



Commission for
Communications Regulation

Decision Notice

Market Analysis – Wholesale Broadcasting Transmission Services

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1 Introduction

- 1.1 The new EU communications regulatory framework requires that ComReg define relevant communications markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in *the Framework Regulations*¹. In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.
- 1.2 *The Framework Regulations* further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which takes places as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets (“*the Relevant Markets Recommendation*”²) by the Commission.³ In carrying out market definition and market analysis, ComReg must take the utmost account of *the Relevant Markets Recommendation* and the Commission Guidelines on Market Analysis and Significant Market Power (“*The SMP Guidelines*”⁴).
- 1.3 The European Commission recommends, in its *Relevant Markets Recommendation*, that National Regulatory Authorities (NRAs) should analyse the relevant wholesale market for “**broadcasting transmission services, to deliver broadcast content to end-users**”. Having carefully considered this market, ComReg decided to define markets appropriate to national circumstances that differ from *the Relevant Markets Recommendation*. The *Relevant Markets Recommendation* obliges ComReg in circumstances where national markets differ from the market recommended to apply three cumulative criteria prior to establishing whether such national markets are subject to ex-ante regulatory intervention. Following this exercise two markets failed the criteria and were not subject, during this review, to further market analysis.
- 1.4 ComReg conducted an extensive market analysis on the remaining two relevant markets defined to assess whether an undertaking had Significant Market Power (SMP). ComReg used a wide range of criteria including market share, countervailing buying power and barriers to entry and also conducted a prospective analysis of the relevant markets.

¹ S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes 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.

² 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.

³ Regulations 26 and 27.

⁴ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3, (“*the SMP Guidelines*”).

- 1.5 ComReg then held a national consultation and considered all comments in coming to its preliminary conclusions on market definition, market analysis and remedies. As required by Regulation 20 of the Framework Regulations, the draft measure was then made accessible to the European Commission and the national regulatory authorities in other member states of the European Community. Having determined that the relevant markets reviewed are not effectively competitive, ComReg is now designating the undertaking with significant market power, in accordance with Regulation 27(4) of the Framework Regulations.

2 Statutory Powers Giving Rise to Decision

- 2.1 In making this Decision, the Commission for Communications Regulation ('ComReg') has taken account, of amongst other things, its functions under Regulation 6 (1) of the Access Regulations,⁵ has (where appropriate) complied with the Policy Directions made by the Minister⁶ and has also taken the utmost account of the EU Commission's Recommendation⁷ and the Guidelines.⁸ This Decision is based on the market definition, market analysis and reasoning conducted by ComReg in relation to the market for wholesale broadcasting transmission services for the purpose of delivering broadcasting content to end users,⁹ as part of the consultation process arising from the ComReg document entitled Market Analysis: Wholesale Broadcasting Transmission Services (Document No. 04/06), dated 3 February 2004. The said document forms part of this Decision.
- 2.2 The measures imposed under this Decision were notified to the EU Commission in accordance with Regulation 20 of the *Framework Regulations* and the Article 7 Recommendation,¹⁰ and were registered by the EU Commission on 3 February 2004. The notified measures were accepted by the EU Commission in its comments to the Chairperson of ComReg, made pursuant to Article 7 (3) of the Framework Directive on 2 March 2004.
- 2.3 This Decision is made pursuant to the provisions of Regulations 25, 26 and 27 of the Framework Regulations.¹¹

⁵ S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Regulations').

⁶ Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 26 March 2004.

⁷ 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.

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

⁹ As referred to in the EU Commission's Recommendation.

¹⁰ Commission Recommendation of 23 July 2003 on notifications, time limits and consultation provided in Article 7 of Directive 2002/21/EC of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services.

