



Commission for
Communications Regulation

Response to Consultation

Response To Consultation on Implementation of Remedies–Wholesale National Markets for Analogue Terrestrial Broadcasting Transmission and Draft Decision

(Relates to Consultation on Implementation of Remedies-Wholesale National Markets for Analogue Terrestrial Broadcasting Transmission: Document 04/80 and Response to Consultation & Notification to European Commission: Document 04/06)

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Contents

1	Executive Summary	2
2	Introduction	4
	OBJECTIVES UNDER THE COMMUNICATIONS REGULATION ACT, 2002	4
	THE REGULATORY FRAMEWORK	4
	PROCESS TO DATE	5
	STRUCTURE OF THIS DOCUMENT	6
3	Proposed Market Remedies	7
	REMEDIES AVAILABLE IN THE ACCESS REGULATIONS	8
	PROPOSED REMEDIES	9
4	Consultation Issues	11
	THE NATURE OF THE POTENTIAL COMPETITION PROBLEMS	11
	COMREG'S OBJECTIVE	14
	PRINCIPLES TO BE APPLIED WHEN SELECTING REMEDIES	15
	PROPOSED TRANSPARENCY REMEDY	16
	PROPOSED NON-DISCRIMINATION REMEDY	22
	PROPOSED ACCOUNTING SEPARATION REMEDY	23
	REGULATORY IMPACT ASSESSMENT	27
	DRAFT DECISION	28
	Annex A: Draft Decision	30
	Annex B: Notification of Draft Measures Pursuant to Article 7(3) of the Directive 2002/21/EC.....	33
	Annex C: Other Issues Raised in the Consultation.....	35
	Annex D: Obligations under the Access Regulations.....	37

1 Executive Summary

- 1.1 This document is the response to consultation on the proposed remedies for the wholesale broadcasting markets consultation (Consultation on Implementation of Remedies-Wholesale National Markets for Analogue Broadcasting Transmission, ComReg Doc No. 04/80). The consultation document followed the market analysis process and outlined the nature of the potential competition problems identified given that RTÉ Networks Limited (RTÉNL) had been designated as having significant market power (SMP, equivalent to dominance in Competition Law terms) in the wholesale national analogue terrestrial transmission markets for radio and for television. The document also consulted on the principles to be applied when selecting the appropriate remedies and the detail of the proposed remedies.
- 1.2 ComReg is obliged to impose at least one obligation listed in Articles 9 to Article 13 inclusive of the Access Directive¹ which are as follows:
- Obligation of Transparency
 - Obligation of Non-discrimination
 - Obligation of Accounting Separation
 - Obligation of Access to, and use of, specific network facilities
 - Obligation of Price Control and Cost Accounting
- 1.3 ComReg believes that it is appropriate, justified and proportionate to impose the following obligations on the SMP operator, RTÉNL:
- **An obligation of Transparency** which would be imposed with respect to access to RTÉNL's network and associated facilities and the terms and conditions under which they are supplied.
 - ComReg regards this obligation to be justified and appropriate as it addresses the potential competition problems identified in the consultation paper such as withholding of information or preferential treatment or pricing for affiliated users of the national analogue transmission services. ComReg considers this obligation to be proportionate as the costs of implementation are relatively low, given that some of this information has already been provided. The benefits of this obligation outweigh the costs as information will be available to all national broadcasters which in its absence could result in costly disputes and uninformed decisions.
 - **An obligation of Non-discrimination** which would be imposed with respect to access to RTÉNL's network and associated facilities and the terms and conditions under which they are supplied.
 - It is considered that a Non-discrimination obligation is justified and appropriate as it should ultimately ensure that RTÉNL does not discriminate in favour of RTÉ's downstream broadcasters. The cost of this obligation should be low, for example Service Level Agreements have already been agreed with RTÉ's downstream broadcasters. The benefit of this obligation

¹ Article 8(2) of Access Directive

is to ensure that all broadcasters are treated fairly by helping to prevent a distortion or restriction of competition in these markets.

- **An obligation of Accounting Separation** which would be imposed with respect to access to RTÉNL's network, services and associated facilities.
 - It is considered that this obligation is justified and appropriate because, by ensuring transparency in accounting treatment, it should support the monitoring of the Non-discrimination obligation. The cost of this obligation is limited, as RTÉNL has already made substantial investment in new accounting systems which will help to produce the required information. The benefits include an assurance that prices are non-discriminatory, that cost allocations will become transparent, and that any excessive profits would be revealed. While this paper sets out the reasoning behind imposing the obligation of Accounting Separation a further consultation will be held on the precise detail and nature of the implementation of the Accounting Separation mechanism.
- 1.4 This document is the response to consultation document in relation to the fore-mentioned proposed remedies. ComReg welcomed all comments received from interested parties on the questions posed in the consultation on remedies and has considered these comments in coming to its conclusions on the implementation of the proposed remedies.
- 1.5 As required by Regulation 20 of the Framework Regulations, the draft decision is now being made accessible to the European Commission and the national regulatory authorities of other member states of the European Community prior to making a final decision.

2 Introduction

Objectives under the Communications Regulation Act, 2002

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

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

2.2 This document is in line with these objectives which are also set out in the EU directives and transposing Irish regulations.

The Regulatory Framework

2.3 Four sets of Regulations,² transposing into Irish law four European Community directives on electronic communications and services,³ entered into force in Ireland on 25 July 2003.

2.4 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within the territory of Ireland, in accordance with the market definition procedure outlined in the Framework Regulations.⁴ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.⁵ Where the regulator determines that an undertaking has significant market power (SMP) then it shall impose on such undertakings such specific obligations as it considers appropriate, based on the

² Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the Framework Regulations"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the Authorisation Regulations"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the Access Regulations"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the Universal Service Regulations").

³ The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the Framework Directive"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the Specific Directives"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the Authorisation Directive"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the Access Directive"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the Universal Service Directive"), OJ 2002 L 108/51; and the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the Privacy and Electronic Communications Directive"), OJ 2002 L 201/37.

⁴ Regulation 26.

⁵ Regulation 27.

nature of the problems identified. Such obligations must also be proportionate and justified in light of the objectives laid down in Article 8 of 2002/21/EC (Framework Directive).

Process to Date

- 2.5 In October 2003 ComReg issued a market analysis consultation paper on ‘Broadcasting Transmission Services, to deliver broadcast content to end-users’, (ComReg Doc. No. 03/126), in accordance with the Recommendation by the European Commission on relevant product and service markets (“the Relevant Markets Recommendation”⁶).
- 2.6 The response to consultation and notification were issued in February 2004 (ComReg Doc. No. 04/06). Pursuant to Article 7 (3) of the Framework Directive, the EU Commission commented on the ComReg notification (ComReg Doc. No. 04/06) on 2 March 2004.⁷ The EU Commission did not raise objections to ComReg’s definitions of the wholesale analogue terrestrial television and radio transmission markets or to its subsequent analysis and findings of SMP.
- 2.7 The EU Commission further invited ComReg to monitor closely the competitive conditions in the provision of cable and satellite transmission services and to have regard to any future EU Commission decision on trans-national satellite broadcasting transmission services under Article 15(4) of the Framework Directive. To date ComReg is not aware of any EU Commission decision on trans-national markets but continues, by way of monitoring, to collect data on broadcasting markets.
- 2.8 In carrying out market definition and market analysis, ComReg took the utmost account of the Recommendation and the SMP Guidelines. These may be revised from time to time by the EU Commission, and the market analysis process is to be repeated when this occurs. ComReg understands that these are unlikely to be revised by the Commission before the latter part of 2005 but ComReg will continue to monitor developments in this regard.
- 2.9 In April 2004 RTÉNL was designated as having SMP (ComReg Doc. No. 04/47) in each of the following wholesale markets:
- The wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of radio content to end-users, and
 - The wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of television content to end-users.
- 2.10 The documents referred to above signalled ComReg’s intention to consult on the details of the proposed remedies for these markets and on 21 July 2004 ComReg

⁶ EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁷ Case IE/2004/0042: Markets in Ireland for Broadcasting Transmission services to deliver broadcast content to end-users

Wholesale Broadcasting Remedies Response to Consultation issued a national consultation on the proposed remedies (Consultation on Implementation of Remedies-Wholesale National Markets for Analogue Broadcasting Transmission, ComReg Doc No 04/80). Interested parties were asked to submit comments by 16 September 2004 on a number of questions pertaining to the implementation. ComReg received submissions from the three respondents by the close of the consultation period.

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

- RTÉ Networks Limited (RTÉNL);
- TV3;
- Today FM.

