figure is based on 2002 CSO estimate of approximately 1.3 million households with a TV

TV and radio programme services (both analogue and digital) over its Multi-point Microwave Distribution Systems (MMDS) in the rural areas of Ireland and over its cable networks in urban areas including Cork, Limerick, Sligo, Ennis, Naas, Newbridge and Kilkenny. Other activities include the provision of voice telephony, cablenet broadband and business communication services.

- 8.23 **Casey Cablevision Ltd.** is a privately owned company, which operates in the Dungarvan area of County Waterford. It offers analogue broadcasting services via a fibre network. Casey Cablevision also provides “Cablesurf”, the company’s high-speed cable modem offering, which provides two-way cable Internet service.
- 8.24 **BSkyB** is the operator of the UK’s largest digital television platform, Sky digital. BSKyB is also the main Direct-to-Home (DTH) supplier in Ireland. The service became Ireland’s first digital TV service on December 18th 1998. BSKyB switched off the analogue service in 2001. Sky also owns and operates 11 channels, including Sky One, Sky News, Sky Travel, the Sky Sports channels and the Sky Movies channels. At 31 March 2003, BSKyB shareholders were: BSKyB Holdco. Inc. (a subsidiary of News Corporation): 35.4%, other public and institutional shareholders: 64.6%.
- 8.25 **Sky Subscribers Services Ltd (SSSL)**, BSKyB’s distribution business, provides conditional access services to Sky Active and to BSKyB for its Sky Sports Extra access services on the digital satellite platform.
- 8.26 **SES ASTRA**, a company registered in Luxembourg, is the operator of ASTRA, a European broadcast satellite system. SES ASTRA is wholly owned by SES GLOBAL, which is active in Europe, USA, the Americas, Asia and Asia-Pacific and also owns SES AMERICOM and has holdings in AsiaSat, NSAB, STAR ONE and Nahuelsat. 13 ASTRA satellites provide capacity for the transmission of TV, radio and IP-based content within Europe. SES ASTRA currently transmits more than 1000 digital and analogue radio and television programme services over 176 transponders to approximately 92 million TV households within its footprint. Services are made available in Ireland using the 19.2 and 28 degrees east orbital slots.
- 8.27 **Eutelsat** is incorporated under French law and headquartered in Paris. It operates subsidiaries in the USA, Brazil and Italy. Its satellites have coverage of Europe, the Middle East, Africa, Asia, eastern North America and South America. Its core business is the provision of transponder capacity for the transmission of video broadcasting, business network solutions, broadband internet access, multicast file delivery and streaming solutions, mobile communications and positioning. Broadcasters who use Eutelsat include BBS, Sky Italia, France Television, Deutsche Welle, TF1, CNN, BSKyB and TPS. Its satellites use orbital slots from 15 degrees west to 76 degrees east. Services are made available in Ireland using transponders on the satellite in the 13 and 28.5 degrees east orbital slots.
- 8.28 **Radio Telefís Éireann (RTÉ)** is the Irish national public service broadcaster. A statutory corporation, it provides a range of radio (since 1926) and television services (since 1961), and a large range of ancillary services. Under the Broadcasting Act 1960 and subsequent legislation, RTÉ is under the control of the RTÉ Authority, appointed by the Government. As the national public service broadcaster, RTÉ is subject to a number of regulatory obligations:-

- RTÉ TV/radio broadcasting services must be available nationally



- RTÉ Transmission Network Limited’s (“RTNL’s”)<sup>67</sup> transmission network has no must-carry obligations but transmission services must be available nationally
- RTÉNL has no must-carry obligations as defined for cable/MMDS however it fulfils RTÉ’s obligations under the Broadcasting Legislation to provide Radio and Television services.

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

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

8.31 In 1994, **Teilifís na Gaeilge** (TG4) was established as a fully owned subsidiary of RTÉ. TG4 is a Government initiative for public service broadcasting and is funded by the Exchequer. In 2002 the annual funding to TG4 from the Exchequer was €21.8m.

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

8.33 The Broadcasting Act 2001 sets out the existing Irish ‘must carry’ obligations. In particular, it requires:

- holders of licences authorising the retransmission of programme material by means of a system that is, in whole or in part, an analogue cable system, must retransmit specified analogue free-to-air services, which currently include RTÉ1, NET 2, TG4 and TV3, on request;<sup>68</sup>
- holders of licences authorising the retransmission of programme material by means of a system that is, in whole or in part, a digital cable system, must

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<sup>67</sup> RTÉNL is RTÉ’s transmission operation providing analogue terrestrial transmission services to TV and radio broadcasters in Ireland.

<sup>68</sup> Section 37(5)(a).

