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Rialáil Cumarsáide
Commission for
Communications Regulation

Market Review

Broadcasting Transmission Services

Consultation and Draft Decision

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Approval

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Redacted Information

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1 Executive Summary

1.1 Overview

- 1.1 This Consultation presents ComReg's analysis of the wholesale broadcasting transmission services ('**BTS**') markets with a view to determining whether any Service Provider ('**SP**') has significant market power ('**SMP**') within them and, if so, imposing appropriate remedies on such SPs. These specific markets have been regulated in Ireland since 2013,^{1 2} and are currently regulated under the 2021 Decision.³
- 1.2 BTS are wholesale services which are ultimately used for the provision of retail free to air ('**FTA**') Digital Terrestrial Television ('**DTT**') and radio broadcast services.
- 1.3 In this Consultation, ComReg examines competition in two wholesale BTS markets to decide whether regulation is warranted and, if so, in what form. Where necessary, in regulating these markets, ComReg's aim is to promote long term sustainable downstream competition by enabling efficient investment in programme services, with competition amongst SPs being the best way to ensure that radio listeners and TV viewers reap the maximum benefits in terms of choice of high-quality services.

1.2 The Relevant Markets, Three Criteria Test and SMP

- 1.4 ComReg first assesses the boundaries of the retail broadcast markets to inform its subsequent analysis of the wholesale BTS markets. ComReg is of the view that there are two separate relevant retail markets, namely the Relevant Retail TV Broadcast Market,⁴ which is a national market consisting of free to air digital

¹ Market Review: Broadcasting Transmission Services in Ireland - Response to Consultation and Decision. ComReg 13/71, D11/13, (the '**2013 Decision**'). See: [Response to Consultation and Decision Notice – Broadcasting Transmission Services in Ireland | Commission for Communications Regulation](#)

² Broadcasting Markets were regulated as far back as 2004 under the 2004 Broadcasting Decision, although at the time it involved, *inter alia*, an analogue terrestrial television market. See Response to Consultation "Market Analysis - Wholesale Broadcasting Transmission Services", ComReg Document No. 04/06, dated 3 February 2004. See [Response to Consultation: Market Analysis - Wholesale Broadcasting Transmission Services](#) (the '2004 Broadcasting Decision').

³ Market Review: Broadcasting Transmission Services in Ireland - Response to Consultation and Decision. ComReg 21/14, D02/21 (the '**2021 Decision**').

⁴ As defined in sub-section 3.3.

terrestrial television ('**FTA DTT**'), and the Relevant Radio Broadcast Market,⁵ which consists solely of Terrestrial Radio⁶ and can likely be distinguished on a local, regional and national basis.

- 1.5 In respect of the wholesale market definition, ComReg defines two separate, vertically related wholesale markets for the provision of BTS, namely **Market A** and **Market B**.
- 1.6 **Market A** is a national market for the provision of National Terrestrial BTS. This is the most upstream service used for the provision of BTS whereby a BTS network provider supplies a transmission and distribution service via its towers/masts and relevant associated facilities, including transmission and distribution equipment in order to enable:
 - (a) The broadcast of National Terrestrial Radio; and
 - (b) The broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end users.⁷
- 1.7 **Market B** is the national market for the provision of wholesale access to DTT Multiplexing Services. This is a wholesale market, downstream of Market A, for the supply of a managed digital multiplexing service by a DTT Multiplex Operator, using wholesale inputs from Market A to Retail TV Broadcasters.
- 1.8 The BTS market(s) has not been considered a market susceptible to *ex ante* regulation since the adoption of the European Commission's 2007 ('**EC**') Recommendation.⁸ There is therefore no presumption in favour of BTS regulation at EU level, and ComReg is required to justify any proposal to regulate the BTS markets by reference to national market conditions, having carried out a Three Criteria Test ('**3CT**'). The three criteria which must be cumulatively satisfied are:
 - (a) There is the presence of high and non-transitory barriers to entry;

⁵ As defined in sub-section 3.5.

⁶ As defined in sub-section 3.4.1.

⁷ For example, Saorview. Channels carried on RTÉ's DTT Multiplexes are packaged and marketed as 'Saorview' to retail end users. See: [Saorview. The TV you want, for Free](#)

⁸ COMMISSION RECOMMENDATION of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC) (the '**2007 Recommendation**').

- (b) The market structure does not tend towards effective competition within the relevant time horizon; and
 - (c) Competition law alone is insufficient to adequately address the identified market failure(s).
- 1.9 ComReg's view is that the 3CT is satisfied in respect of Market A and Market B, therefore it is determined that both markets are susceptible to *ex ante* regulation based on national-level circumstances, and thus, ComReg carries out an SMP assessment to determine whether any SP, or SPs, on those markets hold positions of SMP. To conclude on whether there is evidence of SMP on those markets, ComReg assesses:
 - (a) Existing competition;
 - (b) Potential competition; and
 - (c) Countervailing Buyer Power ('**CBP**').
- 1.10 ComReg considers that, over the five-year review period, Market A will not be characterised by the presence of sufficiently effective competitive constraints on 2rn, such that 2rn has the ability to behave, to an appreciable extent, independently of its competitors, customers and, ultimately, of its end users. Accordingly, having carried out a competition assessment, ComReg considers that it is appropriate to designate 2rn with SMP on Market A.
- 1.11 ComReg further considers that RTÉ should be designated with SMP on Market B. ComReg's view is that competitive constraints in Market B fail to sufficiently constrain RTÉ from acting independently of its competitors, customers and end users.