Structure of this Document

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

- Section 3 contains the proposed market remedies;
- Section 4 contains the consultation issues regarding the proposed remedies, respondents' comments, ComReg's consideration of these comments and further justification of the remedies;
- Annex A contains the draft decision on remedies to be applied to the operator with SMP in the markets for wholesale national analogue terrestrial television and radio transmission services to end users;
- Annex B contains the notification to the EU Commission;
- Annex C contains a summary of other issues raised which were outside of the scope of the consultation;
- Annex D details the obligations available under the Access Regulations

3 Proposed Market Remedies

The need for ex-ante regulation

- 3.1 As set out in the Guidelines⁸, the purpose of imposing *ex-ante* obligations on undertakings designated as having SMP is to ensure that such undertakings cannot use their market power either to restrict or distort competition in the relevant market, or to leverage such market power onto adjacent markets. The Framework Directive states that it is essential that *ex-ante* regulation should only be imposed where there is lack of competition i.e. “in markets where there are one or more undertakings with significant market power (SMP) and where national and Community competition law remedies are not sufficient”.⁹ The Guidelines also make it clear that the mere designation of an undertaking as having SMP on a given market, without imposing any appropriate regulatory obligations, is inconsistent with the provisions of the new regulatory framework, notably Article 16 (4) of the Framework Directive¹⁰. Indeed, NRAs must impose one or more regulatory obligations on an undertaking that has been designated with SMP¹¹.
- 3.2 For the reasons detailed in the response to consultation (Market Analysis - Wholesale Broadcasting Transmission Services ComReg Doc. No. 04/06), ComReg found RTÉNL to have significant market power in each of the following markets:
- The wholesale market for the provision of national analogue broadcasting transmission services for the provision of radio content to end-users, and
 - The wholesale market for the provision of national analogue broadcasting transmission services for the provision of television content to end-users.
- 3.3 Where markets are effectively competitive, *ex-post* competition law is generally considered sufficient to prohibit market abuses by one or more parties. However, where, for historic reasons, a market is not effectively competitive, and/or where there are high and non-transitory barriers to entry, conventional *ex-post* competition law remedies are not sufficient to prevent or remedy market failures. In these circumstances, *ex-ante* regulation is required to promote and facilitate the development of competition.
- 3.4 *Ex-ante* obligations imposed by NRAs on undertakings with SMP aim to fulfil the specific objectives set out in the electronic communications regulations. Competition law remedies are aimed at prohibiting agreements or abusive behaviour which restrict or distort competition in the relevant market¹².

⁸ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 16.

⁹ Recital 27 of the Framework Directive.

¹⁰ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 114.

¹¹ *Ibid*, paragraphs 21 and 114.

¹² *Ibid* paragraph 31.

- 3.5 Given the substantial and non-transitory barriers faced by operators wishing to enter the wholesale national analogue terrestrial television and radio transmission markets and the lack of potential competition within the timeframe of this review¹³, the legislation establishes that certain types of *ex-ante* regulation are necessary. As discussed in the consultation document (Consultation on Implementation of Remedies-Wholesale National Markets for Analogue Broadcasting Transmission, ComReg Doc No 04/80) services are provided by RTÉ's networks division (RTÉNL), downstream to RTÉ's broadcasters and to other independent broadcasters. RTÉNL, as part of a vertically integrated organisation, is in a position where it could exploit its market power in national analogue terrestrial transmission by discriminating against competing broadcasters in downstream markets.
- 3.6 When considering the imposition of *ex-ante* regulation, ComReg has an obligation to encourage efficient investment in infrastructure and promote innovation¹⁴, and to take into account the risks involved in such investment¹⁵.

Remedies Available in the Access Regulations

- 3.7 As set out previously ComReg is obliged by the Framework Regulations to impose an obligation on undertakings with SMP¹⁶. ComReg also has the obligation under Regulation 6¹⁷ 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 (see Annex D) of the Access Regulations¹⁸. The obligations are:
- Transparency, (Regulation 10);
 - Non-discrimination, (Regulation 11);
 - Accounting Separation, (Regulation 12);
 - Access to, and use of, specific network facilities, (Regulation 13);
 - Price Control and Cost Accounting, (Regulation 14).

¹³ ComReg Document No. 03/126 - Market Analysis: Wholesale Broadcasting Transmission Services.

¹⁴ Framework Directive Article 8(2)

¹⁵ Access Regulation 14(2)

¹⁶ 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'

¹⁷ Access Regulation 6(1-5)

¹⁸ 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'

Proposed Remedies

3.8 ComReg has considered the above remedies and finds that only three of them are currently appropriate. These are summarised below.

- **An obligation of Transparency** which would be imposed with respect to access to RTÉNL's networks, services and associated facilities and the terms and conditions under which they are supplied.
- ComReg considers this obligation to be justified and appropriate as it addresses the potential competition problems identified in the consultation paper (and listed below) such as withholding of information or preferential treatment or pricing for affiliated users of the national analogue transmission services. ComReg considers this obligation to be proportionate as the costs of implementation are relatively low, given that some of this information has already been provided. The benefits of this obligation outweigh the costs as information will be available to all national broadcasters which in its absence could result in costly disputes and uninformed decisions.
- **An obligation of Non-discrimination** which would be imposed with respect to access to RTÉNL's networks, services and associated facilities and the terms and conditions under which they are supplied.
- It is considered that a Non-discrimination obligation is justified and appropriate as it should ultimately ensure that RTÉNL does not discriminate in favour of RTÉ's downstream broadcasters. The cost of this obligation should be low, for example, Service Level Agreements have already been agreed with downstream broadcasters. The benefit of this obligation is to ensure that all broadcasters are treated fairly by helping to prevent a distortion or restriction of competition in these markets.
- **An obligation of Accounting Separation** which would be imposed with respect to access to RTÉNL's networks, services and associated facilities.
- It is considered that this obligation is justified and appropriate because, by ensuring transparency in accounting treatment, it should support the monitoring of the Non-discrimination obligation. The cost of this obligation is limited as RTÉNL has already made substantial investment in new accounting systems which will help to produce the required information. The benefits include an assurance that prices are non-discriminatory, that cost allocations will become transparent, and that any excessive profits would be revealed. While this paper sets out the reasoning behind imposing the obligation of Accounting Separation a further consultation will be held on the detail of the implementation of the accounting separation mechanism.

3.9 ComReg has been transparent in its method of consultation and has considered the views of all respondents. Furthermore, ComReg considers that the obligations are not inconsistent with those applied by other EU Member States on operators designated as having SMP in these defined markets.

- 3.10 ComReg did not consider an obligation of Access to be appropriate at this time, as RTÉNL currently provides access to all national radio and television broadcasters and it is unlikely that there will be a new entrant in the timescale of this review. Furthermore there is provision in national legislation which can mandate access to RTÉ's transmission facilities for independent national radio and television broadcasters.¹⁹
- 3.11 ComReg did not consider that an obligation of Price Control and Cost Accounting was appropriate at this time. According to RTÉ's Annual Report, total revenue & TV licence income amounted to €179 million in 2003, while revenue from the regulated business accounted for €15 million of this figure. There is a degree of uncertainty surrounding the future of the national analogue terrestrial transmission networks, with the advent of DTT (digital terrestrial television) and the possibility of DAB (digital audio broadcasting). RTÉNL currently has only two third party customers (apart from RTÉ broadcasters) in the wholesale markets under consideration and ComReg was not convinced that this obligation would be proportionate at this time. However, it may be necessary to reconsider this position should the output of Accounting Separation show discriminatory treatment of broadcasters or excess profits within RTÉNL's regulated business.

¹⁹ Part III, Section 16 of the Radio and Television Act, 1988.

4 Consultation Issues

The Nature of the Potential Competition Problems

Summary of Consultation Issue

- 4.1 ComReg described the types of competition problems that it considered may arise due to an operator having SMP in the wholesale market and also being part of vertically integrated organisation. The potential competition problems identified included: a) Non-price problems such as withholding of information, low quality, undue requirements and quality discrimination; and b) Price problems such as excessive prices, cross-subsidisation and price discrimination. The most obvious problems identified related to a lack of transparency in the market place.

Consultation question 1

Q.1. Do you agree with ComReg's description of potential competition problems arising in these wholesale markets? Are there any further competition problems that you believe ComReg should consider? Please elaborate your response

Responses to question 1

- 4.2 Two of the respondents agreed that ComReg had correctly described the potential competition problems that might arise in these wholesale markets. The third respondent stated that much of the analysis of the potential competition problems appeared to have been carried out without precise information or evidence from RTÉNL's operation or current practise. The respondent questioned whether the remedies were being proposed merely to enable ComReg to gain access to information in order to assess whether there was a problem. If so, the respondent considered that this could be deemed disproportionate and unjustified. This respondent added that it should be for ComReg to demonstrate that all other avenues had been adequately explored.

