



Commission for
Communications Regulation

Response to Consultation

Three Criteria Test on the Broadcasting Transmission Market

Response to Consultation on Document 10/98

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1 Executive Summary

This is the response to consultation on document 10/98, 'Three Criteria Test on the Broadcasting Transmission Market', which was published on ComReg's website on 3 December 2010.¹

ComReg undertook this consultation in light of the EU Commission's revision of its *Recommendation on Relevant Product and Service Markets*, which removed market 18 (wholesale broadcasting transmission) from its recommended list of markets with the characteristics which may warrant *ex ante* regulation, and also in light of the impending move to digital terrestrial television (DTT) broadcasting in Ireland.

In consultation document 10/98, ComReg proposed that, from a wholesale perspective, each transmission platform can be regarded as a separate market. ComReg considered that the market for national terrestrial broadcasting transmission services was a distinct market irrespective of the technical means of delivery (i.e. analogue or digital). ComReg also noted that the boundaries between terrestrial TV and terrestrial radio broadcasting transmission are becoming increasingly blurred, particularly as Ireland moves to digital terrestrial transmission. ComReg's draft opinion was that the three criteria test is satisfied in the national (analogue and digital) terrestrial (TV and radio) broadcasting transmission market.

Respondents were asked to submit their views by 20 January 2011. Seven responses were received. The views of respondents are considered in section 3 together with ComReg's position.

Having carefully considered the responses received, ComReg remains of the opinion that the three criteria test is satisfied with respect to the national terrestrial (analogue and digital TV and radio) broadcasting transmission market.

Therefore, ComReg shall move to the next stage of its review process by conducting a full market analysis, including assessment of SMP and remedies if necessary.

¹ <http://www.comreg.ie/fileupload/publications/ComReg1098.pdf>

2 Introduction

In December 2007, the EU Commission removed the broadcasting transmission market from its *Recommendation on Relevant Product and Service Markets*², which lists electronic communications markets which may be susceptible to *ex ante* regulation. However, despite its removal from the recommended list, national regulatory authorities (NRAs) have the power to assess this market to determine whether, on the basis of national circumstances, this market may still be susceptible to *ex ante* regulation.

As part of this assessment, ComReg must assess if the three criteria test is satisfied before proceeding to a full market analysis which will determine whether the market is effectively competitive or whether it should be subject to *ex ante* regulation.

In light of the Commission's revision of its *Recommendation* and the transition from analogue to digital terrestrial broadcasting transmission in Ireland, ComReg published a consultation on the three criteria test on the broadcasting transmission market in Ireland, on 3 December 2010 (document 10/98).³

In this consultation, ComReg stated that it was of the opinion that the three criteria test is satisfied with respect to the national terrestrial (analogue and digital TV and radio) broadcasting transmission market. The purpose of the consultation was to seek the views of interested parties on ComReg's draft findings, in order to help ComReg determine whether these draft findings remain valid and, consequently, to determine whether ComReg should continue to the next phase of its review, which would be a full market analysis of the wholesale broadcasting transmission market in Ireland.

2.1 List of Respondents

There were seven responses to this consultation and ComReg is grateful to all respondents for their input. The respondents were eircom Limited, the Independent Broadcasters of Ireland (IBI), Magnet Networks Limited, RTÉ and RTÉNL (Raidió Teilifís Éireann and its wholly owned subsidiary RTÉ Transmission Network Limited), Telefonica O2 Limited, TG4 (Teilifís na Gaeilge), and TV3.

In addition, ComReg has had discussions with the Broadcasting Authority of Ireland (BAI) during this consultation process and ComReg has taken into account views expressed by the BAI.

Non-confidential responses are available on ComReg's website in the accompanying document 11/24S.

² EU Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. (Second Edition).

³ <http://www.comreg.ie/fileupload/publications/ComReg1098.pdf>

3 Consultation Questions and Responses

3.1 Relevant legal provisions

As *ex ante* regulation under the electronic communications framework may not be necessary if other forms of regulation are available, ComReg considered other statutory powers that may apply to the broadcasting transmission market. ComReg discussed the principal roles and responsibilities of ComReg, the Broadcasting Authority of Ireland (BAI), and the Minister for Communications, Energy and Natural Resources. In addition, ComReg considered national and EU legislative provisions which may be relevant to this analysis and which are found in the Communications Act 2002, the Wireless Telegraphy Acts 1926 – 2009, the Broadcasting Act 2009, the Framework Directive 2002, and the Access Directive 2002.

ComReg asked respondents the following question.

Q. 1. Do you agree that this section assesses all relevant legislation for analysis of the broadcasting transmission market? Are there any other relevant legislative provisions which ComReg has not addressed here? Please explain your answer.

3.1.1 Views of Respondents

Two respondents acknowledged ComReg's statutory obligation to review this market and asked that ComReg take note of remedies applied by other NRAs, which have been notified and accepted by the EU Commission, especially those which aim to control transmission costs applied to broadcasters.

Another respondent agreed that ComReg considered all relevant broadcasting legislation, as part of its consultation.

One respondent suggested that it is noteworthy that section 130(10) – (12) of the Broadcasting Act 2009 fails to provide for a price control remedy, as is provided for under the EU harmonised electronic communications regulatory framework, and that there is no specific reference to objective, transparent, proportionate and non-discriminatory pricing in the Broadcasting Act 2009.

Another respondent pointed out that there are specific provisions which deal with concerns raised in the consultation document, particularly sections 108 and 109 of the Broadcasting Act 2009. The respondent stated that these provisions set out how RTÉ is to conduct its business with its commercial subsidiaries and give the BAI power to monitor RTÉ's compliance (at the direction of the Minister) with section 108. ComReg was asked by the respondent to note that there are detailed accounting

obligations imposed on RTÉ in this regard and that RTÉNL is a separate company which files separate accounts.