1.3 Market A – Proposed Remedies

- 1.12 ComReg considers, in the absence of any regulation, what competition concerns could arise in Market A (and related markets). Having regard to 2rn's SMP position, including other factors such as it being a wholly owned subsidiary of RTÉ which therefore competes at each level of the broadcast supply chain, ComReg has identified that 2rn has the ability and incentive to potentially engage in anti-competitive behaviours, ultimately to the detriment of wholesale and retail competition. These behaviours include the ability and incentive for 2rn to deny other SPs access to its network and to engage in pricing and other behaviours which could restrict or distort competition by actual or potential competitors of RTÉ in downstream markets. To address

these concerns, ComReg imposes a full suite of justified and proportionate regulatory obligations on 2rn in Market A. These include:

- (a) Access obligations;
- (b) Transparency obligations;
- (c) Non-discrimination obligations;
- (d) Price Control and Cost Accounting obligations; and
- (e) Accounting Separation obligations.

- 1.13 These obligations, which include obligations for tariffs to be cost oriented and to publish separated accounts, are largely maintained from the 2021 Decision, apart from proposed further specifications on the timelines around the annual review of tariffs. Details of the obligations can be found in Section 7.

1.4 Market B – Proposed Remedies

- 1.14 Having designated RTÉ with SMP in Market B, ComReg also considers, in the absence of any regulation, what competition concerns could arise in Market B (and related markets). Having regard to RTÉ's SMP position, and the structural factors such as it being a vertically-integrated SP that competes at both the retail and wholesale levels, ComReg has identified that RTÉ has the ability and incentive to engage in anti-competitive behaviours, ultimately to the detriment of wholesale and retail competition. These behaviours include the ability and incentive for RTÉ to deny other SPs⁹ access to its DTT platform and to engage in pricing and other behaviours which could restrict or distort competition by actual or potential competitors in order to increase its advertising market share at the retail level. To address these concerns, ComReg imposes a full suite of justified and proportionate regulatory obligations on RTÉ in Market B. These include:

- (a) Access obligations;
- (b) Transparency obligations;
- (c) Non-discrimination obligations;
- (d) Price Control and Cost Accounting obligations; and
- (e) Accounting Separation obligations.

⁹ Those independent of RTÉ.

- 1.15 These obligations are largely maintained from the 2021 Decision, including obligations for tariffs to be cost oriented and to publish separated accounts. ComReg has, however, proposed a further specification on the price control obligations whereby the calculation of the cost oriented tariffs reflect a fixed level of capacity utilisation. With this proposed change, the annual review of tariffs, for which a formal timeline is also proposed, will be focused on updates to cost inputs. Details of Market B obligations can be found in Section 10.

1.5 Next Steps

- 1.16 ComReg invites views from interested parties on the issues analysed in this Consultation, with the procedure and deadline for the submission of responses set out in Section 2.9 below.

2 Introduction

2.1 Overview

- 2.1 The Commission for Communications Regulation (**'ComReg'**) is the National Regulatory Authority (**'NRA'**) responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector in the State.
- 2.2 This consultation paper (**'Consultation'**) presents ComReg's preliminary conclusions on its analysis of the markets for broadcasting transmission services (**'BTS'**) and its proposal to regulate the relevant BTS markets on the basis that they are characterised by the presence of market failure in the form of SMP and associated competition problems, absent regulation, arising from 2m's and RTÉ's ability and incentive to behave anti-competitively in their respectively defined wholesale BTS markets.

2.2 What are Broadcasting Transmission Services?

- 2.3 BTS are wholesale inputs used to enable retail television (**'TV'**) programme SPs such as RTÉ, Virgin Media Ireland (**'VMI'**) and TG4 (**'Retail TV Broadcasters'**), and national/quasi-national radio programme SPs such as RTÉ, Today FM and Newstalk (**'Retail Radio Broadcasters'**)¹⁰ to broadcast their TV and radio content to end users.
- 2.4 In the 2021 Decision,¹¹ ComReg defined two vertically related wholesale BTS markets. **Market A**, the most upstream wholesale BTS market, consisted of transmission and distribution services provided via tower/mast infrastructure and relevant associated facilities (including transmission and distribution equipment) (**'National Terrestrial BTS'**) used for the provision of DTT Multiplexing Services and FTA national/quasi national radio (**'National Terrestrial Radio'**).¹²
- 2.5 ComReg further defined a separate market for DTT Multiplexing Services (**Market B**), being a wholesale BTS market which sits downstream from Market

¹⁰ Retail TV Broadcasters and Retail Radio Broadcasters are together referred to as **'Retail Broadcasters'**.

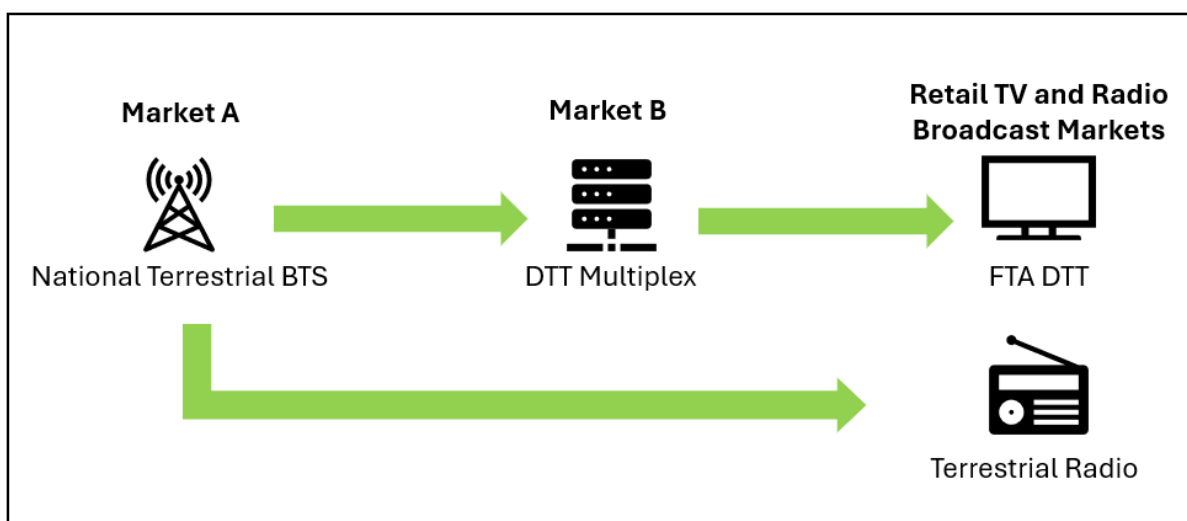
¹¹ Market Review: Broadcasting Transmission Services in Ireland - Response to Consultation and Decision. ComReg 21/14, D02/21 (the **'2021 Decision'**)