Non-Price Problems:

- 4.3 One of the respondents felt that the lack of access to 'view only' network monitoring placed it at a distinct disadvantage to RTÉ's downstream broadcasters. The respondent stated that this denied it the ability to ensure, via spot checks, that transmission quality was being maintained at its optimum. ComReg understands that "view only" network monitoring refers to a facility that allows a broadcaster to view the status of parts of the transmission network at any given point in time, for example, the status of link systems or transmission systems at a nationwide level if required.
- 4.4 Another respondent stated that RTÉNL currently provides information and services openly and freely to all interested parties. The respondent stated that as part of the process of separation of RTÉNL, as a commercial entity, within the RTÉ Group Service Level Agreements (SLAs) were put in place earlier this year, for the terrestrially transmitted RTÉ radio and TV services. In addition the respondent stated that the TV3 and Today FM contracts contain a clear provision that the same level of service must be provided to TV3 and Today FM as is afforded to RTÉ services. That is to say, there is a clear undertaking to provide the same level and quality of service to all parties/customers. The respondent stated that RTÉNL will be happy to put in place a SLA with all parties in the interest of consistency and clarity, notwithstanding the above.

- 4.5 The respondent also noted that RTÉNL does not engage in placing penalties or other undue requirements on its customers and that the contracts in place with the independent national broadcasters merely match the length of their contracts with the Broadcasting Commission of Ireland (BCI).

Price Problems

- 4.6 One of the respondents stated that following an analysis of RTÉ's accounts as set out in the 2003 Annual Report it believed that there was a real possibility of price discrimination and cross-subsidisation. This respondent stated, that based on information gathered from a Freedom of Information Act (FOI) request in 2001, it was charged three times more than an RTÉ affiliated broadcaster that transmitted from more sites.
- 4.7 The respondent also noted that according to RTÉ's 2003 Annual Report, RTÉ had transferred its network transmission assets with a net book value of €16 million during the financial year 2003 to RTÉNL for €30 million while TG4 assets, with a net book value of €7.4 million, were disposed of for €7.4 million. The respondent stated that the RTÉ assets could have been disposed of at this level to create debt for the network company thereby creating a high cost base and necessitating high charges to reduce this debt. The respondent accepted that there might be reasons for using different valuations of various classes of assets i.e. market value or net book value but that there has been no transparency with regard to the process by which valuations have been made. The respondent believed it was imperative that the internal budgetary processes of the RTÉ group should be completely transparent and non-discriminatory and that this could be seen to be the case.
- 4.8 Another respondent stated that it regretted that ComReg had not spent sufficient time understanding in greater detail RTÉNL's accounting system before it published the consultation paper. It also stated that it regretted that the consultation paper presented "*ComReg's view that RTÉNL accounting in its current form does not provide sufficient information to assess whether there is any discrimination. From a professional accounting perspective the respondent refutes the accounting basis upon which ComReg has arrived at this view and is concerned at ComReg's failure to substantiate this assessment.*" This respondent also stated that there were issues with the disclosure of confidential information.
- 4.9 Furthermore, the respondent stated that the existing contracts were linked to the Consumer Price Index (CPI) and that this was the only method available to increase prices unless the level of coverage or service was increased at the broadcasters' request.

ComReg's Position

- 4.10 In relation to the comments made by one respondent, on ComReg's analysis of potential competition problems and the evidence available from RTÉNL's current practices to support this, ComReg considers that in line with other NRAs, and the legislation, when imposing *ex ante* regulation it may not be possible to clearly observe a certain type of anti-competitive behaviour.²⁰ ComReg instead has to anticipate the manifestation of a particular competition problem based on the incentives of a SMP undertaking to engage in such behaviour or to take steps to prevent certain abuses from occurring. ComReg, as is consistent with the regulatory framework, conducted its market analysis on a forward looking basis.

²⁰ ERG Common Position on the approach to Appropriate remedies in the new regulatory framework, ERG (03) 30 p.5

Furthermore, as stated above, the mere designation of an undertaking as having SMP without imposing an appropriate regulatory obligation is inconsistent with the provisions of the new regulatory framework.

- 4.11 In addition, ComReg notes that in the response to the consultation on the market analysis (ComReg Document No. 04/06) two respondents complained about the lack of information from RTÉNL on its pricing policy and how it sells and controls transmission services. One of the respondents to that consultation also stated that it was unable to gain satisfactory service on a number of issues such as data and logs in relation to outages, the lack of a service level agreement and that planned outages were timed to suit RTÉ services. The steps ComReg has taken, in particular the imposition of the obligations of Transparency and Accounting Separation, should enable, via self monitoring, the prevention of certain abuses, but should also disclose certain abuses within a reasonable time frame.
- 4.12 ComReg also notes that two of the respondents stated that the competition problems identified by ComReg are entirely reflective of the issues in the area. ComReg provided analysis of the proportionality and justification of remedies when setting out the detailed remedies and in the regulatory impact assessment (RIA).

Non-Price Problems:

- 4.13 ComReg notes that one of the respondents felt that the lack of access to “view only” network monitoring placed it at a distinct disadvantage to RTÉ’s downstream broadcasters. If RTÉNL has such a system in place and this is available to RTÉ’s downstream broadcasters then ComReg is of the opinion that reasonable efforts should be made to make this system available on request, on a fair, reasonable and non-discriminatory basis to all users within the relevant markets.
- 4.14 In relation to the comments on the other potential competition problems such as low quality and quality discrimination, ComReg notes that RTÉNL has signed SLA agreements with RTÉ affiliated parties. ComReg also notes that RTÉNL is happy to provide similar SLAs for independent national terrestrial broadcasters. The issue of SLAs is more fully addressed in paragraph 4.39.

Price Problems

- 4.15 In relation to the comments received on price discrimination and cross-subsidisation, ComReg notes, as stated in earlier documents, that the imposition of Accounting Separation should assist in the disclosure of excessive profits (if any). Accounting Separation is designed to help in the provision of evidence from RTÉNL which may demonstrate the absence or presence of price discrimination. ComReg considered that the immediate imposition of additional remedies concerning Price Controls and Cost Accounting systems was not appropriate or proportionate at this time. ComReg therefore considers that the imposition of the obligation of Accounting Separation is the minimum regulatory obligation to achieve the desired outcome of disclosure of excess profits.
- 4.16 One respondent argued that ComReg did not spend sufficient time understanding RTÉNL’s accounting systems. In the previous market analysis consultations (ComReg Documents 04/06 & 04/80) ComReg stated that it would consider the adequacy of RTÉ’s published accounts, when they became available, to assess whether or not the obligation of Accounting Separation was to be imposed on RTÉNL. Following correspondence and a number of meetings with RTÉNL,

ComReg took the view that these accounts were not designed for ComReg's purpose. ComReg accepts that RTÉNL has made progress in addressing accounting separation by the publication of separated accounts for RTÉ. However, further work is necessary to ensure these accounts satisfy the requirements of an Accounting Separation obligation. ComReg concluded that these accounts for RTÉ did not show sufficient detail in relation to RTÉNL to satisfy the obligation of Accounting Separation because they only highlighted, with appropriate interpretation, the total of RTÉNL's business. For example, these accounts were insufficient to monitor, a lack of price discrimination. ComReg is concerned with certain parts (and not the totality) of RTÉNL's business. ComReg proposes to continue working with RTÉNL to ensure that next years separated accounts will address these needs.

- 4.17 ComReg understands that under the current contracts prices are linked to the Consumer Price Index (CPI) (see paragraph 4.9). The movement of costs in the transmission business, however, may be very different from the basket of costs/products contained in the CPI, and indeed such transmission business price movements could mean that prices should actually decrease. ComReg considers that, whether or not there is an issue of price problems, this should be addressed when Accounting Separation information is actually made available. It is only once all of the obligations have been put in place and fully implemented that allegations of potential discrimination can be clearly identified or dismissed.
- 4.18 ComReg notes that a number of issues relating to the implementation of Accounting Separation e.g. confidentiality of information, publication of information and the valuation of assets were raised. These issues will be dealt with by ComReg in a forthcoming consultation on the implementation of Accounting Separation.
- 4.19 Having considered all of the responses to the consultation, ComReg is still of the view that the potential competition problems outlined in the consultation document are indicative of those that may arise as a result of RTÉNL having SMP in the wholesale national markets for analogue terrestrial broadcasting transmission services.

ComReg's Objective

Summary of consultation issue

- 4.20 ComReg's stated objective is to address the potential competition problems in the relevant markets. The principal competition problem is that there may be an ability to distort the competitive dynamics at the wholesale level through the conditions of supply of wholesale transmission services.
- 4.21 In selecting the appropriate remedies, one of ComReg's aims is to provide greater predictability and legal certainty in relation to charges for national analogue terrestrial transmission services to deliver radio and television services to end users and to increase transparency, while keeping, to a minimum the regulation required, to achieve this. ComReg's view is that it should impose remedies, in particular Accounting Separation, which, at a minimum, allow relevant parties to compare a detailed breakdown of the costs/charges for transmitting RTÉ's programme services against the amounts charged to other broadcasters for national analogue terrestrial broadcasting transmission services. ComReg considers that this will assist in monitoring non-discrimination and will be in the interests of end-users,

Wholesale Broadcasting Remedies Response to Consultation
which is in accordance with ComReg's policy objectives as stated in Section 12 of
Communications Regulation Act, 2002.