Wholesale Broadcasting Transmission Services – Response to Consultation  
retransmit specified digital free-to-air services, which currently include RTÉ 1,  
NET 2, TG4 and TV3, on request.<sup>69</sup>

- holders of licences authorising the retransmission of programme material by means of a system that is, in whole or in part, an analogue MMD system, must retransmit specified analogue free-to-air services, currently TV3, on request;<sup>70</sup> and
- holders of licences authorising the retransmission of programme material by means of a system that is, in whole or in part, a digital MMD system, must retransmit specified digital free-to-air services, currently TV3, on request.<sup>71</sup>

8.34 In addition, RTÉ is required to endeavour that, insofar as it is reasonably practical to do so, its services are available to the whole community in Ireland.<sup>72</sup>

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<sup>69</sup> Section 37(5)(b).

<sup>70</sup> Section 37(6)(a).

<sup>71</sup> Section 37(6)(b).

<sup>72</sup> Section 5(5).

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

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

There are currently five national radio stations:<sup>73</sup>

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

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

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

- RTÉ TV/radio broadcasting services must be available nationally
- RTÉ Transmission Network Limited's ("RTNL's")<sup>74</sup> transmission network has no must-carry obligations but transmission services must be available nationally
- RTNL has no must-carry obligations as defined for cable; however it fulfils RTÉ's obligations under the Broadcasting Legislation to provide Radio and Television services.

8.38 The national television and sound broadcasting services required to be maintained by RTÉ must have the character of a public service, continue to be a free-to-air service

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<sup>73</sup> Joint National Listenership Research (JNLR) figures – December 2002

<sup>74</sup> RTÉNL is RTÉ's transmission operation providing analogue terrestrial transmission services to TV and radio broadcasters in Ireland.

and be made available, insofar as it is reasonably practicable, to the whole Irish community.

- 8.39 RTÉ's income is derived principally from advertising and the licence fee. Both FM and AM are used to distribute RTÉ Radio 1 and 2FM services. All RTÉ's national radio services can be accessed via RTNL's analogue terrestrial radio transmission network, a subscription to the major cable and satellite digital broadcasting platforms or over the Internet.
- 8.40 **RTÉ Transmission Network Limited (RTNL)** runs the only national analogue terrestrial transmission network for radio. RTÉ is obliged to ensure, in so far as it is reasonably practicable to do so, that the services provided by it are free-to-air and available to the whole community in the State<sup>75</sup>. It meets this obligation broadcasting over its own transmission network. RTNL also provides network facilities for other radio broadcasters (i.e., independent commercial broadcasters), under the Radio and Television Act 1988. Historically, RTÉ treated its transmission network as a budgeted activity within group operations. However, under its new corporate structure, radio, television and network divisions now operate as separate business divisions. RTNL provides national analogue terrestrial radio transmission services to each of its radio stations and to the independent radio broadcaster Today FM. Through its relationship with RTÉ, Today FM achieves approximately 96% population coverage. RTNL is contracted to provide Today FM with national transmission services up to 2007. RTNL also provides transmission services to a number of local/regional radio operators throughout the State.
- 8.41 **Today FM**, operating since 1997, has contractual agreement with the Broadcasting Commission of Ireland (BCI). Today FM can be accessed nationally via RTNL's analogue terrestrial radio transmission network, over the major cable platforms (to subscribers) or streamed over the Internet.
- 8.42 There are currently twenty-seven independent **local/regional** radio stations operating in specified franchise areas, including six in Dublin. These independent stations are operated by commercial companies which provide local radio broadcasting services with their income derived from advertising and sponsorship. Although each independent radio station has a designated franchise area and cannot transmit beyond the boundaries of this area, when viewed together, they cover the whole State. All local/regional radio stations can be accessed over an analogue receiver, some as part of cable packages, and some are streamed over the Internet.
- 8.43 UK stations, community stations, other foreign stations and unlicensed stations make up the balance of radio listenership in the State.
- 8.44 The major cable and satellite platform operators (i.e., ntl, Chorus and BSkyB) carry some or all of the national radio stations in their analogue and digital packages. In addition, Chorus and ntl include some local/ regional stations in their digital packages. Cable operators provide transmission services directly to each station, but RTÉ national radio stations sub-lease SES-ASTRA satellite transponder capacity from BSkyB. No payments are made by radio operators for transmission on cable networks and ComReg has not been informed of payments made by national radio stations for

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<sup>75</sup> Broadcasting Act 2001-Part II 5(5)

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satellite transmission. RTNL also provides satellite up-linking services to each of the national radio stations.