¹² For the avoidance of doubt, National Terrestrial Radio includes both national and quasi-national terrestrial radio.

A, but upstream from retail TV and radio markets. This comprises a DTT Multiplex Operator,¹³ using wholesale inputs from Market A, combined with carriage on its own DTT multiplex,¹⁴ supplying wholesale managed BTS to Retail Broadcasters, thereby enabling the transmission of their DTT broadcasting programme signals to end users.

- 2.6 Figure 1 below illustrates the relationship between Market A, Market B and the retail TV and radio broadcast markets.

Figure 1: Relationship between Market A, Market B and retail TV and radio broadcast markets



- 2.7 As illustrated in Figure 1 above, National Terrestrial BTS is used for the provision of National Terrestrial Radio, as well as an upstream input into the provision of DTT Multiplexing Services. DTT Multiplexing Services is used for the provision of FTA DTT.¹⁵

2.3 Legal basis and regulatory framework

- 2.8 The European regulatory framework for electronic communications, recast and set out in the 2018 European Electronic Communications Code Directive ('EECC'), provides for the regulation of markets identified to be susceptible to *ex ante* regulation and which are not effectively competitive.

¹³ A DTT Multiplex Operator refers to a licensed operator of a DTT multiplex.

¹⁴ Also referred to as a DTT platform.

¹⁵ Unless otherwise specified in this Consultation, **FTA DTT** means Irish FTA DTT and does not include UK FTA DTT.

- 2.9 The EECC was transposed into Irish law by the European Union (Electronic Communications Code) Regulations 2022, SI No. 444 of 2022 (the '**ECC Regulations**').¹⁶
- 2.10 Regulation 46 of the ECC Regulations requires that ComReg, taking the utmost account of the 2020 Recommendation and of the SMP Guidelines¹⁷ defines relevant markets appropriate to national circumstances, in accordance with the principles of competition law.
- 2.11 Following the adoption of the European Commission's 2007 ('**EC**') Recommendation¹⁸ the BTS market(s) is no longer considered a market that is susceptible to *ex ante* regulation. There is, therefore, no longer a presumption in favour of BTS regulation at EU level, and NRAs must justify any proposal to regulate BTS markets by reference to national market conditions, having carried out a 3CT.
- 2.12 The 3CT sets out the criteria that must be cumulatively satisfied to determine whether a relevant market not identified in an EC Recommendation should be subject to *ex ante* regulation. The three criteria are:
- (a) The presence of high and non-transitory barriers to entry;
 - (b) A market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry; and
 - (c) The insufficiency of competition law alone to adequately address the identified market failure(s).
- 2.13 Where at least one of the criteria above is not satisfied, *ex ante* regulation is deemed to be no longer appropriate and any existing obligations arising from an SMP designation must be removed (subject to a notice period where

¹⁶ European Union (Electronic Communications Code) Regulations 2022 (S.I. No. 444 of 2022) (the '**ECC Regulations**'). The ECC Regulations transpose the EECC.

¹⁷ Communication from the Commission — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (C/2018/2374) ('**SMP Guidelines**').

¹⁸ COMMISSION RECOMMENDATION of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC) (the '**2007 Recommendation**').

necessary and appropriate). Where, on the other hand, all three criteria are satisfied, *ex ante* regulation may be warranted.

- 2.14 Regulation 49(8) of the ECC Regulations requires that where ComReg determines that a relevant market is not effectively competitive, and that the imposition of regulatory obligations is justified, it must designate the SP, or SPs, which individually or jointly have SMP in that market, and impose appropriate and specific obligations on such SP(s), or maintain, or amend, such obligations where they already exist.
- 2.15 Regulation 45(1) of the ECC Regulations defines SMP as being equivalent to dominance on a market, that is to say a position of economic strength affording the operator concerned the power to behave, to an appreciable extent, independently of competitors, customers and, ultimately, consumers in a relevant market.
- 2.16 In carrying out its assessment, ComReg applies the Modified Greenfield Approach ('**MGA**'), as set out in the 2020 Explanatory Note.¹⁹ ComReg's market assessment starts from the assumption that SMP regulation is not present in the specific markets under consideration but considers regulation present in other related markets, or through the general regulatory framework.²⁰ This approach avoids erroneously drawing conclusions regarding the competitive structure of a particular market that may be influenced by, or indeed premised on, existing regulation on that market. Considering how markets may function absent regulation helps to ensure that SMP-based regulation is only applied (or withdrawn) in circumstances where it is justified and proportionate to do so.
- 2.17 Given ComReg is analysing two vertically related wholesale BTS markets in this Consultation, namely Market A and Market B,²¹ it adopts the following approach with respect to the application of the MGA. In analysing Market A and applying the MGA, ComReg first examines Market A assuming regulation is absent in this market and in downstream markets (and related retail

¹⁹ See page 9 of the 2020 Explanatory Note. The Modified Greenfield Approach requires NRAs to assess whether markets are effectively competitive from a forward-looking perspective in the absence of SMP regulation, in order to avoid circular reasoning whereby a market is deemed to be competitive on the basis of the presence of SMP regulation.