3.1.2 ComReg's Position

As part of ComReg's application of the three criteria test, ComReg reviewed notifications sent by national regulatory authorities (NRAs) in other Member States to the EU Commission, concerning the broadcasting transmission market. However, a finding that the three criteria are met does not, of itself, result in the imposition of regulatory obligations. The three criteria test is the first stage of a possible two stage review process, and it is only upon conclusion of both stages that a decision is made as to whether *ex ante* regulation is warranted in the relevant market(s).

ComReg has reviewed the Broadcasting Act 2009 and notes sections 108 and 109 of the Act. Section 108 provides that all transactions entered into by a corporation, as between the activities arising from (a) its public service objectives, and (b) its exploitation of commercial opportunities, shall be made at arms length and on commercial terms. At the direction of the Minister, a report on compliance with this requirement shall be made by the Compliance Committee of the BAI.

Section 109 of the Act sets out the general accounting procedures for "a corporation", defined in the Act as meaning RTE or TG4 or both, as the case may be. These accounting procedures include the requirement for a corporation to prepare and submit audited accounts to the Minister as required. The BAI, at the direction of the Minister and having consulted with the corporation, shall prepare and publish guidance for the corporation as regards the cost accounting principles and methods to be considered in preparing a statement made in respect of public funding paid to it under section 123 of the Act. In particular, section 109(9)(b) provides that a corporation shall, after the end of each financial year, send to the Minister a statement in respect of the total revenue and costs derived by the corporation in that financial year. That statement to the Minister shall distinguish between monies received or expended on (a) activities in pursuance of its public service objectives, and (b) activities in pursuance of its exploitation of commercial opportunities objective.

The above provisions of the Broadcasting Act 2009 appear to be aimed at securing accountability for expenditure of public monies and protecting against inappropriate use of public funds. These provisions are not designed to address issues of significant market power per se, and neither provision would, in ComReg's view, result in full transparency of internal pricing in the same manner as under the electronic communications regulatory framework. ComReg considers that though certain provisions of the Broadcasting Act 2009 could potentially duplicate elements of *ex ante* regulation, in the context of a vertically integrated entity such as RTÉ these provisions under the Broadcasting Act 2009 are not sufficient in their scope as to remove any requirement for *ex ante* regulation. For example, the provisions of the Broadcasting Act 2009 do not provide for prices to be set in order to prevent excessive pricing or margin squeeze on competitors. This can be done under the electronic communications regulatory framework (following a finding of SMP).

In terms of any existing regulatory obligations in the broadcasting transmission market, the market review process will determine whether the market is susceptible to *ex ante* regulation or not. If the market is found to be effectively competitive then obligations on any operator which was formerly designated as having SMP will need to be withdrawn. Alternatively, where the market is not found to be effectively competitive, then current obligations may be amended and/or new obligations imposed (again on undertaking(s) designated with SMP).

ComReg, having had regard to the responses received, considers that it has had proper regard to all relevant legislation applicable to the broadcasting transmission market in Ireland.

3.2 Market Definition

In its consultation, ComReg noted that although it is not necessary to identify the relevant retail market in order to apply the three criteria test, it is useful to examine retail end-users use of particular platforms, while having regard to broadcasters need to reach as many retail end-users as possible in order to obtain advertising revenues.

ComReg stated that in geographic areas where pay-TV services over satellite and cable are both available, both of these services can be deemed to fall within the same retail market due to the relative ease with which most households can switch between these services and the national pricing strategy of the more widely available satellite platform. IPTV was not considered as ComReg does not consider that IPTV will be a significant access means for end-users in Ireland in the timeframe of this review (over the next three years).

ComReg then assessed whether the lowest priced pay-TV services and free to air (FTA) services are substitutable for one another. It was ComReg's provisional opinion that this was not the case, as the respective services have a number of different characteristics including subscription fees, minimum contract commitments, and content and availability.

With the additional capacity available on the DTT platform (expected to be fully launched in mid 2011), and with a proposed FTA satellite service from which RTÉ (Saorsat) will operate, it could be expected that the retail market will tend towards the inclusion of basic FTA⁴ and pay-TV packages over time. However, ComReg stated that it did not view this as likely given the possible incentives of RTÉ as a vertically integrated entity. As a vertically integrated entity, RTÉ may have less incentive to provide offerings that more closely match pay-TV, due to its concerns over potential negative impacts on the viewership numbers of its own channels and, consequently, its advertising revenues. The offering of a superior free to air service or of a relatively cheap pay-TV could, potentially, reduce the viewership of RTÉ's own channels as choice for households expands. Even with the transition to DTT, the breadth and diversity of programmes available on this platform will not match those

⁴ The Boxer consortium (which was involved in a bidding process for commercial multiplexes) planned to offer entry level pay-TV services at €9.99.
http://www.communicorp.ie/press_release.php?id=58

provided over pay-TV.⁵ If pay-TV providers feared that viewers would move away from their pay-TV packages, it is likely that they would respond with a more competitive package. This would have the potential to further reduce the viewership of RTÉ's channels. Even with the proposed FTA satellite service (Saorsat), the fact that many households have been unwilling or unable to erect a satellite dish⁶ means that ComReg considered that it is unlikely that the dynamic towards potential competition will change in the timeframe of this review.⁷

Regarding radio services, ComReg did not view radio content over satellite and cable as a substitute for terrestrial broadcasting, due to the importance of end-user mobility and the limited portable devices available for cable and satellite radio broadcasting. ComReg also expressed its view that, in line with its previous market definition findings in 2003 / 2004, local/regional terrestrial radio broadcasting transmission services do not satisfy the three criteria test, because there are low barriers to entry. ComReg met with a number of parties during its three criteria test review and did not receive strong representations contrary to this view at these meetings.