Consultation question 2

Q.2. Do you agree with ComReg's objective for remedies in these wholesale markets?

Responses to question 2

- 4.22 Two of the respondents agreed with ComReg's objective for remedies in these wholesale markets. One of these respondents expressed concern that the remedies proposed would be insufficient to address non-price problems and in particular that of "undue requirements."
- 4.23 One of the respondents questioned whether remedies were always needed wherever there are incentives to abuse market power even where no evidence exists that such an abuse is or is likely to occur. The respondent stated that this seemed at odds with the principles of competition law and proportionality. The respondent also stated that *ex ante* obligations needed to be flexible enough to adapt to a changing and dynamic market. The respondent questioned when and how ComReg would judge whether effective competition exists and what criteria would be applied.

ComReg's Position

- 4.24 In relation to the comments on whether the remedies would be sufficient to address non-price problems, specifically "undue requirements." ComReg believes that the obligations which it has proposed should be sufficient in addressing the competition problems identified and that any continuing problem could be resolved through dispute resolution or through final recourse to the courts.
- 4.25 With respect to the comments on whether remedies are always required where there are incentives to abuse market power, ComReg reiterates (see paragraph 4.10) that the purpose of *ex ante* regulation is to anticipate the appearance of a particular competition problem and that the obligations proposed in the consultation are proportionate and justified. With regard to the queries raised on when and how ComReg will judge whether effective competition exists, ComReg would like to refer the respondent to the European Commission Guidelines on Market Analysis with which ComReg has complied.²¹ As stated elsewhere ComReg will periodically conduct market reviews in accordance with European Commission Guidelines and Recommendations. If effective competition were found to exist in a regulated market provision ComReg would be obliged to remove all SMP obligations from a SMP undertaking.

Principles to be applied when selecting remedies

Summary of consultation issue

- 4.26 ComReg set out the remedies that may be applied from Regulations 10-14 (inclusive) of the Access Regulations.

²¹ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03). See paragraphs 70-82 and 107-121

4.27 ComReg stated that while it is obliged to impose the least burdensome and most effective remedy or remedies to address the competition problems in the markets, the interplay of a number of remedies may often be necessary. Therefore, the remedies available to ComReg could be seen as a complementary suite of remedies that support and reinforce each other (to which ComReg must give careful consideration).

Consultation question 3

Q.3. Do you agree with the principles which ComReg believes should be used when selecting remedies? Do you think that there are other principles that ComReg should consider when selecting appropriate remedies?

Responses to question 3

4.28 Two of the respondents agreed with the principles used by ComReg when selecting remedies. The third respondent referred to its response to questions one and two of the consultation, which queried whether the analysis of potential problems identified had been carried out with precise information or evidence of RTÉNL's current practise. In addition, this respondent also commented on paragraph 3.33 of the consultation document (04/80) and the reference, made by ComReg, to digital tariffs which it assumed was an error as there are currently no digital terrestrial transmission services.

ComReg's Position

4.29 In relation to whether remedies were always required where there are incentives to abuse market power even if evidence suggests such an abuse does not exist, ComReg refers the respondent to its previous response (see paragraph 4.10).

4.30 The point contained in paragraph 3.33 of ComReg's consultation document is a direct reference to RTÉ's Code of Fair Trading Practice in which it is stated that RTÉNL will "*maintain from 2004 a schedule of tariffs for Analogue and Digital broadcast services which will be reviewed annually and approved by the board of RTÉ Transmission Network Ltd. before 30 September each year*".²² ComReg agrees that the remedies proposed in this consultation apply only to the national analogue terrestrial radio and television transmission markets.

Proposed Transparency Remedy

Summary of consultation issue

4.31 ComReg stated in its consultation that an obligation of Transparency has many benefits. It can assist ComReg and the industry in ascertaining and monitoring whether SMP operators are complying with a Non-discrimination obligation, under Regulation 11, which can deter potential anti-competitive behaviour from SMP operators. Furthermore, it can serve to speed-up negotiation, avoid disputes and give confidence to market players that a service is not being provided on a discriminatory basis, as the information needed for the purpose of negotiations and

²² (<http://www.rte.ie/about/organisation/fairtrading.PDF>)

disputes will be available to broadcasters and assist them in making informed decisions.

- 4.32 Regulation 10 (Transparency) of the Access Regulations, permits the regulator to impose on an operator obligations to ensure transparency in relation to interconnection, access or both interconnection and access, requiring such an operator to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices. In addition the regulator may specify under a Transparency obligation the precise information to be made available, the level of detail required and the manner of publication. In accordance with this obligation, ComReg proposed that RTÉNL file all agreements and associated documents for the provision of transmission services with ComReg, that RTÉNL publish a schedule of tariffs and that it gives advance notification of any price changes. ComReg asked for views on what detail the schedule of tariffs should contain and what other information interested parties believed should be published. In addition ComReg proposed that RTÉNL provide all relevant parties with a SLA, which would include but not be limited to such headings as listed in paragraph/condition 2.6 of the Direction contained in Annex A of this document and asked for views on the proposed SLA.

Consultation questions 4 – 7

<p>Q.4. Do you agree that an obligation of Transparency should be imposed on RTÉNL? Please provide a detailed answer.</p>
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Responses to question 4

- 4.33 Two of the respondents agreed that an obligation of transparency should be imposed on RTÉNL. These respondents both stated that they had no realistic alternative to RTÉNL for the provision of transmission services. One of these respondents stated that it had entered into contract with RTÉNL without any alternative commercial quote and no knowledge of how the pricing compared to that charged to internal RTÉ companies. This respondent acknowledged that improvements had taken place on service and transparency of information with regard to service levels but also stated that an obligation of transparency would assist in ensuring the continuation of these improvements. In particular, the respondent noted that an obligation of transparency in pricing is necessary to ensure that it is charged in line with RTÉNL's internal pricing for RTÉ downstream broadcasters. The respondent was especially concerned that account be taken of any potential cross charging by a RTÉ downstream broadcaster to RTÉNL that could dilute the network charge. The respondent stated that the dilution of the RTÉNL charge to affiliated stations could hypothetically arise via internal management charges, such as recharging of costs and management time.
- 4.34 Two of the three respondents agreed that the information as outlined in the consultation document should be sufficient under the Transparency obligation. One of these respondents agreed that the information was sufficient with the assumption that the transmission agreements to be filed would include those between RTÉNL and RTÉ's downstream broadcasters and that the service level agreement will be standard to all customers of RTÉNL whether internal or external. This respondent also stated that it would assist confidence in the transparency if it was verified by an independent auditor's statement. Another respondent also believed that the level of transparency as outlined in the consultation document was

appropriate provided that RTÉNL makes public the costs to each broadcaster which would enable comparisons to be made between the charges to broadcasters. This respondent also stated that a managed services tariff should be based on effective radiated power levels.

- 4.35 Another respondent stated that it will work with ComReg to agree the precise level of transparency necessary to achieve the objective but that any principle or conditions for transparency must be consistent with the RTÉ Code of Fair Trading Practice. The respondent also stated that it would make available copies of agreements and contracts within 28 days, dependent on the permission of affected/relevant third parties prior to submission.
- 4.36 In relation to the SLA, this respondent stated that agreements have been in place since the beginning of 2004 and cover all detailed aspects that ComReg suggested.

ComReg's Position

- 4.37 ComReg notes the agreement of the respondents with respect to the Transparency obligation. ComReg will oblige RTÉNL to file all transmission agreements and associated documents, including those between RTÉNL and RTÉ broadcasters, with ComReg.
- 4.38 As stated earlier, ComReg notes that RTÉNL has recently introduced SLAs to customers in this market. ComReg notes that the SLAs are in place between RTÉNL and RTÉ affiliates only. RTÉNL has stated that *“it would be happy to put in place the SLA with all parties in the interest of consistency and clarity, though it is clear from the contracts that RTÉNL is providing, and has a duty to provide, the same quality of service to all of its customers.”* RTÉNL has supplied a SLA to ComReg.
- 4.39 In light of the above ComReg has decided that RTÉNL should be required to conclude legally binding SLAs with each of the national broadcasters, and that these be filed with ComReg as part of the Transparency obligation. ComReg also considers that while putting in place a SLA helps to ensure a guaranteed level of service, it does not on its own prevent quality discrimination. The SLAs should provide details of the agreed service levels, which should include but should not be limited to the headings listed in both paragraph 3.33 of Consultation Document 04/80 and condition 2.6 of the draft decision contained in Annex A. ComReg will direct that such agreements must be produced, and put into place for each national broadcaster. Each SLA should provide, at a minimum, the same level of detailed agreement as that contained in the existing SLAs which RTÉNL has in place with affiliated broadcasters.
- 4.40 ComReg notes that one respondent stated that it will comply with a Transparency obligation and file all agreements with ComReg in 28 days, subject to the approval of third parties relevant to that agreement. ComReg refers the respondent to Regulation (10) of the Access Regulations in relation to making information available under the Transparency obligation. With regard to the obligation of Transparency being in keeping with the Code of Fair Trading Practice, ComReg considers that it was stated in the consultation document that the obligation proposed was in keeping with the Code of Fair Trading Practice and was for that reason a proportionate and justified remedy.