²⁰ For the avoidance of doubt, under the MGA, ComReg assumes the absence of only SMP regulation on the relevant markets. ComReg must still take account of other relevant legislation and/or regulations, including the Broadcasting Act 2009, as well as operator licensing conditions.

²¹ Defined in Section 4.

markets). When assessing Market B, the MGA requires that ComReg takes account only of regulation present upstream, in Market A. ComReg considers this approach to be consistent with Regulation 49(5) of the ECC Regulations.

- 2.18 Where an SP is designated as having SMP in a market, ComReg is obliged under Regulation 50(1) of the ECC Regulations to impose on that SP, or maintain or amend where they already exist, such of the obligations set out in Regulations 51 to 56, 58 and 62 of the ECC Regulations, as it considers appropriate. Pursuant to Regulation 50(5) of the ECC Regulations, any obligations imposed must be:
- (a) Based on the nature of the problem identified;
 - (b) Proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Act 2002 (as amended),²² and Regulation 4 of the ECC Regulations; and
 - (c) Only be imposed following consultation in accordance with Regulations 17 and 101 of the ECC Regulations.
- 2.19 Section 12(1)(a) of the 2002 Act sets out ComReg's objectives in exercising its functions in relation to the provision of electronic communications networks, electronic communications services, and associated facilities, namely to:
- (a) Promote competition;
 - (b) Contribute to the development of the internal market; and
 - (c) Promote the interests of users within the European Union.
- 2.20 In addition, Regulation 4(3) of the ECC Regulations sets out the general objectives of the Regulator which it shall pursue in the context of its tasks specified in the ECC Regulations, which are in summary to:
- (a) Promote connectivity and access to, and take up of very-high-capacity networks;
 - (b) Promote competition in the provision of electronic communications networks and associated facilities;

²² Communications Regulation Act 2002 (No. 20 of 2002), as amended (the '2002 Act').

- (c) Contribute to the development of the internal market by removing remaining obstacles to, and facilitating convergent conditions for, investment in, and the provision of, electronic communications networks, services and associated facilities throughout the European Union; and
 - (d) Promote the interests of the consumers and businesses in the State, by ensuring connectivity and the widespread availability and take-up of very-high-capacity networks.
- 2.21 Regulation 4(5) of the ECC Regulations requires that, in pursuit of its objectives under that Regulation and under section 12 of the 2002 Act, ComReg shall apply objective, transparent, non-discriminatory, and proportionate regulatory principles by, *inter alia*:
- (a) Promoting regulatory predictability;
 - (b) Ensuring there is no discrimination in the treatment of undertakings;
 - (c) Safeguarding competition and promoting, where appropriate, infrastructure-based competition (Regulation 4(5)(c) of the ECC Regulations requires the application of EU law in a technologically neutral fashion);
 - (d) Promoting efficient investment and innovation in new and enhanced infrastructures;
 - (e) Taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State; and
 - (f) Imposing *ex ante* regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled.
- 2.22 In addition to conducting a public consultation in accordance with Regulation 101 of the ECC Regulations, ComReg is required by Regulation 49(1) of the ECC Regulations to carry out an analysis of relevant markets, where appropriate, in collaboration with the Competition and Consumer Protection Commission ('**CCPC**').
- 2.23 ComReg is also obliged to make certain draft measures accessible to the EC, the Body of European Regulators for Electronic Communications ('**BEREC**'), and NRAs in other Member States, pursuant to Regulation 17(4) of the ECC Regulations ('**European Notification Requirements**').

2.4 Broadcasting Act 2009

- 2.24 The following sub-section sets out the specific provisions of the Broadcasting Act 2009 (the '**2009 Act**') and powers of the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media (the '**Minister**') which are most relevant to this market review.
- 2.25 Under the 2009 Act, RTÉ is fixed with certain "*public service objects*", which are defined as meaning those activities which are undertaken by RTÉ in pursuance of paragraphs (a) to (i) of section 114(1) of the 2009 Act. This includes under section 114(1)(a) of the 2009 Act, to "*establish, maintain and operate a national TV broadcasting service which shall have the character of a public service, be a free-to-air service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland*", and under section 114(1)(i), to "*establish, maintain, and operate one or more national multiplexes*", where multiplex is defined under section 129 as "*an electronic system which combines programme material and related and other data in a digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public.*"
- 2.26 Section 114(4)(r) also empowers RTÉ to "...*make available the broadcasting services of RTÉ in so far as reasonably practicable by any and all means of transmission, relaying or distribution, whether by way of broadcast (which includes terrestrial sound and television broadcasting networks, cable networks or satellite networks), or by any form of electronic means (which includes fixed terrestrial networks, mobile terrestrial networks, including the internet and other electronic communications networks) and whether now known or hereinafter invented on a linear or non-linear basis.*"
- 2.27 In addition to its objects and powers, RTÉ is also the subject of "*must offer*" obligations pursuant to section 77(11) and (12) of the 2009 Act. These require RTÉ to ensure that its "*must offer services*", being its FTA television service, is offered for re-transmission by "*appropriate network provider(s)*" (such as cable and satellite networks) on fair and reasonable terms. ComReg notes that, when

commenced,²³ section 128B of the 2009 Act will extend RTÉ's must offer obligations to 'platforms', as defined²⁴ in the 2009 Act as:

"...a service, transmitted by means of an electronic communications network and accessed by the use of an interactive guide, which re-transmits or makes available more than one audiovisual media service, including at least one audiovisual on-demand media service".