¹¹ S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of

3 Market Review

Market Definition

- 3.1 This Decision relates to the market for wholesale broadcasting transmission services for the purpose of delivering broadcasting content to end users.
- 3.2 The broadcasting transmission market defined in the EU Commission's Recommendation is, in this Decision, divided by ComReg into the following four product markets, which are defined as:-
- i. Radio broadcasting transmission services on national analogue terrestrial networks;
 - ii. Radio broadcasting transmission services on local/regional analogue terrestrial networks;
 - iii. Television broadcasting transmission services on analogue terrestrial networks; and
 - iv. Broadcasting transmission services on cable and satellite networks.
- 3.3 The relevant geographic market for the product markets is defined as Ireland.
- 3.4 ComReg's conclusions in this Decision are based on the lack of demand and supply-side substitution between transmission services offered on different platforms. The users of broadcasting transmission services, for the purposes of the markets being considered, are both television and radio broadcasters, local and national, who wish their content to be carried on a specific platform.
- 3.5 On the basis of a test of the three criteria identified in the EU Commission's Recommendation, ComReg excludes the market for broadcasting transmission services on cable and satellite networks referred to in section 2.2 of this Decision from market analysis (considering that it tends towards effective competition), as well as the market for local/regional analogue terrestrial radio broadcasting transmission services (considering that it is characterised by low entry barriers).
- 3.6 Pursuant to Article 7 (3) of the Framework Directive, the EU Commission's comments on 2 March 2004 questioned whether transmission services provided over cable and satellite platforms constituted a single market. However, the EU Commission acknowledged that even if satellite and cable transmission activities were delineated as distinct product markets, both of these markets would be likely to be excluded from market analysis since the second criterion of the three criteria test identified by the EU Commission's Recommendation would not be fulfilled. The three criteria are (i) the presence of high and non-transitory entry barriers, (ii) the market is such that it does not tend towards effective competition and (iii) the

the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

application of competition law alone would not adequately address the market failure(s) concerned.

Designation of Undertaking with Significant Market Power ('SMP')

3.7 The criteria used to assess SMP in the two wholesale markets for radio and television broadcasting transmission services on national analogue terrestrial networks include:-

- i. Market shares;
- ii. Barriers to entry
- iii. Absence of countervailing bargaining power;
- iv. Lack of potential competition; and
- v. Evidence of market behaviour.

3.8 RTE Transmission Network Limited ('RTNL')¹² is designated as having SMP in the two wholesale markets for radio and television broadcasting transmission services on national analogue terrestrial networks.

3.9 A reference in this section to RTNL shall be deemed to include RTNL and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, the undertaking in question and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant market defined in section 2 of this Decision.

SMP Obligations

3.10 ComReg is required to impose *ex ante* regulatory obligations that are, appropriate, based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in Article 8 of the Framework Directive¹³. ComReg has previously identified remedies it considers may be appropriate to impose on a SMP operator in these markets. These were the obligations of transparency, non-discrimination and accounting separation. However, ComReg intends to consult fully

¹² RTNL is the transmission operating arm of Radio Telefis Eireann ("RTE"), the Irish national public service broadcaster (since 1926), which provides analogue terrestrial transmission services to TV and radio broadcasters in Ireland. RTE is under the control of the RTE Authority, appointed by the Government. RTNL is the only supplier in both markets on which it is designated as having SMP.

¹³ The Guidelines provide at paragraph 114 that:-

'Merely designating 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 Directive. In other words, NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP.'

on the remedies to be imposed and the details to attach to those considered suitable in this instance. ComReg will then notify the EU Commission of the results of this consultation.

4 Decision Notice Issues

Provision of Information

- 4.1 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.

Directions

- 4.2 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.

5 Conclusion

Designation 5.1

RTE Transmission Network Limited ('RTNL') is designated as having SMP in the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks.

RTE Transmission Network Limited ('RTNL') is designated as having SMP in the wholesale market for television broadcasting transmission services on national analogue terrestrial networks.

The above designations are made pursuant to regulation 27(4) of the Framework Regulations.

Effective Date

5.1 This Decision shall be effective from the date of its publication.