ComReg stated that it was of the view that each transmission platform is a separate market, as broadcasters must enter into contracts with each platform provider who can deliver a significant amount of potential viewers and/or listeners, in order to obtain as many viewers and/or listeners as possible and thereby maximise its advertising revenue.

ComReg defined the market for application of the three criteria test as national in scope.

⁵ It is anticipated that there will be 9 TV channels available on the DTT platform for its planned full launch in mid 2011. See <http://www.dcenr.gov.ie/NR/ronlyres/53109763-FB78-4318-A034-47D2021C6D39/0/MinistersDecision.pdf>

⁶ According to Nielsen TV Audience Measurement Establishment Survey data on behalf of TAM Ireland Ltd. approximately 49% of TV households have a satellite service. There are a number of planning restrictions for erecting satellite dishes on residential homes. Planning regulations do not allow the erection of two satellite dishes on one home, the dish must be no larger than 1 metre in size, and must not be placed on the front wall of the house. In addition, some properties like apartment blocks or rented accommodation might place restrictions on the erection of a satellite dish. See <http://www.irishstatutebook.ie/2001/en/si/0600.html#parti> Dishes which allow a greater reception arc e.g. Toroidal satellite dishes can receive signals within a 40 degree arc. However, these dishes have some drawbacks. They cost multiple times the amount a standard satellite dish costs, and are currently not sold in Ireland though they can be purchased on the internet. They also have a higher wind load and therefore, require stronger bracketing when mounting them.

⁷ As households with existing satellite dishes are pointing towards satellites that operate in a different orbital position to the free to air satellite service from which RTÉ (Saorsat) may operate, households are unlikely to adjust their satellite dishes towards the satellite from which Saorsat may operate as they would lose out on all the other services that they currently receive. It is also currently unclear what channels may be available on the Saorsat service; thus its attractiveness even to households with a satellite dish may be low.

ComReg further stated that for broadcasters who wish to provide FTA services, the change in the technical means of delivery (i.e. from analogue to digital) will not change their desire to broadcast by terrestrial FTA platforms because if they did not do so then they would lose a significant number of end-users.

ComReg went on to state its opinion that the boundaries between terrestrial radio and TV are becoming increasingly blurred, particularly given the move to digital transmission as digital TV multiplexes can also be used to broadcast digital radio services, while any TV terrestrial transmission system would also be designed to deliver radio broadcasting (in analogue and digital format).

ComReg thus proposed, in consultation paper 10/98, that national terrestrial TV and radio broadcasting transmission are in the same market. The market was defined as the national (analogue and digital) terrestrial broadcasting transmission market and this is the market to which ComReg applied the three criteria test in its consultation document.

ComReg asked respondents the following questions.

Q. 2. Do you agree with ComReg's draft finding that the retail pay-TV (cable and satellite) and free to air terrestrial TV services, which are national in scope, are not in the same retail market? Please explain your answer and provide evidence where available.

Q. 3. Do you agree with ComReg's draft finding that in light of the two sided nature of the market and ComReg's finding that the retail TV broadcasting market is separated between free to air and pay-TV, that from a demand perspective the broadcasting transmission market is also in a separate market? Please explain your answer and provide evidence where possible.

Q. 4. Do you agree with ComReg's draft finding that radio broadcasting services over cable and satellite platforms are not in the same retail market as national terrestrial radio broadcasting? Please explain your answer and provide evidence where possible.

Q. 5. Do you agree with the draft conclusion that national radio services provided over the terrestrial platform and those provided over other platforms are not in the same broadcasting transmission market? Please explain your answer and provide evidence where possible.

3.2.1 Views of Respondents

One respondent does not agree that free to air (FTA) TV and pay-TV are in separate retail markets. The respondent stated that 10% of the population have a UK free satellite service proving that FTA and pay-TV markets are becoming indistinguishable. The respondent further stated that DTT and the existence of combination receivers which can receive DTT and FTA UK satellite services underline this development. The respondent noted that with the proposed FTA satellite service Saorsat, and given the variety of FTA services coming into the Irish market, the market could be expected to tend towards inclusion of both pay-TV and FTA over time.

The respondent further stated that the provision of other services such as broadband using the same receiver equipment suggests that market separation is not visible from the demand side.

The respondent further stated that as there are now multiple means of receiving broadcasting services and contested the notion that there are separate retail markets for radio services. The respondent stated that the blurring of boundaries in the transmission market points to the complexity of separating markets.

The respondent also noted that while the consultation document refers to the fact that satellite operators are not subject to the “must-carry” rules under the Broadcasting Act 2009, broadcasters are subject to “must-offer” obligations as per section 77 of the Broadcasting Act 2009.

Another respondent stated that it found it difficult to answer whether retail pay-TV is in the same market as FTA, as the FTA service does not have a market per se as it is free and broadcast as a public service obligation as opposed to a commercial offering. For this reason, the respondent stated that retail pay-TV is one market while FTA is not a market in itself.