- 2.28 Section 130(1) provides most of the statutory bases upon which access to the multiplex is provided, while section 132 sets out the licensing regime that applies to multiplexes. Section 130(1)(a)(i) and section 130(1)(a)(ii) provides for the requirement to broadcast RTÉ One, RTÉ Two and TG4. The Houses of the Oireachtas Channel and the Irish Film Channel must also be afforded access where required by the Minister pursuant to section 130(1)(a)(iii). In addition, any television service, for example a holder of a *"content provision contract"* under section 71 of the 2009 Act, having been designated by the Minister as: *"having the character of a public service"*, in accordance with section 130(1)(a)(iv), will be granted access as of right.
- 2.29 Like RTÉ, TG4 has certain public service objectives, as set out in section 118 (1)(a) of the 2009 Act, including a requirement *"to establish, maintain and operate a national TV broadcasting service which has the character of a public service, be FTA, and made available, in so far as is reasonably practicable to the whole community on the island of Ireland."*
- 2.30 Channels broadcast by RTÉ and TG4, (both defined as a *"corporation"* under the 2009 Act), additional to those listed in Section 130(1)(a)(i) - (ii) and made available via Saorview,²⁵ namely, the RTÉ News Channel, RTÉ Junior, and Cúla 4, are carried on the multiplex on the basis of ministerial consent to a variation in channels pursuant to section 103(2). Further ministerial consent would be a prerequisite to any of those channels being removed from Saorview.
- 2.31 Section 130(10) also empowers the Minister, having first received a request from Coimisiún na Meán (**'Cnam'**) (formerly the Broadcasting Authority of Ireland (**'BAI'**)) to require RTÉ to make provision on the multiplex for the

²³ Inserted by Online Safety and Media Regulation Act 2022 (41/2022), s. 40, not commenced as of date of writing.

²⁴ Section 128A - Inserted by Online Safety and Media Regulation Act 2022 (41/2022), s. 40, not commenced as of date of writing.

²⁵ Channels carried on RTÉ DTT Multiplexes are packaged and marketed as 'Saorview' to retail end users. See: [Saorview. The TV you want, for Free.](#)

television programme service provided by a “*television programme service provider*”, being the holder of the “*television programme service contract*” pursuant to section 70 of the 2009 Act. A contract under section 70 includes an obligation to provide an FTA service, and there may only be one holder of such a contract.

- 2.32 The current section 70 contract is with VMI and provides for the availability of Virgin Media One (**‘VM1’**) and Virgin Media Two (**‘VM2’**) on the multiplex and for their carriage on Saorview. This contract runs from September 2023 for a ten-year period, with the option of a further ten-year extension²⁶.
- 2.33 Virgin Media Three (**‘VM3’**) and Virgin Media Four (**‘VM4’**) operate under section 71 content provision contracts, the terms of which run until September 2025 and June 2032 respectively.²⁷ Neither VM3 or VM4 have been designated by the Minister as “*having the character of a public service*” under section 130(1)(a)(iv) and so, do not enjoy access to the multiplex as of statutory right. Instead, access is afforded to those channels by RTÉ on commercial terms, following consultation with CnaM and having obtained the consent of the Minister, in line with RTÉ’s ability under section 130(1)(e) to exploit commercial opportunities in pursuit of its objects by broadcasting programme material. All such arrangements are contingent upon available capacity on the multiplex.
- 2.34 The other television channels currently available on the Saorview platform, namely Challenge and Sky News (both owned by Sky Group), are again carried on the multiplex pursuant to RTÉ’s section 130(1)(e) function and therefore do not enjoy a statutory right of access.
- 2.35 Section 132(1) of the 2009 Act requires that ComReg, at the request of RTÉ, issue to RTÉ a licence in respect of the establishment, maintenance and operation of a single television multiplex, which, in so far as it is reasonably practicable, is capable of being transmitted by digital terrestrial means to the whole community in the State. In addition, section 132(2) provides that ComReg, at the request of RTÉ and after consultation with the Minister and with CnaM regarding the digital capacity requirements of TG4, the television programme service contractor, the Houses of the Oireachtas Channel, the Irish Film Channel, and any television service designated under section 130(1)(a)(iv), issue to RTÉ a licence in respect of the establishment,

²⁶ <https://www.cnam.ie/coimisiun-na-mean-signs-new-contract-with-virgin-media-television-limited/>.

²⁷ Information provided to ComReg by CnaM.

maintenance and operation of one further television multiplex, which also capable to the extent possible, of being transmitted by digital terrestrial means to the whole community in the State. ComReg has issued these two multiplex licences to RTÉ.

- 2.36 Section 132(3) also envisages that ComReg would issue, at the request of CnaM, television multiplex licences in respect of the establishment, maintenance and operation of four television multiplexes, capable, in so far as it is reasonably practicable, of being transmitted by digital terrestrial means to the whole community in the State. However, no request for television multiplexes licences has been received from CnaM.
- 2.37 In light of the requirements of the 2009 Act, a six-multiplex plan has been developed to protect the potential future deployment of DTT and ensure that ComReg can meet its obligations to issue six multiplex licences (two to RTÉ and four to CnaM). The Irish six-multiplex plan has been coordinated internationally but only a two-multiplex plan has been implemented in Ireland to date, in the absence of any interest in commercial DTT platforms in addition to Saorview. The multiplexes licensed to RTÉ²⁸ operate in the Ultra High Frequency Band ('UHF'). Under Decision (EU) 2017/899 on the use of the 470-790 MHz frequency band in the Union, the UHF band is to be used at least until 2030 for terrestrial broadcasting. The World Radio Conference 2023 set a timetable for a further review of the band in 2031. This means that the UHF band can continue to be used for terrestrial broadcasting into the early 2030s and future use of the band is not relevant at this stage to this market analysis, which covers the period to 2030-2031.
- 2.38 In addition to television services, RTÉ provides national analogue terrestrial radio services to retail end users. These services can be divided into two categories: public service broadcasting ('PSB') services provided by RTÉ and national independent commercial radio services which are licenced under a CnaM contract.
- 2.39 Section 115(1) of the 2009 Act empowers the Minister, following a request from CnaM and following consultation with RTÉ, to require RTÉ to co-operate with a holder of a "*sound broadcasting contract*" in the use of any mast, tower, site or other installation or facility needed in connection with the provision of