Q.5. Do you agree that RTÉNL should be required to publish a schedule of tariffs? If so, what do you think this schedule should contain? Please provide a detailed answer.

Responses to question 5

- 4.41 In relation to the publication of a **schedule of tariffs**, two of the respondents agreed that a schedule of tariffs should be published. One of the respondents stated that its contract contained a single annual fee, a single capital fee and a single power fee, which are linked to the CPI. This respondent asked that the published tariff list contain the costs of all components of the RTÉNL contract, both service and capital and that it be independently verified that these fees were the same as those charged to RTÉ affiliated companies for similar services. In addition, this respondent stated that any tariffs would need to be based on the most efficient running of the transmission network. Another respondent believed that there should be three separate types of tariff, a managed services tariff, a non managed services tariff and an ancillary services tariff.
- 4.42 One of the respondents agreed with the publication of a schedule of tariffs, in principle, but stated that ComReg must be mindful of requiring the publication of any information that would put RTÉNL at a competitive disadvantage in the unregulated business area and believed the area needed further discussion. The respondent further stated that the nature of the business of RTÉNL does not lend itself to issuing a list of tariffs. For example, the cost to be allocated to each broadcast customer will depend on the number of customers availing themselves of a service on each site and as the markets under consideration are national television and radio broadcasting, the exact requirements of each individual broadcaster will vary, as tariffs are not calculated on a site by site basis. This respondent argued that the calculation of a schedule of tariffs would represent an unreasonable burden on RTÉNL and result in a variety of tariffs that would not allow for reasonable comparison. This respondent believed that a more meaningful way to provide transparency of tariffs would be to provide customers with a full explanation of the principles and methods used in arriving at tariffs, the respondent also stated that the tariff model would make available the actual tariffs (costs to user) available. The respondent believed that more detailed discussion was needed on this subject.

ComReg's Position

- 4.43 ComReg has taken into account the comments made by all respondents on the production of a schedule of tariffs. ComReg agrees with the respondent who stated that it could be difficult to provide a single tariff because of the problems outlined above and welcomes the steps already taken by RTÉNL in producing a tariff model. ComReg will oblige RTÉNL to provide a full explanation of the principles and methods used in arriving at the costs, which determine the tariffs for transmission services and considers that this would constitute part of tariff transparency. In line with the response from the other two respondents, ComReg will oblige RTÉNL to produce costing information under the Accounting Separation obligation, the output of which would relate to managed services, non managed services and ancillary services, (and quite likely their constituent parts) with the precise detail to be finalised in the consultation on the detail of Accounting Separation. If ComReg considers that prices may not be cost orientated, for example following a review of the Accounting Separation information, ComReg may use other methods i.e. bottom up models or benchmarking prior to making a

decision concerning the appropriateness of price levels and the imposition of further remedies.

- 4.44 In the interests of making all tariffs for all national analogue terrestrial transmission services transparent, ComReg will oblige RTÉNL to produce and publish a schedule of tariffs as is provided for in the above mentioned tariff model. ComReg notes that RTÉNL has already committed to producing this in 2004 as part of the Code of Fair Trading Practice²³. At present, contracts are in place between RTÉNL and the two independent national broadcasters, until 2007 and 2008 respectively. The tariff charged to these broadcasters for transmission services is determined by these contracts. As a result, the tariff for transmission services determined by the tariff schedule will apply only to the RTÉ affiliate broadcasters. The publication by RTÉNL of the costs relating to the various services it provides should ensure that the independent national broadcasters will also have tariff transparency whilst contracts are in place.
- 4.45 ComReg expects RTÉNL's tariff schedule to include details of a mechanism to inform and notify relevant parties of any changes to tariffs as a result of material changes in cost. ComReg agrees that verification of the non-discriminatory nature of prices charged for similar services would be confirmed by an audit opinion. ComReg intends that the implementation of this requirement will be addressed as part of the detail of the Accounting Separation consultation.

Q.6. If RTÉNL is to provide advance notification of new charges or amendments to existing charges do you agree that 28 days is a sufficient time period? Please give reasons for your answer.

Responses to question 6

- 4.46 In relation to the notice period for advance notification of tariffs, two of the respondents stated that a period of 90 days was the norm. One of these respondents stated that a longer notice period should be provided because transmission costs are a significant cost to its business. However, the second respondent stated that under the contract the effects of changes in price were limited to new transmission sites or equipment upgrade albeit that this had the potential to change under the terms of any new contract. The third respondent stated that it saw no difficulty with RTÉNL adhering to this provision within 28 days. However the respondent also stated that a notice period of 90 days could be adhered to in most situations. The respondent stated that there might be difficulty in adhering to a 90 day notice period if the impact on the charges was as a result of the actions of a third party, for example an increase in the power charges by an electricity supplier or an increase in capital costs based on the CPI. For either of those cases RTÉNL might not be in receipt of the amended information within 90 days and would therefore be unable to meet the request for a 90 days notice period.

ComReg's Position

²³ Under the Code of Fair Trading Practice, RTÉ has committed in relation to the Transmission Network, to operate its services in a transparent, accountable and non-discriminatory way. From 2004 it will maintain a schedule of tariffs, calculate tariffs based on industry standard practice and the schedule of tariffs will provide the pricing point at the commencement of any new contract.

(<http://www.rte.ie/about/organisation/fairtrading.PDF>)

4.47 Having considered the responses ComReg has decided that RTÉNL should provide advance notification of new charges and/or amendments to existing charges within 90 days. If there are clear circumstances which are outside the control of RTÉNL whereby they do not receive notice from external parties within 90 days, of factors affecting charges, then ComReg, under these limited circumstances, expects that a notice period of 28 days should be adhered to. ComReg notes that two of the respondents stated that a 90 day period of notice for price changes would be their first preference, while the third respondent stated that they see no difficulty, with this provision being adhered to within 90 days in most cases.

Q.7 Do you believe that ComReg should require RTÉNL to make public any further information other than that outlined above? Please provide support for your answer.

Responses to question 7

4.48 One of the respondents commented that it assumed that the transmission agreements that would be filed with ComReg, including those between RTÉNL and RTÉ broadcasters which would then be available to all under a Freedom of Information (FOI) request.

ComReg's Position

4.49 All parties are free to make FOI requests and each request is considered by the relevant body on its merit, but not all information requested under FOI would necessarily be disclosed as there are a number of exemptions contained in the Freedom of Information legislation.²⁴ ComReg notes that these exemptions are subject to an overriding public interest test. However, ComReg is of the view that if it becomes necessary to publish these documents to demonstrate compliance with the Transparency and Non-discrimination obligations it will require RTÉNL do so under condition 2 of the draft decision.

Summary of ComReg's Position

4.50 ComReg will impose an obligation of Transparency on RTÉNL, as outlined in the above paragraphs, the details of which is contained in condition 2 of the draft decision in Annex A of this document.

4.51 In summary, having considered all of the responses received, ComReg considers that an obligation of Transparency is justified and appropriate in this case. It addresses the potential competition problems identified in the consultation paper such as withholding of information or preferential treatment or pricing for affiliated users of the national analogue transmission services. ComReg considers this obligation to be proportionate as the costs of implementation are relatively low, given that some of this information has already been provided. The benefits of this obligation outweigh the costs, as information will be available to all national broadcasters, which in its absence could result in costly disputes and uninformed decisions. In addition, an obligation of Transparency will have many benefits in deterring potential anti-competitive behaviour from a SMP operator as it allows ComReg and the industry to actively monitor the behaviour of that operator.

²⁴ Freedom of Information Act 1997, Sections 19-32 and Freedom of Information (Amendment) Act 2003.

Proposed Non-discrimination Remedy

Summary of consultation issue

- 4.52 In its consultation ComReg proposed the obligation of Non-discrimination which would require that RTÉNL applied equivalent conditions in equivalent circumstances to undertakings providing equivalent services. This obligation can serve (for all broadcasters) to ensure that RTÉNL does not distort competition by virtue of it being part of a vertically integrated organisation which supplies services to undertakings with which RTÉ itself competes in downstream markets.²⁵ ComReg considered that the SLAs provided under the obligation of Transparency would be necessary to monitor RTÉNL's obligation of Non-discrimination, and would ensure that equivalent service is being provided in equivalent circumstances.
- 4.53 ComReg also proposed that RTÉ's downstream arm should not have privileged access to RTÉNL wholesale. For example, other broadcasters should be afforded equivalent access to RTÉNL wholesale as RTÉ's broadcasters.
- 4.54 ComReg proposed to address any allegation of discrimination through dispute resolution procedures where appropriate.