One respondent agreed with ComReg’s preliminary findings, stating that the separation of FTA and pay-TV is a well established principle of EU competition law. The respondent pointed to the EU Commission, DG Competition decision NewsCorp/Telepiù⁸ and Champions League case⁹ as supporting this. The respondent stated that the key difference between FTA and pay-TV platforms is that FTA requires the end-user to pay no fee while pay-TV requires a payment. The

⁸ http://ec.europa.eu/competition/mergers/cases/decisions/m2876_en.pdf

⁹ Champions League Case COMP/C.2-37.398

respondent stated that despite the existence of cable and satellite, over 20% of households rely on FTA coverage on their first TV set. The respondent also stated that there are technical/geographical limitations to the use of cable/MMDS as only approximately 30% of homes have cable television. The respondent stated that in some areas planning restrictions limit the installation of satellite receiving dishes and that the cost and contractual limitations for satellite (length of contracts etc.), show that it is not comparable to FTA. The respondent referred to the 2005 Chorus/NTL merger determination¹⁰ by the Competition Authority to support its position. In that merger review, the Competition Authority found that freeview (includes FTA and freesat) was in a separate retail market to pay-TV.

The same respondent also made the point that for the commercial broadcast sector there is a statutory obligation (section 70 of the Broadcasting Act 2009) that national commercial services be available from the national terrestrial transmission platform. The respondent stated that while cable and satellite systems are used by 80% of the population, approximately 30% rely on FTA reception.¹¹ The respondent also suggested that it could be argued that if terrestrial distribution was delivered by a properly operating market then there would be a number of channel providers/operators trying to enter this market which is not the case, and so new channels only enter on other transmission platforms.

This same respondent further stated that mobility is fundamental to most radio listeners and that to receive radio by cable and satellite would require additional cost for the listener. The respondent pointed out that in order to receive satellite radio an end-user must purchase a satellite receiver.

One respondent, stated that it considers that radio broadcasting over terrestrial means and over cable/satellite to be in different markets, as radio over terrestrial networks is wireless and accessible anywhere and requires very small equipment while cable and satellite requires a fixed piece of equipment, namely a television with some sort of set-top box.

While other respondents agreed with ComReg's retail market definitions, two respondents stated that they were unclear as to what Question 3 was asking, stating that they see the transmission and retail markets as clearly separate.

3.2.2 ComReg's Position

ComReg must define markets on the basis of whether products/services therein are substitutable for one another. If products/services are not substitutable for one another, then this would indicate that there are separate markets.

With pending developments in the Irish broadcasting market (i.e. DTT and proposed satellite service Saorsat) coupled with the availability of the Freesat service in

¹⁰ http://www.tca.ie/images/uploaded/documents/m_05_024_p1d.pdf

¹¹ The respondent, here, may be referring to a situation where 80% of the population are using cable and satellite and 30% are reliant on FTA reception (including FTA satellite services), so this does not sum to 100%.

Ireland, it could be expected that retail FTA TV services and retail pay-TV services (cable and satellite) would tend towards inclusion in the same retail market, over time. However, ComReg believes that this is unlikely to occur within the timeframe of this review, for the reasons outlined below.

A key difference between retail FTA and pay-TV is the requirement of a subscription fee to access pay-TV. Currently, the minimum monthly subscription fee for cable and satellite services is about €24. ComReg considers it unlikely that in response to a 5% change in prices in one platform there would be a sufficient number of subscribers substituting their services between pay and FTA TV¹², to lead ComReg to conclude that FTA and pay-TV services may be in the same retail market. Despite price increases in subscription packages, pay-TV services remain popular in Ireland.¹³ Pay-TV subscriptions also require a minimum contract commitment with cancellation fees if terminated early, further constraining the incentive of pay-TV subscribers to switch away from their pay-TV service.

Furthermore, the availability of cable and satellite TV services is not comparable to terrestrial FTA. Cable and satellite TV services are not available to all consumers. Planning regulations can restrict the installation of satellite services in certain areas, such as apartment blocks, while it is estimated that around 55% of households are passed for cable TV services in Ireland. On the other hand, terrestrial FTA services are estimated to be available to most of the population and this will remain the case with DTT.

Currently there are equipment costs for consumers switching between pay-TV and FTA, as FTA services require minimal equipment compared to pay-TV services. Furthermore, the content available on pay-TV subscriptions is greater in quantity and more diverse than that available on FTA. While equipment switching costs should be reduced with the arrival of DTT, the distinction between the range and breadth of content available via pay-TV versus the more limited content available via FTA¹⁴ will remain and so offer a different appeal to end-users.

DTT services will be made available via RTÉ's terrestrial multiplex and RTÉ has also proposed to make its DTT service available through a satellite platform which would have a specific beam focused on Ireland.

As a vertically integrated entity, RTÉ's incentive to provide offerings that more closely match pay-TV might be lower. This is because the offering of a more enhanced FTA offering, or a relatively cheap pay-TV offering, could potentially

¹² In the case where a service has no ongoing monthly price the notion of applying a SSNIP test clearly become problematic. In such a case we have to proceed with outlining the relevant market by a process of elimination. If FTA and pay-TV are in the same relevant market then it would not be possible to sustain a definition of the market that is restricted to pay-TV alone.

¹³ ComReg estimates that, (using Nielsen TV audience Measurement Establishment Survey data on behalf of TAM Ireland Ltd.) approximately 79% of TV homes in Ireland have pay-TV subscriptions. However, it should be noted that this number is likely to be over-estimated as it may include free to air type satellite services such as freesat.

¹⁴ *Ibid*, p. 6

reduce RTÉ's viewer numbers. If pay-TV providers feared that viewers would move from their services to FTA then it is likely that they would react by offering more competitive offerings, which in turn could reduce RTÉ's viewership numbers and, as a consequence, its advertising revenues.