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

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

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

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

	services, respectively
<b>Television Digital</b>	Digital cable – between 33 and 58 programme services in addition to those in the basic analogue package, <sup>76</sup> made available as: <ul style="list-style-type: none"> <li>○ 25 to 38 additional basic services;</li> <li>○ 3 additional sports services;</li> <li>○ 4 to 15 additional movie services; and</li> <li>○ up to 8 additional adult, movie or individual subscription services.</li> </ul>
<b>Radio Analogue</b>	Between 6 and 17 radio programme services <sup>77</sup> (including RTÉ Radio 1, 2 FM, Lyric FM and Radio na Gaeltachta, and BBC radio services)
<b>Radio Digital</b>	Between 8 and 11 radio programme services <sup>78</sup> in addition to those in the basic analogue package, <sup>79</sup>

<sup>76</sup> The channels in the basic analogue package are also supplied, digitised, as part of the basic digital package.

<sup>77</sup> NTL offers 17 radio channels in Dublin and Waterford (including 2 and 1 local station(s) respectively) and 16 in Galway (including 2 local stations). Chorus only offers radio channels in the digital package while Casey Cablevision offers 6 radio channels on its analogue network.

<sup>78</sup> Chorus offers 11 digital radio channels in Cork (including 1 local radio station) and 8 digital channels in Limerick.

<sup>79</sup> The channels in the basic analogue package are also supplied, digitised, as part of the basic digital package.

## Annex E: Subscription packages prices in 2003

Analogue subscription packages in 2003 are priced as follows:

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

Digital subscription packages in 2003 are priced as follows:

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



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

## Annex F: Methodology for Calculation of Market Shares in Wholesale Cable and Satellite Transmission Market

- 8.46 Although Irish broadcasters do not currently incur costs for cable and satellite transmission services, ComReg has, using information provided to it by industry, calculated market shares based on capacity provided to broadcasters, measured as number of digital programme services. There are currently five main players in the national market for wholesale broadcasting transmission services on cable and satellite networks<sup>80</sup>. ComReg formulated a number of methodologies for calculating market shares, intended to take into account the diversity in transmission systems, characteristics of coverage and varying levels of quality across each network. ComReg considered methodologies based on the number of programme services broadcast in Ireland and on the number of frequency channels used to broadcast programme services in Ireland, respectively. However, it considered that, due to the different levels of digitisation across networks<sup>81</sup>, the first approach unfairly penalised those networks that had digitised their networks to a greater extent *e.g.*, SES ASTRA (by allocating them a high market share of 51.4%), while the second methodology penalised analogue networks (*e.g.*, cable had 49.3% market share).<sup>82</sup>
- 8.47 To address these perceived problems, a third methodology was devised which converted the capacity currently used for the transmission of analogue programme services on cable networks into an equivalent number of digital programme services, to enable comparison of the number of programme services that could be transmitted across all networks. This was done by calculating the number of digital programme services which could be carried on the capacity currently used for analogue transmission (*i.e.*, multiplying the number of analogue programme services currently transmitted by the number of possible digital programme services - 6.5 - which could be carried in place of a single analogue programme service).
- 8.48 However, the transmission capacity used on cable networks is not homogeneous, reflecting the differences in available bandwidth and extent to which networks are upgraded. Therefore, ComReg calculated average capacity across the cable networks, assuming that the degree of digitisation across the cable networks was 55%. The average number of programme services for cable networks was found to be 109 digital programme services.
- 8.49 The calculation of market shares for satellite operators was complicated by the network reach of satellite transponders. Therefore, ComReg considered capacity that is leased and subleased to entities which offer services in Ireland (double-counting associated with the sub-leased capacity was accounted for). Services which can be received in Ireland because the satellite transponder happens to include Ireland in its satellite footprint have not been included. ComReg took the view that those channels do not play a significant role in the Irish broadcasting market. The calculation was

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<sup>80</sup> Ntl, Chorus, SES ASTRA, Eutelsat, BSKyB

<sup>81</sup> Cable/MMDS networks are only partially digitised, while satellite networks used to transmit programme services into Ireland are fully digitised.

<sup>82</sup> Digitised networks would provide a higher number of programme services using fewer frequency channels, while analogue networks provide fewer programme services using a higher number of frequency channels.

Wholesale Broadcasting Transmission Services – Response to Consultation based on transponder capacity used and the equivalent number of digital programme services.<sup>83</sup>

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<sup>83</sup> These market shares, based on number of channels, do not take into account the fact that BSkyB does not use all its capacity to provide broadcasting channels. It also provides enhanced services. Accordingly, the number of channels attributed to BSkyB in ComReg's calculations does not correspond to the number supplied by BSkyB in the data collection process.

## Annex G: Views of the Competition Authority

- 8.50 Under Regulation 27(1), ComReg is required to liaise with the Competition Authority in its definition and analysis of markets. The Competition Authority have been asked to provide their view with respect to the outcome of ComReg’s review and analysis of wholesale market(s) for broadcasting transmission services , to deliver content to end users. This view is set out below.



Competition Authority  
An tÚdarás Iomaíochta

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Your ref.