²⁸ The two DTT multiplex licences issued to RTÉ for the provision of DTT services expire on 13 December 2031 (see [ComReg Document 24/99](#), page 48).

transmission facilities for sound broadcasting services under the sound broadcasting contract.

- 2.40 Today FM and Newstalk, both owned by Bauer Media Audio Ireland ('**BMAI**'), each hold a national contract with CnaM for analogue terrestrial radio services provided to retail end users together with the attendant ComReg spectrum licence.
- 2.41 Other independent broadcasters have entered into contractual arrangements with CnaM for national, quasi-national and regional radio services.

2.5 Previous Review of the Relevant Markets

- 2.42 ComReg adopted the 2021 Decision on 24 February 2021, in which it set out its position regarding its review of competition within the BTS markets. Following its assessment of retail broadcast markets, ComReg defined two separate, national, vertically related, wholesale BTS markets, namely Market A and Market B.
- 2.43 ComReg defined **Market A** as a wholesale market for the supply of transmission and distribution services via tower/mast infrastructure and relevant associated facilities to enable:
- (a) The national broadcast of analogue terrestrial radio signals to end users; and
 - (b) The national broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end users.
- 2.44 In its 2021 Decision, ComReg designated RTÉ Transmission Network ('**2rn**'),²⁹ being the sole terrestrial transmission supplier operating in Market A, as having SMP in this market.
- 2.45 Having regard to the range of then identified competition problems, ComReg accordingly imposed a range of regulatory obligations on 2rn. These included obligations relating to access, non-discrimination, transparency, accounting separation, price control and cost accounting.
- 2.46 ComReg defined **Market B** as a market for the supply of a managed digital multiplexing service by a DTT Multiplex Operator, using wholesale inputs from Market A to TV and radio broadcasters ('**DTT Multiplexing Services**').

²⁹ RTÉ Transmission Network DAC trades at 2rn. ComReg will refer to RTÉ Transmission Network as 2rn throughout this market review.

- 2.47 ComReg designated Raidió Teilifís Éireann (**'RTÉ'**), the sole DTT Multiplex operator in Market B, as having SMP.
- 2.48 Having regard to the range of identified competition problems, ComReg imposed a range of regulatory obligations on RTÉ. These included obligations in relation to access, non-discrimination, transparency, accounting separation, price control and cost accounting.

2.6 Current Review of the BTS Markets

- 2.49 Given the time that has elapsed since ComReg's previous analyses of these markets, it is now appropriate to review these markets again.
- 2.50 To inform this market review, ComReg has obtained qualitative and quantitative information from SPs through information requests, as well as follow-up clarifications through meetings or correspondence. This information supplements data which is provided to ComReg in the performance of its regular operations (e.g. for the Irish Communications Market Quarterly Key Data Report (**'Quarterly Key Data Report'** or **'QKDR'**)) or its ongoing regulatory activities, as well as the other information sources outlined in section 2.7 below.
- 2.51 ComReg has also reviewed, in detail, the experience of other NRAs in regulating wholesale BTS markets in other European jurisdictions, and has carefully analysed guidance available from the EC, BEREC, and other relevant commentators before arriving at its preliminary views in this Consultation.

2.7 Information Sources

- 2.52 In drafting this Consultation, ComReg draws upon the following information and data sources:
- (a) Information provided by SPs in response to detailed Stakeholder Questionnaires issued by ComReg in Q1 2024 in which both quantitative and qualitative information on the retail TV and radio markets, and the relevant wholesale markets was sought (**'2024 Information Requests'**)
 - (b) Nielsen/TAM TV Audience Measurement Establishment Survey: This is a biannual survey produced by Nielsen TV Audience Measurement (fieldwork is carried out by Behaviours and Attitudes) on behalf of Television Audience Measurement (**'TAM'**) Ireland Ltd (a TV ratings body). The Establishment Survey covers areas such as ownership of TV related equipment, method of TV reception and demographics of individuals within the TV household.

- (c) JNLR/Ipsos Report – Radio and the Irish Audio Market: This is an annual survey report published Ipsos B&A, on behalf of Joint National Listenership Research, ('**JNLR**') that is commissioned by Irish national, regional and local stations, AAI, IAPI and Coimisiún na Meán.
- (d) The experience of NRAs in regulating BTS markets in other jurisdictions;
- (e) Guidance from the EC, BEREC and other relevant commentators;
- (f) Information set out in the 2021 Decision;
- (g) Information provided to ComReg by SPs for the purpose of ComReg's Quarterly Key Data Reports; and
- (h) Other information in the public domain.