The proposed option of a FTA satellite service by RTÉ (Saorsat) is unlikely to significantly alter the dynamics of this market. A substantial proportion of the population have been unable or unwilling to erect a satellite dish. In addition, the radio spectrum frequency band and orbital position from which the host satellite would operate is different to current satellite services and this means that, even with set-top boxes capable of running the Saorsat service and other satellite services (such as Freesat and Sky), an end-user would still be unable to access the Saorsat satellite and other satellites from a single satellite dish. It is considered unlikely that a significant number of households currently with satellite dishes would adjust their dishes towards Saorsat and lose their existing channels. Further to this point, planning regulations do not allow the option of erecting two satellite dishes on a residential property while satellite dishes that could receive more than one satellite signal can be costly and complex to install.¹⁵

One respondent highlighted a number of findings from competition *ex ante* merger review cases as supporting evidence that FTA and pay-TV operators are in separate markets. ComReg has reviewed the Newscorp/Telepiù case, (in which the European Commission decided to clear a merger in which media company Newscorp proposed to acquire control of Italian pay-TV platforms Telepiù and Stream) and notes that the Commission found that there is a clear distinction between pay-TV and FTA TV services from the viewpoint of both customers and suppliers. This was because the content and program schedules of pay-TV and FTA TV services are not the same and so this creates different appeals of these services for end-users. In terms of supply-side substitutability, the business models of the two types of services were also found to be distinct, as pay-TV operators would not be able to switch to FTA TV in the short term and vice versa.

In addition, ComReg notes that the Competition Authority, in its NTL/Chorus merger determination, also found freeview (FTA and freesat) and pay-TV services to be in separate retail markets.

Following the outcome of the commercial DTT multiplex licensing process in 2010 without any commercial DTT operator being contracted, the BAI indicated that it considered that it will not be feasible to introduce commercial DTT until after analogue switch off at the earliest.¹⁶ This means that any possible cheaper pay-TV offer¹⁷ via this means is unlikely to be made available prior to analogue switch off, at which point most consumers will have made their decision in terms of their TV

¹⁵ *Ibid*, p. 7

¹⁶ http://www.bai.ie/about_news_art023.html

¹⁷ *Ibid*, p. 6

service. If a significantly cheaper pay-TV offering was available then this could possibly result in sufficient substitution between FTA and pay-TV so as to render them, from a market definition perspective, in the same retail market. However, ComReg considers that this is unlikely in the timeframe of this review, and therefore pay-TV and FTA services are expected to remain separate retail markets, subject to future review.

As noted by one respondent some broadcasters (RTÉ, TG4 and TV3) have “must-offer” obligations under section 77 of the Broadcasting Act 2009. However, while the inclusion of these broadcasters’ channels on a particular platform might increase the attractiveness of a particular platform to end-users ComReg does not believe that this would imply that pay-TV and FTA TV can be regarded as being in the same retail market, as the number of channels, range and diversity of channel content available on pay-TV formats is still far greater than on FTA so that end-user demand for these services remains distinct. This is unlikely to change even with the transition to a digital terrestrial network.

Irrespective of this, in the broadcasting transmission sector, each platform can be regarded as a separate market. ComReg considers this to be so because in order to obtain maximum advertising revenues, broadcasters must enter into transmission agreements with any platform that has access to even a small but significant number of end-users. If a broadcaster did not do so they would potentially lose a significant number of end-users and consequently advertising revenues.

In addition, RTÉ, TG4, and TV3 have a statutory obligation to ensure that their “must-offer” services are at all times offered for re-transmission on any network available to the public in all or in part of the State, including by means of satellite service. Under section 70 of the Broadcasting Act 2009, TV3 must transmit its television service as FTA. Under Section 114, RTÉ must establish, maintain and operate a national TV and radio service, which shall have the character of a public service, and that is FTA and available, as far as practicable, to the whole community of Ireland. Section 118 sets out similar provisions in respect of TG4. These provisions require these broadcasters to sign transmission agreements with the terrestrial transmission provider (RTÉ and its subsidiary RTÉNL). The option of using the narrowband FTA satellite service as an alternative is not an option for these broadcasters as it would not enable them to meet these statutory obligations. Furthermore, capacity on this narrowband FTA satellite is likely to be limited due to provision of other services (e.g. broadband) over this medium.

Managed internet TV (IPTV) could be viewed as another viable transmission platform if a significant number of end-users use such a service. However, very few households currently subscribe to an IPTV service (estimated at about 1% of TV homes in Ireland). Due to supply side issues such as coverage, bandwidth requirements, and cost, and the relative lack of demand from end-users, it is unlikely that broadcasters, and especially FTA broadcasters, would view IPTV as an attractive alternative transmission proposition, in the timeframe of this review.

ComReg believes that radio broadcasting services over terrestrial and cable and satellite are not substitutable. This is because most end-users require mobility while

listening to the radio and there are limited portable devices available over which end users can receive radio content via cable or satellite. A ComReg consumer survey¹⁸ found that accessing radio content over a radio set is the most popular means of access (81%) followed by in the car (48%). A report by the Broadcasting Commission of Ireland (now the Broadcasting Authority of Ireland)¹⁹ on digital radio noted that listenership via devices other than fixed and car radio is low.²⁰

While radio listeners could technically receive radio services via mobile satellite receivers, there is a lack of demand for and supply of, such equipment in Ireland and so this does not constitute an alternative to terrestrial broadcasting supply in Ireland.

Given the relatively static nature of radio services over the internet, and quality issues, it is not regarded as a substitute for terrestrial supply. ComReg's consumer survey (Q4 2008) indicated that this is not a frequently used means of radio access in Ireland by radio listeners. Use of these services via the internet may increase in future but it is considered unlikely to be a significant means of end-user access in the timeframe of this review.