Consultation question 8

Q.8. Do you agree that an obligation of Non-discrimination should be imposed on RTÉNL? Please elaborate your answer making reference to ComReg's interpretation of such an obligation as set out above.

Response to question 8

- 4.55 Two of the respondents agreed that an obligation of Non-discrimination should be imposed on RTÉNL while the remaining respondent agreed with the principle of non-discrimination but believed that the level and detail of information available from RTÉNL is sufficiently detailed to ensure there is no discrimination.
- 4.56 One of the respondents stated that it had concerns about non-pricing, service and upgrade issues and ensuring that RTÉNL operates under similar terms of agreements with external and internal customers. The respondent also reiterated a request for independent confirmation on actual charging of tariffs but stated that the obligation of Non-discrimination would go some way to ensuring that it was not at a disadvantage to RTÉ broadcasters.
- 4.57 In addition the respondent was concerned that RTÉ will attempt to argue that its services are different from those provided by the independent sector due to its public service remit. The respondent therefore urged ComReg to be careful in its definition of equivalent service and equivalent price.
- 4.58 Another respondent stated that ComReg must be clear in establishing the parameters for what can be deemed to be discriminatory. The respondent also stated that such parameters should be justified in terms of the aim of promoting competition given the varied nature of each broadcaster's service. Furthermore, the respondent stated that both TV3 and Today FM entered into freely negotiated contracts with RTÉNL to provide the transmission facility with the advice of a number of external parties and advisors.

²⁵ Recital 17 of Access Directive.

ComReg's Position

- 4.59 ComReg notes the agreement of the respondents with the imposition of an obligation of Non-discrimination. ComReg agrees with some of the comments made by one respondent on the level of information that is currently available from RTÉNL. Based on what ComReg has seen to date it is likely that the information available from RTÉNL will be sufficiently detailed to show whether there is discrimination or not.
- 4.60 With respect to the concerns expressed by one respondent on non-pricing issues and service discrimination, ComReg considers that the obligation of Non-discrimination coupled with the other obligations will address the non-price problems and ensure that RTÉNL provides the same level of service to all parties, for example through the provision of SLAs. ComReg has addressed the issue of SLAs more fully in paragraph 4.39.
- 4.61 In regard to the comments made that clear parameters for what is discriminatory behaviour must be established by ComReg in advance, Regulation 11 of the Access Regulations states, *inter alia*, that any such obligation shall ensure, in particular that the operator “applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services”. ComReg considers this to be sufficient, as NRAs are required to be justified and proportionate in the imposition of remedies and what constitutes discriminatory behaviour can change over time and with circumstances.

Summary of ComReg's Position

- 4.62 ComReg will impose an obligation of Non-discrimination as detailed in condition 3 of the draft decision contained in Annex A of this document.
- 4.63 ComReg, having taken into account all of the comments received, is still of the view that an obligation of Non-discrimination is justified and appropriate for these markets. Allied to an obligation of Transparency, it should help to ensure that RTÉNL provides services and information to others under the same conditions and of the same quality as the SMP operator provides for its own services or those of its parent company or partners and associates. ComReg also considers it proportionate as the cost of this obligation should be low, for example SLAs have already been agreed with downstream broadcasters. The benefit of this obligation is to ensure that all broadcasters are treated fairly by helping to prevent a distortion or restriction of competition in these markets. The obligation of Non-discrimination should promote the interests of broadcasters, who can be considered end-users in the context of these wholesale markets, as it will allow for the minimum of protection against any discrimination in price or non-price terms and conditions. ComReg considers that this obligation should help to address the issues highlighted by the majority of respondents in relation to potential quality and other discriminatory practices.

Proposed Accounting Separation Remedy

Summary of Consultation issue

- 4.64 ComReg noted that the obligation of Accounting Separation should support ComReg in its monitoring of RTÉNL's behaviour with regard to Non-discrimination, by clearly reporting its wholesale prices and internal transfer prices

for relevant services, as well as making transparent the non-discriminatory allocation of costs between products and services.

- 4.65 ComReg also noted that an obligation of Non-discrimination can require, *inter alia*, the imposition of financial reporting regimes in order to monitor RTÉNL's compliance with such an obligation. ComReg stated that it was appropriate to impose an obligation of Accounting Separation upon RTÉNL, in order to monitor RTÉNL's compliance with a Non-discrimination obligation.
- 4.66 ComReg also stated that it proposes to consult further on the detailed implementation of Accounting Separation under the new framework.

Consultation question 9

<p>Q.9. Do you agree that an obligation of Accounting Separation should be imposed on RTÉNL?</p>

Responses to question 9

- 4.67 Two of the respondents agreed that an obligation of Accounting Separation should be imposed on RTÉNL. Elsewhere in its response, in relation to Non-discrimination, one of these respondents had stated that it was concerned that it was in RTÉNL's interest to increase the cost base of the transmission company to justify the current rates charged to independent broadcasters. Another respondent asked for clarification on ComReg's proposed consultation on Accounting Separation and specifically whether it was a consultation on whether or not to impose the remedy or a consultation on the detail of the remedy to be implemented.
- 4.68 This respondent also stated that RTÉNL's accounts are in compliance with the description of accounting separation provided in the EU Framework Directive, that is "*to keep separate accounts audited in accordance with generally accepted auditing practices for the activities associated with the provision of that network or service, to the extent that it would be required if those activities were carried out by one or more legally independent companies, so as to identify all elements of cost and revenue, with the basis of their calculation and the detailed attribution methods used, related to its activities associated with the provision of electronic communications networks or services including and itemised breakdown of fixed asset and structural costs.*"
- 4.69 This respondent believed that the accounts as currently provided by RTÉNL fully discharge RTÉNL's duty to provide separated accounts. The respondent stated that accounting separation currently exists between RTÉ and RTÉNL and monthly invoices are issued to RTÉ broadcast customers. The respondent stated that the structure of the 2003 accounts (audited by KPMG) has been designed to facilitate complete separation of all accounting records for RTÉNL. The respondent also questioned whether it is consistent to impose an obligation of Accounting Separation given that the notification to the European Commission had proposed two remedies of Transparency and Non-discrimination and had adopted a wait and see approach to Accounting Separation.
- 4.70 Elsewhere in its response, this respondent stated that from a professional accounting perspective it refuted ComReg's conclusion that "*RTÉNL's accounts in their current format are not sufficient to demonstrate compliance with Non-discrimination*". With respect to this, the respondent queried whether ComReg had

carried out the “*essential, in-depth, professional review of RTÉNL’s accounting system*” prior to issuing the opinion in the consultation and furthermore what level of information is required to demonstrate compliance.

- 4.71 The respondent also expressed a concern that ComReg did not take into account the changes that have taken place to the financial, accounting and business operation of RTÉNL over the last 18 months. The respondent stated that the most recently published RTÉ Annual Report and Accounts 2003, as audited by KPMG clearly disclosed the costs of operating the business of RTÉNL and that ComReg’s statement in the consultation document that it was difficult to understand the operating costs of managing the network was not correct. The respondent stated that RTÉNL has developed a tariff model to enable the transparent calculation of charges and cost allocation for its broadcasting customers, which will form the basis of any future contracts with regulated broadcast customers.

ComReg’s Position

- 4.72 In relation to the comments on RTÉNL increasing the cost base of the transmission company, ComReg considers that the level at which non-discrimination needs to be demonstrated is at the level of individual service provided, together with full disclosure of the allocation of costs to those services. ComReg believes it is not sufficient to implement such an obligation at a market level as it is important to discourage possible cross-subsidisation of pricing at a service level. It is intended that this will be consulted upon further in ComReg’s proposed consultation document on the detail of Accounting Separation.
- 4.73 With regard to clarification of the proposed consultation on Accounting Separation, ComReg can confirm, that the purpose of this paper is to set out and justify remedies appropriate to address the competition problems identified, including Accounting Separation. As clearly stated in the consultation document, a further consultation on Accounting Separation will set out the precise detail and nature of this remedy. Consultation Document 04/80, to which this is the response, was a consultation on the principle of imposing Accounting Separation.
- 4.74 ComReg notes that one respondent considers that RTÉNL’s accounts are already produced in a manner that fully meet the description of Accounting Separation as described in the Framework Directive. From the quote in its response, ComReg assumes that the respondent is referring to Article 13 of the Framework Directive 2002 as transposed in Framework Regulation (20) 2003. ComReg notes, that this consultation and response to consultation are part of the Market Analysis process; therefore the remedies being imposed are under the Access Regulations²⁶ and not as the respondent indicates, under the Framework Directive. ComReg considers that these comments are therefore not relevant and has provided in the paragraphs below reasoning as to how and why it thinks Accounting Separation is necessary and how it will work in the legal framework provided by the Access Regulations. The obligation of Accounting Separation is necessary to monitor RTÉNL’s

²⁶ Specifically Regulation 12 of the Access Regulations states that a Regulator may “require an operator which is vertically integrated to make transparent its wholesale prices and its internal transfer prices, *inter alia*, to ensure compliance with any obligation imposed under Regulation 11 Non-discrimination or, where necessary, to prevent unfair cross subsidy and where it does so, may specify the format and accounting methodology to be used.”

obligation of Non-discrimination by clearly reporting its wholesale prices and internal transfer prices for its services.