2.8 Liaison with other Bodies

- 2.53 Pursuant to Regulation 49(1) of the ECC Regulations, ComReg is required, where appropriate, to consult with the Competition and Consumer Protection Commission ('**CCPC**') under section 34 or 47(g) of the Competition Act 2002 (as amended)³⁰ on the relevant markets to be set out in the final decision. This will issue following ComReg's consideration of the responses received to the issues raised in this Consultation. ComReg will continue to keep the CCPC informed throughout the conduct of this market analysis process.
- 2.54 ComReg is also required to make its draft measures accessible to the EC, BEREC, and NRAs in other Member States (collectively referred to as the '**European Notification Requirements**') pursuant to Regulation 17(4) of the ECC Regulations and to take utmost account of any comments received.
- 2.55 ComReg will, as appropriate, conduct the CCPC Consultation and the European Notification Requirements prior to the adoption of any decision arising from this Consultation.

2.9 Consultation Process

- 2.56 ComReg invites all interested parties to respond to the questions set out in this Consultation. The consultation period will run until **5pm on 11 April 2025**, providing an 8-week consultation period. Respondents must ensure that any submissions are provided within this period.

³⁰ Competition Act 2002 (No. 14 of 2002), as amended, ('**Competition Act 2002**').

- 2.57 The task of analysing responses received will be made easier if all comments are referenced to the specific question numbers set out in this Consultation. In so doing, respondents are requested to:
- (a) Clearly explain the reasoning for their response, indicating the specific relevant paragraph numbers within the Consultation to which their response refers, along with all relevant factual or other evidence supporting views presented. Respondents should ensure that their responses contain paragraph numbers to facilitate cross referencing;
 - (b) Ensure that a non-confidential version of their response is provided by the closing date set out above at paragraph 2.56 and also be aware that all non-confidential responses to this Consultation will be published subject to the provisions of ComReg's guidelines on the treatment of confidential information.³¹ Similarly, any correspondence received by ComReg from SPs in the course of the consultation process may also be published;
 - (c) Ensure that confidential elements of responses are clearly marked using the following format: [✂ relevant text deemed to be confidential ✂] and identify why they consider that the relevant text is confidential. Respondents should provide both a confidential and non-confidential version of any submissions by the closing date set out above; and
 - (d) Provide a copy of their submissions in an unprotected electronic format in order to facilitate publication by ComReg.
- 2.58 Having analysed and considered the comments received, ComReg will review the proposals set out in this Consultation and having conducted the CCPC Consultation and the European Notification Requirements will consider whether to maintain or amend its proposals, as appropriate.³²
- 2.59 ComReg will then seek to adopt and publish the final decision in its subsequent Response to Consultation and Decision.
- 2.60 All responses should be sent by email to the address below to arrive on or before **5pm on 11 April 2025**. Responses received after this date will not be considered. Responses should be marked for the attention of:

³¹ Subject to the provisions of ComReg's published guidelines on the treatment of confidential information as set out in [ComReg Document 05/24](#).

³² See Annex 2 and Annex 2 of this Consultation for the Draft Decision Instruments to give effect to the proposals (which may be amended having considered respondents' views on the Consultation proposals).

Rachel Creane

Ph: +353 1 804 9600

Email: rachel.creane@comreg.ie

- 2.61 This is a non-confidential version of the Consultation. Certain information within the Consultation has been redacted for reasons of confidentiality, with such redactions indicated by the symbol X . Should an individual SP wish to review its own redacted information, it should make a request for such in writing to ComReg (to the person identified above) and indicate, where possible, the specific paragraph numbers within which the redacted information being requested is contained. ComReg will consider requests for redacted information and will, subject to the protection of confidential information, respond accordingly.

2.10 Structure of the Consultation

- 2.62 The Regulatory Impact Assessment ('**RIA**') is an analysis of the likely effect of proposed new regulation or regulatory change. The purpose of a RIA is to establish whether regulation is necessary, to identify any possible negative effects which might result from imposing a regulatory obligation and to consider any alternatives. The RIA will help identify regulatory options and establish whether proposed regulation is likely to have the desired impact.
- 2.63 This entire document constitutes a RIA in respect of each type of remedy, for example, access obligations, non-discrimination obligations, transparency obligations, accounting separation obligations, and the price control and cost accounting obligations. Hence, in this document and in the process of preparing this document, ComReg has carried out a RIA and concluded that the measures set out in this document are necessary.
- 2.64 In carrying out the RIA, ComReg has taken into account the following:
- (a) ComReg's RIA Guidelines (ComReg Document 07/56a);
 - (b) Policy Directions issued by the Minister for Communications, Marine and Natural Resources to ComReg under Section 13 of the Communications Regulation Act 2002, as amended, on 21 February 2003;
 - (c) RIA Guidelines issued by the Department of An Taoiseach in June 2009; and
 - (d) Guidance from the European Commission and Best Practice Principles for Regulatory Policy from the Organisation for Economic Co-operation and Development ('**OECD**').

2.65 The checklist for ComReg in respect of the RIA is as follows:

- (a) Describe the policy issue to be addressed and identify the objectives;
- (b) Identify and describe the regulatory options (i.e. prepare a list of policy options including to make no change to the current policy);
- (c) Determine the impacts on stakeholders (i.e. identify the costs, benefits and impacts of each of the regulatory options);
- (d) Determine the impact on competition (i.e. consider the impact of each option on competition in the market); and
- (e) Assess the impacts and select the best option.

2.66 Hence, the five steps of the RIA (above) are reflected for each type of remedy in Sections 7 and 10.

2.67 The remainder of this Consultation is structured as follows:

- (a) **Section 3** presents an assessment of the retail TV broadcast market and the retail radio broadcast market. ComReg provides an overview of key trends and developments in these markets, and defines the relevant retail markets from both a product and a geographic perspective;
- (b) **Section 4** defines the wholesale Relevant BTS Markets from both a product and a geographic perspective.
- (c) **Section 5** sets out the 3CT, as well as ComReg's assessment of whether any SP in Market A has SMP;
- (d) **Section 6** outlines the competition problems that can arise in Market A absent regulation, including exploitative and leveraging practices;
- (e) **Section 7** presents the proposed remedies for Market A;
- (f) **Section 8** sets out the 3CT, as well as ComReg's assessment of whether any SP has SMP in Market B;
- (g) **Section 9** outlines the competition problems that can arise in Market B absent regulation, including exploitative and leveraging practices;
- (h) **Section 10** presents the proposed remedies for Market B; and
- (i) **Section 11** outlines the next steps involved in bringing the findings of this Consultation to a Decision stage following the responses from stakeholders, and the dates for when these responses are due.