At the wholesale level, in order to generate advertising revenues broadcasters want to reach as many listeners as possible and so they will not substitute terrestrial transmission with other broadcasting means such as satellite, cable, or internet as they would lose out on the significant number of end-users who listen to radio through terrestrial means.

3.3 Three Criteria Test

In consultation paper 10/98, ComReg applied the three criteria test to the national (analogue and digital TV and radio) terrestrial broadcasting transmission market. ComReg stated that, subject to the responses received, it was of the preliminary view that the three criteria test was satisfied in this market, as there are high and non-transitory barriers to entry, the market does not exhibit a tendency towards competition, and *ex post* competition law alone would be insufficient to deal with the range of potential competition problems that might arise.

ComReg identified the high and non-transitory barriers to entry as including high (and potentially sunk) costs of entry, lengthy contract durations between broadcasters and the transmission network company, site location, and planning issues.

ComReg stated that it did not consider that there is a tendency towards competition in the market due to the potential incentives of RTÉ, as a vertically integrated entity.

¹⁸ ComReg Consumer ICT Survey, Q4 2008 (Doc. 09/07).

¹⁹ The Broadcasting Authority of Ireland (BAI) was established on 1 October 2009 following the enactment of the Broadcasting Act 2009. The BAI assumes the roles previously held by the Broadcasting Commission of Ireland and the Broadcasting Complaints Commission and takes on a range of additional responsibilities as set out in the Act.

²⁰ Broadcasting Commission of Ireland (now the Broadcasting Authority of Ireland),(2009) Digital Radio for Ireland: Competing Options Public Expectations.

ComReg noted that, as a vertically integrated entity, there is a possibility that RTÉ might try to exclude or charge excessive transmission fees to potential terrestrial competitors with whom RTÉ competes for content, talent and advertising revenues. Furthermore, market entry for national analogue broadcasters is constrained by the finite amount of spectrum available for national broadcasters. While a digital network would be expected to provide greater capacity, the number of national radio and TV broadcasters is likely to be dependent on the capacity available on RTÉ's multiplex(es) (or on multiplex(es) to be licenced by the BAI, if any) as well as constraints or limitations on additional services arising from BAI policy on terms and conditions of access to the multiplex(es).

Though RTÉ may have an incentive to expand its offerings in the digital world, RTÉ may not want to induce pay-TV companies to make offerings that more closely match its FTA offering due to the higher likelihood of RTÉ's own channels being viewed through the FTA platform rather than a pay-TV platform which would consequently translate into higher advertising revenues for RTÉ.

In terms of the third criterion, ComReg stated that it was of the preliminary view that application of *ex post* competition law alone is insufficient to deal with the range of potential competition problems that might arise in this market. Furthermore, ComReg did not believe that any other legislative provisions, such as those under the Broadcasting Act 2009, removed the need for *ex ante* regulation in this market.

ComReg asked respondents the following questions.

Q. 6. Do you agree with the draft finding that the first criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.

Q. 7. Do you agree with the draft finding that the second criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.

Q. 8. Do you agree with the draft finding that the third criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.

**Q. 9. Do you agree with the draft finding that the three criteria test is satisfied in the national terrestrial broadcasting transmission market?
Please explain your answer and provide evidence where possible.**

3.3.1 Views of Respondents

One respondent disagreed with these findings, contending that with recent and ongoing advances in technology, the distinction drawn with the wholesale terrestrial market and particularly with the wholesale satellite market is artificial. The respondent stated its belief that there is significant substitutability between the two platforms and this will increase as FTA satellite and DTT services develop.

The respondent further asserted that in many cases household choice of platform does not inform the choice a broadcaster will make, as people are aware of the services (channels) which they can access but are not aware of the platform they use. The respondent contended that there are a range of services available to the consumer at the lower end of satellite and cable which are indistinguishable from those on offer on FTA. The respondent also stated that there is an easy and affordable transfer path between any of the offerings to the consumer.

The respondent stated that it believes that an increase in competition is an inevitable result of current market developments and that contrary to the views expressed in consultation document 10/98, it is in RTÉ's interests to expand its TV offerings and RTÉ is interested to see competition increase. The respondent also stated that it disagrees that, in relation to Saorsat, it is unlikely that many households would adjust their dishes.

The same respondent made reference to its previous response to ComReg's broadcasting questionnaire where it stated that it believes there are comprehensive must-carry and must-offer provisions in broadcasting legislation, together with competition law remedies available, to address any perceived market failure.

One respondent stated that RTÉNL's infrastructure would be difficult to replicate and that any market entry is highly unlikely and would not happen within the two year period regarded under competition law as likely to constitute a competitive restraint. The respondent further stated that while it would be difficult and expensive to replicate RTÉNL's network, planning issues at suitable sites would also be difficult.

This respondent stated that it believes that recent unsuccessful attempts to find a commercial multiplex provider show the extent to which RTÉ controls access to terrestrial transmission and that tendency towards competition is unlikely to occur in the next 3–5 years. The respondent stated that in terms of other platforms, neither cable nor satellite can be expected to provide for a FTA network given costs and rights issues. The respondent stated that RTÉ's proposed Saorsat platform presents the end-user with an expensive alternative to FTA reception (estimated at €375). The respondent expanded by stating that customers would likely have to purchase set-top

boxes capable of receiving Ka band signals while promotion of hybrid boxes capable of receiving Ku and Ka band signals could present possible illegal State Aid issues.