- 4.75 In relation to the comments by the same respondent on the consistency of imposing an obligation of Accounting Separation, ComReg would refer the respondent to the notification to the European Commission and Consultation documents 04/06 and 04/80. It is clearly stated that the three remedies of Transparency, Non-discrimination and Accounting Separation are proposed. ComReg has already made detailed comments on this issue in paragraphs 2.6 -2.8 and 4.10 of this document.
- 4.76 In relation to the comments made on the changes that have taken place in RTÉNL, ComReg acknowledges that significant changes have taken place within RTÉ and by extension RTÉNL over the past 18 months. Significant progress has been made in preparing separated accounts and management information as part of the obligation under the Code of Fair Trading Practice, which was committed to under the Public Service Broadcasting Charter. However, while these accounts may have been satisfactory for those purposes, it should be reiterated that ComReg did not overlook these documents but, having considered them, concluded that in their current form they did not provide sufficient information, to demonstrate RTÉNL's compliance with an obligation of Non-discrimination through Accounting Separation. ComReg concluded that these accounts did not disclose either the revenues from transmission services or the allocation of costs to such services at an adequate level of detail. The accounts only show, with appropriate interpretation, total RTÉNL figures. ComReg will continue to work with RTÉNL in ensuring that accounts are developed to satisfy the Accounting Separation obligation.
- 4.77 ComReg notes that the Auditor's opinion contained in the Annual Report relates to the affairs of the RTÉ Group and not to individual segments of the business. In addition, the detailed allocation of costs to each channel, segment or activity, or those to individual transmission services, are not disclosed. Therefore, it is not possible to fully understand the detail of and the basis for the split of costs between the Group and non-Group activities (which have not been audited) in these published accounts.
- 4.78 In relation to the comments on the adequacy of RTÉNL's accounts to show compliance with Non-discrimination, ComReg is currently carrying out a review, in conjunction with RTÉNL staff to determine the sufficiency of RTÉNL's systems for providing Accounting Separation information. As stated in paragraph 4.76, the information ComReg has received to date with respect to RTÉNL is not sufficient, particularly with respect to the documentation on cost allocations and the form and content of financial statements. ComReg is hopeful, that the discussions it is having with RTÉNL will rectify this situation without imposing an undue burden, since progress has already been made by RTÉNL.
- 4.79 ComReg considers that imposing an obligation of Accounting Separation on RTÉNL will support ComReg in its monitoring of RTÉNL's behaviour and compliance with the obligation of Non-discrimination, by clearly reporting its wholesale and internal transfer prices for the relevant services as well as making transparent, the non-discriminatory allocation of costs between products and services, which was of concern to the majority of respondents to this consultation.

Summary of ComReg's Position

- 4.80 Having taken into the account the views of the respondent ComReg maintains its view that imposing an obligation of Accounting Separation on RTÉNL is appropriate, proportionate and justified in this market. ComReg proposes to consult further on the issue of the detailed implementation of Accounting Separation. Details of the Accounting Separation obligation are contained in condition 4 of the draft decision in Annex A of this document.
- 4.81 ComReg considers that the obligation of Accounting Separation is justified and appropriate in this market. It is based on the nature of the problem identified, and is justifiable and proportionate in the support of the promotion of competition. In this regard, the Accounting Separation obligation will be designed to help disclose possible market abuses and provide evidence in relevant markets of the presence or absence of discrimination.
- 4.82 ComReg does not consider that the obligation of Accounting Separation imposes an undue burden. ComReg intends to use the work already undertaken in producing separated accounts and management information as a basis for proposing amendments to meet the requirements of an Accounting Separation obligation. If ComReg were not to impose this obligation, it would not have any means of monitoring non discrimination or profits in the wholesale business.

Regulatory Impact Assessment

Summary of consultation issue

- 4.83 ComReg is required to conduct regulatory impact assessments in accordance with a Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources under Section 13 in accordance with S13 of the Communications Regulation Act, 2002) published in February 2003. The Direction states :

“The Commission before deciding to impose regulatory obligations on undertakings in the market for electronic Communications or for the purposes of the management and use of the radio frequency spectrum or for the purposes of the regulation of the postal sector, shall conduct a Regulatory Impact Assessment in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government’s Better Regulation programme.”

- 4.84 ComReg carried out a regulatory impact assessment which is contained in section 4 of consultation document 04/80. This concluded that the obligations proposed would have a neutral to positive effect, in terms of the promotion of competition, the development of the internal market and the promotion of the interests of users within the Community as overall, they will provide the operators with greater predictability and legal certainty over charges for national analogue terrestrial services to deliver radio and television content to end-users while keeping the regulation required to the minimum to achieve this.
- 4.85 In addition, ComReg considers the market analysis process to be a comprehensive review of the sector under consideration and is approximate to a regulatory assessment as considered by the Ministerial Direction quoted above.

Consultation question 10

Q.10. Do you agree with ComReg's regulatory impact assessment?

Responses to question 10

4.86 Two of the respondents provided views on this question. The first respondent agreed in general with the assessment subject to any concerns raised in answers to previous questions. The respondent also commented on Price Control and urged that should the obligation of Accounting Separation not be sufficient that a Price Control and Cost Accounting obligation be implemented. The second respondent also commented on the imposition of other controls such as Access and Price Control and Cost Accounting and asked that ComReg consider these and consult with the Department of Communications, Marine & Natural Resources in respect of this.

ComReg's Position

4.87 ComReg, as stated in the consultation document had considered the obligation of Access but decided that it would impose a disproportionate burden on RTÉNL at this time. As stated in paragraph 4.5 of consultation document 04/80, RTÉNL currently provides access to all of the national radio and television broadcasters and the possibility of new entrants is considered unlikely during the review period. ComReg had also considered an obligation of Price Control and Cost Accounting but decided that it would impose a disproportionate burden on RTÉNL at this time. However, ComReg may reconsider the obligation of Price Control and Cost Accounting in the future if the output of Accounting Separation shows excess profits within the relevant parts of RTÉNL operations designated as having SMP.

4.88 Independent broadcasters can be regarded as users in the context of these wholesale markets and ComReg considers that the implementation of these remedies will allow the internal transfer prices to be rendered visible, while removing the ability to distort the competitive dynamics at wholesale level through the conditions of supply of wholesale transmission services. In addition, the imposition of these remedies, will promote the interests of end-users as they allow the minimum protection against any excessive pricing or discrimination in price/ non-price terms and conditions. Furthermore, the proposed remedies promote the provision of clear information, in particular requiring transparency of tariffs and conditions for the use of the transmission services.

4.89 Having considered all of the responses, ComReg considers that the remedies being imposed, as contained in the draft Decision in Annex A, are proportionate and justified in light of RTÉNL's SMP on these markets.

Draft Decision

Summary of consultation issue

4.90 ComReg enclosed a draft decision in Annex B of the original consultation paper (ComReg 04/80). The draft decision set out the statutory powers giving rise to the decision, and included details of the proposed obligations.

Question 11

<p>Q. 11. Do you agree with the wording of the draft Decision? Please elaborate your response</p>
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Responses to Question 11

4.91 One of the respondents commented on the draft decision. The respondent agreed with the wording of the draft decision subject to any concerns highlighted in responses to previous questions and with them being satisfied as to the detail in the obligation for accounting separation.

ComReg's Position

4.92 ComReg has considered the respondent's comments and all of the submissions to the issues raised in the consultation. The draft decision has been amended to take into account suggestions made and accepted on the detail of the obligations as discussed earlier in this section of the document. The amended draft decision is contained in Annex A of this document.

Annex A: Draft Decision

1 SMP Obligations Generally

- 1.1 In accordance with Regulation 9 of the Access Regulations, RTÉNL shall have imposed on it, the obligations of Transparency, Non-discrimination and Accounting Separation obligations as provided for by Regulations 10, 11 and 12 of the Access Regulations respectively. These obligations are detailed in the sections below.