Our ref.

John Doherty  
Chairperson  
Commission for Communications Regulation  
Abbey Court  
Irish Life Centre  
Lower Abbey Street  
Dublin 1

30 January 2004

Dear Chairperson,

I have been asked, in my capacity as a Member of The Competition Authority ("the Authority"), to provide the Authority's view with respect to the outcome of the Commission for Communications Regulation's ("ComReg") review and analysis of wholesale markets for "*broadcasting transmission services, to deliver broadcast content to end-users*".

ComReg is obliged under the EU Communications Regulatory Framework to conduct market definition and market analysis activities to determine the relevant markets for the purposes of the new regulatory framework and in accordance with competition law. Under Regulation 27(1) ComReg is required to liaise with the Authority in its process of market definition and analysis of markets that are outside or differ from those recommended by the Commission under the *Relevant Market Recommendation*. In December 2002, a cooperation agreement was signed between the Authority and ComReg in accordance with Section 34 of the Competition Act 2002 to facilitate *inter alia* cooperation in this type of exercise.

Staff at the Authority have participated in the Steering Group, the senior group of advisors and ComReg staff involved in recommending market analysis decisions to ComReg, and have provided comments to the final decisions. The Authority considers that those Authority staff have contributed fully in the process and any comments made by them in the preparation of the consultation documents and recommendations have been duly considered by ComReg in drafting the market proposals.

In its *Relevant Market Recommendation*, the Commission recommends that National Regulatory Authority's should analyse the wholesale market for "*broadcasting transmission services, to deliver broadcast content to end-users*". ComReg has considered the characteristics of this market in the context of the Irish national circumstances. In the light of the extensive analysis and volume of data and information collected by its staff, ComReg has concluded that there are four discrete markets:

1. The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks;
2. The wholesale market for television broadcasting transmission services on analogue terrestrial networks;
3. The wholesale market for radio broadcasting transmission services on local/regional terrestrial networks; and
4. The wholesale market for broadcasting transmission services on cable and satellite networks.

ComReg went on to examine the competitive environment in each of these markets in accordance with the cumulative criteria prescribed in the Commission's *Relevant Market Recommendation*. ComReg carried out a market analysis, based on an assessment of the competitive environment in each of the markets; barriers to entry, level of countervailing bargaining power, potential competition, patterns of actual market behaviour, to establish whether an undertaking in these proposed markets holds Significant Market Power ("SMP"). ComReg has concluded that two of those markets are characterised by a lack of effective competition:

1. The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks; and
2. The wholesale market for television broadcasting transmission services on analogue terrestrial networks;

ComReg's preliminary assessment is that RTÉ Network Limited ("RTÉNL"), as the only supplier of wholesale national analogue radio terrestrial transmission services and the only supplier of wholesale television broadcasting transmission services on analogue terrestrial networks, should be designated as holding SMP in both of these market. The Authority is of the view that ComReg's conclusions in this regard are supported by the evidence.

The Authority is of the view that in conducting its market analysis ComReg has defined markets in accordance with competition law and taken due account of the SMP Guidelines issued by the EU Commission in accordance with regulation 27(1) of the Framework Regulations. The Authority is also of the opinion that ComReg's conclusions are appropriate on the basis of the information in its possession.

In addition to the earlier comments and observations provided by its staff members in the preparation of the consultation documents and recommendation, the Authority has some further comments:

- The Authority supports the approach taken by ComReg, in this instance, to identify those wholesale broadcasting markets in the State that are characterised by a lack of effective competition and in which ex ante regulatory intervention will facilitate the development of such effective competition.
- The Authority takes the view that the exercise undertaken by ComReg to define these proposed markets applied principles based on best practice for defining relevant markets in competition analysis. Therefore, it is

reasonable to accept ComReg's preliminary findings that these proposed markets exist in the case of Ireland.

- With regard to ComReg's finding that RTÉNL, a division or subsidiary of RTÉ, holds an SMP position in these proposed markets, the Authority is of the view that the analysis carried out by ComReg supports this view. Therefore, it is reasonable to accept ComReg's preliminary finding that RTÉNL has SMP and under the circumstance the remedies prescribed do not appear to be disproportionate.
- The Authority would also suggest that the document should clarify the relative position of RTÉ in the proposed markets and its relationship with RTÉNL to enable ComReg determine that responsibility for implementation of the remedies is clearly defined.

The Authority's comments are made in the context of the specific provisions of the SMP guidelines relating to the relationship between markets defined for the purposes of ex ante regulation vis-à-vis competition law enforcement. The Authority reserves the right to re-examine any or all of the issues underlying these recommendations in the light of facts and evidence that may arise in specific future cases before it.

Sincerely,



Dr. Paul K. Gorecki  
Member  
Competition Authority