The same respondent also stated that recourse to competition law can take considerable time to complete and that the damage caused may be too severe before any relief is obtained through *ex post* procedures. The respondent also made the point that a court will be very reluctant to mandate any specific prices or methodologies to be used and will not monitor these prices on an ongoing basis. The respondent further stated that *ex post* competition law cannot prevent discriminatory behaviour and could not be effectively applied to address strategic decisions which limit the possibility of new terrestrial channels entering the market. The respondent also stated that the must-carry rules do not address all the potential competition problems, while no such provisions exist for analogue terrestrial TV. The respondent further stated that, in terms of digital TV, section 130 of the Broadcasting Act 2009 would not ensure that the capacity employed by RTÉ is adequate to carry other broadcasters' content. Furthermore, the respondent stated that vertical integration in this sector would not provide for appropriate cost accounting obligations. The respondent's conclusion was that this market needs regulatory certainty and that only *ex ante* regulation can provide this.

Another respondent pointed to the high capital investment required to enter the national terrestrial broadcasting transmission market, the time period required for obtaining planning permissions, spectrum limitations, the absence of fit for purpose alternative platforms, and the market power of the incumbent. For these reasons, the respondent believes that there are high non-transitory barriers to entry to the national terrestrial broadcasting transmission market. The respondent further stated that there is insufficient evidence that the market will tend towards effective competition within a relevant time horizon. In addition the respondent stated that there is a commercial incentive on RTÉNL to exclude potential terrestrial competitors. The respondent stated that competition law alone is not sufficient to address these market failures because of its *ex post* nature.

One respondent proposed that *ex ante* regulation is needed in the broadcasting transmission market to ensure that new market entrants are not margin squeezed before they can establish themselves. The respondent also stated that competition law alone should not be left to regulate this market after an event has occurred.

Other respondents agreed with ComReg's findings.

3.3.2 ComReg's Position

For the same reasons set out in its reply to the market definition questions, ComReg remains of the opinion that although there are a number of access means at the retail level for end-user consumption of TV and radio services, FTA services will remain in a separate market for the timeframe of this review. From a broadcasting transmission perspective, as broadcasters must reach as many end-users as possible in order to drive their advertising revenues, each transmission platform that has access to even a small but significant number of end-users can be regarded as being in a separate market.

ComReg does not consider that the basic offerings from pay-TV subscription services (satellite and cable) are comparable to FTA in terms of content; pay-TV offerings such as those of Sky and UPC offer a greater number of channels across a range of more diverse topics than FTA offerings and this is unlikely to change in the timeframe of this review. Nor does ComReg consider that a sufficient number of end-users would switch between terrestrial and cable / satellite in response to a 5% price change, to imply that these markets may be substitutable at the retail level. However, if a significantly cheaper pay-TV offering was available then this could possibly result in sufficient substitution between FTA and pay-TV markets to render them, from a market definition perspective, in the same retail market. However this is unlikely to occur in the timeframe of this review and therefore pay-TV and FTA services will remain separate markets.

ComReg notes that the reasons set out in consultation 10/98 for its belief that there are high non-transitory barriers to entry in the national terrestrial transmission market have not been contested in the responses and most respondents agree with ComReg's findings. ComReg considers that due to high costs, planning issues, contract commitments, and the technological know-how required to replicate the terrestrial network, it would not be economically viable to compete with the established terrestrial transmission provider, RTÉNL, in the relevant timeframe.

There is one provider of national terrestrial broadcasting transmission services – RTÉNL - and this has been the case since ComReg's last market review in 2003/2004.

Development of the transmission platform for DTT has been undertaken by RTÉNL and while no national independent digital radio services are expected to be launched in the timeframe of this review, radio equipment for national analogue broadcasting will continue to be hosted by RTÉNL's towers. For existing analogue services, FTA broadcasters contract with RTÉNL for transmission. In order to reach digital terrestrial end-users, terrestrial broadcasters will also require agreements with RTÉNL and RTÉ (for access to their digital multiplex(es)) which is RTÉNL's parent company. RTÉ competes with other terrestrial companies for rights to content, talent etc. There remains the possibility that a vertically integrated company such as RTÉ might have incentives to potentially discriminate (in terms of restricting access or charging excessive prices) against its potential terrestrial competitors.

There are a number of constraints to market entry for national broadcasters. On the analogue network, capacity is limited due to the finite amount of spectrum available for national services, reducing the scope for market entry. Although the digital terrestrial network is expected to provide for an increase in capacity, the presence of competing national terrestrial broadcasters will be dependent on the capacity available on RTÉ's multiplex(es) or (if any) multiplex(es) to be licenced by the BAI and constraints or limitations from BAI policy on the terms and conditions of access to the multiplex(es).

In terms of the FTA satellite service Saorsat, it is unlikely, in the timeframe of this review, to change the dynamic for competition in the market as there remain a large

number of households who have been unable / unwilling to erect a satellite dish. Furthermore, the proposed satellite from which this FTA service would operate is located in a different frequency band and orbital position to existing satellites, so it is unlikely that households currently with satellite dishes will adjust their dishes in the direction of this satellite and consequently lose out on their existing channels. Planning regulations prevent the erection of two dishes on residential homes while dishes which could receive signals from this satellite and others are likely to be undesirable to consumers due to cost and complexity of installation.²¹ This, therefore, is unlikely to act as a link in the chain of substitutability between the retail pay and FTA TV market or present an attractive alternative transmission platform for broadcasters in the timeframe of this review.