2 Obligation of Transparency

- 2.1 The SMP Operator RTÉNL shall file with ComReg all agreements and associated documents, for the provision of transmission services, including, a description of all terms and conditions and prices. ComReg may oblige RTÉNL to make these agreements and associated documents publicly available.
- 2.2 All existing agreements for the provision of transmission services (whether or not in writing) shall be filed with ComReg by RTÉNL within 28 days of the date of this Decision becoming effective. Any new agreement (and any updates to thereto) shall also be filed by RTÉNL within 28 days.
- 2.3 RTÉNL shall publish on its website a complete schedule of tariffs, within 28 days of the date of this Decision becoming effective. The schedule of tariffs shall include details of the mechanism whereby all parties with which RTÉNL has a contractual arrangement for the relevant services, will be notified of a change in tariffs resulting from any material change in costs.
- 2.4 RTÉNL shall send to ComReg a written notice (which may be in electronic format) of any new charges or, any amendment to the existing charges at which it provides national analogue terrestrial transmission services, not less than 90 days prior to the introduction of any such new charge or, any amendment to any existing charges.
- 2.5 RTÉNL shall notify all parties with which RTÉNL has a contractual arrangement for the relevant services of the matters referred to in section 2.3 and 2.4 at the same time as ComReg is notified.
- 2.6 RTÉNL shall make available to all parties with which RTÉNL has a contractual arrangement for the relevant services and to ComReg, details of the technical specifications, network characteristics and terms and conditions of supply, under a service level agreement ('SLA'). ComReg may oblige RTÉNL to make these SLAs publicly available. The matters addressed by a SLA shall include but not be limited to the following:
 - a. The scope of the SLA and details of the duration and negotiation of the SLA;
 - b. The objective of the SLA;
 - c. Broadcasters' Business Support;
 - d. Fault Incidents;
 - e. Fault management;
 - f. Fault Response;

- g. Escalation Process;
- h. Network Monitoring Centre;
- i. Service Requests;
- j. Business Continuity Management;
- k. Routine Meetings;
- l. Reports;
- m. A dispute resolution procedure to be used between parties;
- n. Provisions regarding confidentiality of non-public parts of the SLA;
- o. A description of the Network Access to be provided, including technical information;
- p. The locations of the points of Network Access;
- q. The technical standards for Network Access (including any usage restrictions and other security issues);
- r. The conditions for access to ancillary and supplementary services;
- s. Details of traffic and network management;
- t. Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
- u. Details of quality metrics;
- v. Details of measures to ensure compliance with requirements for network integrity; and
- w. Rules of allocation between the parties when supply is limited.

3 Obligation of Non-discrimination

- 3.1 Without prejudice to the generality of section 1.1 and Regulation 11 of the Access Regulations, RTÉNL shall ensure that it offers a SLA to broadcasters, addressing all of the matters referred to in section 2 of this Decision, on a non-discriminatory basis

4 Obligation of Accounting Separation

- 4.1 The details of the Accounting Separation obligation will be contained in a decision or decisions to be made by ComReg, following further consultation in relation to the detailed requirements for, and the practical implementation of Accounting Separation.

5 Provision of Information

- 5.1 For the avoidance of doubt, ComReg may, under Regulation 17 of the Framework Regulations require any undertaking to provide (within such time as ComReg shall specify in the document containing the requirement) any information, including financial information, that ComReg considers necessary for the purpose of ensuring compliance with this Decision.

6 Directions

- 6.1 For the avoidance of doubt, ComReg may, for the purpose of further specifying requirements to be complied with relating to obligations imposed by this Decision, issue directions to any undertaking to do or refrain from doing anything which ComReg specifies in the direction and the undertaking shall comply with any such directions.

7 Period for which the Obligations shall remain in force

- 7.1 The obligations contained in this Decision shall remain in force until further notice, unless withdrawn by ComReg following the completion of any further market review.

8 Effective Date

- 8.1 This Decision shall be effective from the [•] day of [•]

John Doherty
Chairman
The Commission for Communications Regulation
The [•] day of [•]

Annex B: Notification of Draft Measures Pursuant to Article 7(3) of the Directive 2002/21/EC

Pursuant to Article 16 of 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.

Pursuant to 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 on 3 December 2003. The responses to this consultation have been taken into account and ComReg reached preliminary decisions in relation to market definition, designation of SMP and regulatory obligations, which are contained in ComReg document 04/06 and were notified to the EU Commission in February 2004. A Decision Notice was issued in April 2004 (D6/04) designating the undertaking with significant market power, in accordance with Regulation 27 (4) of the Framework Regulations. Further to this notification and Decision, ComReg has conducted a national consultation, contained in ComReg document 04/80 on the implementation of remedies. This consultation ran from 22 July 2004 and ended on 16 September 2004.

ComReg's hereby notifies the Commission of its proposed remedies and obligations, in accordance with Article 7(3) of Directive 2002/21/EC. These remedies and obligations are set out in the attached summary notification form.

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))	The following obligations are proposed and the detail can be found in the draft decision: <ul style="list-style-type: none"> • Transparency-Regulation 10 • Non-discrimination-Regulation 11 • Accounting Separation-Regulation 12 	Pages 30-32
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	Such information can be found in Sections 3 & 4 of this document. In short these obligations are proportionate, appropriate and justified as they address the potential competition problems identified and will assist in preventing discrimination and increase transparency for broadcasters in the relevant markets.	Pages 7-29

3.3	<p>to be found</p> <p>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</p>	Not applicable	
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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 (Access Directive)	Not applicable	
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 C: Other Issues Raised in the Consultation

4.93 There were a number of issues raised in the responses to consultation which were outside of the scope of this consultation on the proposed remedies. ComReg will address those issues in this section.

DAB and DTT

4.94 A respondent commented on DAB and DTT which was mentioned in paragraph 3.54 of the consultation document 04/80. The respondent asked that any developments undertaken by RTÉ/RTÉNL in these areas should be done in consultation with the industry and their customers.

ComReg's Response

4.95 ComReg notes that DTT and DAB are outside the scope of this consultation process and that the relevant markets under discussion are analogue in nature.

Structural Separation of RTÉ and RTÉNL

4.96 A respondent, in respect of question 9, suggested that ComReg should investigate the possibility of the complete structural separation of RTÉNL from RTÉ

ComReg's Response

4.97 ComReg does not consider that it would be appropriate for it to investigate the possibility of the complete structural separation of RTÉNL from RTÉ. Any decision on the future of RTÉNL is ultimately a matter for RTÉ and the Government to decide and not ComReg.

Transmission Costs

4.98 A respondent, in respect of question 9 made a number of comments in relation to the costs for transmitting a service. The respondent stated that the costs for transmitting an individual service cannot be calculated and reported on separately in published accounts. The respondent stated that many of the costs of RTÉNL are common costs relating to the maintenance of the common infrastructure of the network as a whole. The respondent stated that while costs are allocated in a clear, transparent and equitable way, such costs are not recorded and are not incurred on a customer by customer basis. The respondent stated that it was therefore appropriate to attribute costs to broadcast customers on the basis of their network utilisation in such a way that customers receiving an equivalent service can expect an equivalent level of cost allocation. The respondent further stated that the costs of the network would be collected and analysed based on the specific markets, which in the case of analogue terrestrial transmission services, will be as determined by ComReg.

ComReg's Response

4.99 ComReg considers that these issues would best be addressed in the forthcoming consultation on the detailed implementation of Accounting Separation, as the level of detail is outside the scope of this consultation, which is a consultation on the principle of imposing Accounting Separation and not detailed implementation. ComReg will, discuss with RTÉNL, amongst other things the ways in which the costs for transmitting an individual service can be calculated, the treatment of the

many common costs covering both SMP and non SMP markets and consult upon these methods in the forthcoming consultation on Accounting Separation.

Market Definition

- 4.100 One of the respondents stated that the market definitions adopted by ComReg were too narrowly framed and that the case for defining national terrestrial transmission as a separate market was not well proven or established across EU Member States.

ComReg's Position

- 4.101 Respondents should note that the consultation was on remedies to be applied in these markets and not on the market analysis, which was the subject of an earlier consultation process. Notwithstanding this, ComReg would like to make clear that the market definition and analysis and the designation of RTÉNL with SMP in the relevant markets, was accepted by the European Commission. In addition, two of the three Member States that have, to date, notified on the broadcasting markets (Market 18), the Austrian and Finnish regulators, defined national analogue terrestrial television transmission services and national analogue terrestrial radio transmission services as relevant broadcasting markets and notified the EU Commission accordingly. The Finnish regulator also defined separate markets for national digital terrestrial television and national digital radio transmission services.²⁷

27

<http://forum.europa.eu.int/Public/irc/infso/ecctf/library?l=/sterreich/registerednotifications/at20030018&vm=detailed&sb=Title>
<http://forum.europa.eu.int/Public/irc/infso/ecctf/library?l=/suomifinland/registerednotifications/fi20040076&vm=detailed&sb=Title>

Annex D: Obligations under the Access Regulations

Obligation of Transparency

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

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 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

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

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

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