ComReg remains of the opinion that competition law alone is insufficient to address potential failures in this market. The reasons for this are as follows. Competition law is *ex post* which can take considerable time to complete and therefore may be sub-optimal as it would not deal with potential discriminatory behaviour in advance of it occurring. A court will not normally mandate specific prices or pricing methodologies nor will it police these on a regular basis. It is also very difficult for competition law to address strategic decisions which limit the possibility of new channels entering the market.²² Therefore, competition law is unlikely to deal with all the potential forms of discriminatory behaviour which could otherwise be addressed under *ex ante* regulation.

It is also relevant to assess the legislation in the market which could potentially address competition problems. One respondent made reference to “must-carry” and “must-offer” legislation. For analogue terrestrial TV there are no such provision of “must-carry” rules, though for terrestrial radio there are provisions relating to co-operation of RTÉ with sound broadcaster to facilitate the provisions of transmission facilities for sound broadcasting services at the behest of the BAI and Minister under section 115(1) of the Broadcasting Act 2009.

For digital TV, section 130 provides for periodic payments for access to RTÉ’s multiplex, to be set by the Minister, and ensuring capacity employed by RTÉ is adequate to carry other broadcaster’s content. Therefore, there are provisions which may duplicate elements of *ex ante* regulation in the Broadcasting Act 2009 for TV3, TG4, the Houses of the Oireachtas channel, the Irish Film Channel and any channel deemed by the Minister to have the character of a public service broadcaster who has a contract with the BAI. Similar provisions on periodic payments and access exist in respect of digital radio services, and access to a national sound multiplex operated by RTÉ.

If RTÉ has spare capacity on any other multiplex under its control, under section 132(2) of the Act, it can broadcast other channels on a commercial basis. These

²¹ *Ibid*, p. 7

²² While use of competition law can be an option in cases where there may be competitive supply issues, the availability of capacity to carry a broadcaster on a network will limit such an option.

channels are not subject to any of the provisions on access, prescribed periodic payments or capacity.

These provisions encompass particular forms of price control but are not necessarily comparable to those that might arise under the electronic communications framework (such as ensuring that prices are set to minimize risk of excessive pricing or to prevent margin squeeze on competitors) such that ComReg does not consider that the provisions of the Broadcasting Act 2009 remove the need to consider *ex ante* regulation.

3.4 Other Comments

Q. 10. Do you have any further comments to make on the draft findings in this consultation paper? Please explain your answer and provide evidence where possible.

3.4.1 Views of Respondents

One respondent stated that this process represents an opportunity to open up the sector to full competition through appropriate *ex ante* regulation.

Another described its experience at attempting to enter the national digital broadcasting market and contends that this illustrates a competition problem in the wholesale market that requires remedies to be implemented.

Finally, one respondent advocated the need for every broadcaster to be treated equally in terms of access to and costs of transmission platforms.

No further comments were received.

3.5 Conclusion

3.5.1 Views of Respondents

One respondent stated that the market for wholesale broadcasting transmission is competitive and does not agree with ComReg's market definitions at both the retail and wholesale level. Furthermore, the respondent did not agree that the three criteria test is satisfied.

One other respondent disagreed with ComReg's market definition for retail TV services, stating that it sees the retail FTA and pay-TV as one market. However, this respondent did agree that the radio broadcasting over terrestrial means is a distinct market and that the three criteria test is satisfied in the national terrestrial broadcasting transmission market.

Another respondent agreed with ComReg's findings. The respondent stated that RTÉ has a dominant position in the terrestrial transmission market which will remain unchanged with DTT. It suggested that RTÉ is in control of the infrastructure and spectrum and access by third parties will be limited and controlled such that RTÉ can act independently of its customers and competitors to an appreciable extent. This respondent also noted that none of the potential providers of commercial multiplex services was able to reach agreement with RTÉ to access their DTT network.

Two other respondents agreed with ComReg's findings. One of these respondents stated that ComReg should now proceed to a market review of the broadcasting

transmission market and identify and implement effective remedies to address ongoing market failure.

Another respondent stated that ComReg's proposed market definition is correct and agrees that the three criteria test is satisfied. It stated that there are high barriers to entry due to the high capital investment involved, time period required to satisfy town and country planning regulations in establishing an alternative network, spectrum limitations, and absence of fit for purpose alternative platforms and the market power of the incumbent. Further, it said that there is insufficient evidence that the market will tend towards competition in a relevant time horizon and that there is a commercial incentive for RTÉNL to exclude potential terrestrial competitors. Finally, the respondent said that competition law alone could not address the market failures concerned because of its *ex post* nature. It describes its experience of attempting to enter the digital broadcasting market as illustrating a competition problem which needs remedies to be overcome.

Finally, one respondent said that digital radio broadcasting in Ireland requires a similar level of coverage to that which is currently available, and an improved level of service at a lower cost and assurance that financial, technical, and human resources of radio broadcasters will not be hampered by costs and charges associated with access to transmission platforms.

3.5.2 ComReg's Position

Having considered these responses to this consultation, ComReg retains its preliminary opinion (in consultation document 10/98) that the three criteria test is satisfied in the national terrestrial broadcasting transmission market. Most respondents agreed with ComReg's findings and ComReg has received no additional evidence to warrant a change to its preliminary conclusion.

4 Next Steps

Having carefully considered the responses received as part of this consultation process, ComReg is of the opinion that the three criteria test remains satisfied with respect to the national terrestrial (analogue and digital TV and radio) broadcasting transmission market, such that this market may be susceptible to *ex ante* regulation.

ComReg will now proceed to the second stage of this review process; that is, to a full market analysis, including assessment of SMP and if necessary, remedies. This will involve a consultation process before any final decision is made.