2.68 There are also a number of annexes to the Consultation document, which provide additional supporting analysis and, in some cases, outline the

approach and findings in more detail, where they have been condensed for reasons of brevity in the main text.

- (a) **Annex 1** contains the draft decision instrument for Market A;
- (b) **Annex 2** contains the draft decision instrument for Market B;
- (c) **Annex 3** describes price control and pricing methodology options;
- (d) **Annex 4** describes how a substitution analysis is conducted in defining the relevant product markets
- (e) **Annex 5** outlines the remaining SMP criteria, which ComReg considers are not relevant to the assessment of SMP in this current market analysis;
- (f) **Annex 6** sets out a glossary of relevant terms used in this Consultation; and
- (g) **Annex 7** contains the questions set out throughout this Consultation.

3 Retail Market Assessment

3.1 Overview

- 3.1 In this section, ComReg presents some of the main structural and behavioural trends associated with the provision of retail TV and radio broadcast services, supplied using upstream wholesale BTS.
- 3.2 ComReg then defines the relevant market for retail TV broadcast services, as well as retail radio broadcast services (the ‘**Relevant Retail Markets**’), from both a product and geographic perspective, having regard to the circumstances prevailing in the State.
- 3.3 The EC defines relevant product markets as comprising of,
*“all those products that customers regard as interchangeable or substitutable to the product(s) of the undertaking(s) involved, based on the products’ characteristics, their prices and their intended use”.*³³
- 3.4 ComReg is not required to conclude on a precise definition of the retail markets in this market review. Rather, the purpose of the retail market assessment is to inform the subsequent assessment of Market A and Market B in respect of both market definition and the strength of any indirect retail constraints emanating from the related downstream retail TV and radio broadcast markets.
- 3.5 Given that Access Seeker³⁴ demand for wholesale BTS is a derived demand driven by end user demand for retail TV and radio broadcast services, it is necessary to consider the dynamics of these retail markets and whether these dynamics materially impact competition at a wholesale level.
- 3.6 The 2020 Explanatory Note explains that “...the starting point for the identification of wholesale markets susceptible to ex ante regulation is the analysis of the corresponding retail markets...”,³⁵ indicating that any analysis of a wholesale market must be preceded by an assessment of the competitive conditions in the related retail market, absent regulation, under an MGA.³⁶

³³ Commission Notice on the definition of relevant market for the purposes of Community competition law (C/2024/1645), paragraph 12, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202401645.

³⁴ Access Seeker is a term used to describe a wholesale BTS customer.

³⁵ At p.8-9 of the 2020 Explanatory Note.

³⁶ Described in paragraphs 2.16 and 2.17 above.

- 3.7 Retail TV and radio are treated as distinct markets, on the basis that the experience and attributes of the two media types are very different, and substitution between the two is unlikely to meet the requirements of a radio listener or a TV viewer. Therefore, in the sections that follow, retail TV broadcast and retail radio broadcast markets are assessed separately under the following headings:
- (a) TV Transmission/Viewership Trends (sub-section 3.2);
 - (b) Retail TV Broadcast Market Definition (sub-section 3.3);
 - (c) Radio Transmission/Listenership Trends (sub-section 3.4); and
 - (d) Retail Radio Broadcast Market Definition (sub-section 3.5).

3.2 TV Transmission/Viewership Trends

- 3.8 As of July 2024, there were 1.761 million TV homes in Ireland,³⁷ representing a 97.5% penetration rate of the circa 1.806 million occupied households³⁸ in the State.
- 3.9 Retail TV broadcast services are available primarily via terrestrial, cable, satellite and Internet Protocol ('**IPTV**') platforms and, depending on the type of platform, are offered either FTA, or on a paid subscription ('**pay TV**') basis.
- 3.10 As set out in more detail below, while FTA DTT remains one of the leading TV platforms in the State, there is a continued preference for multihoming, whereby TV viewers most often have more than one TV platform in their household and TV broadcasters continue to make their TV channels available on as many TV platforms as possible. In terms of content, TV viewers show a continued strong preference for Irish programming services but how consumers choose to watch TV continues to evolve and is influenced by subscription-based video-on-demand ('**SVOD**') providers such as Netflix, Apple TV, Disney, Amazon Prime or Now TV.

³⁷ Nielsen/TAM TV Audience Measurement Establishment Survey ('**Nielsen/TAM Establishment Survey**') "Reception Types" July 2024, available at: [Universes - TAM Ireland](#).

³⁸ CSO statistical publication 2022, available at: [Housing Census of Population 2022 - Preliminary Results - Central Statistics Office](#).

3.2.1 Household Penetration Rates

- 3.11 Irish TV viewers often engage in a behaviour known as ‘multi-homing’,³⁹ whereby they retain several TV platform services in parallel. For example, as of June 2024, 36% of TV viewers have FTA DTT⁴⁰ in their household, but only 12% of TV viewers rely on FTA DTT as their only TV service.⁴¹ This indicates that a sizeable number of households are using FTA DTT together with TV services provided over alternative platforms, including pay TV platforms such as cable, IPTV and Sky TV (Sky TV is a pay TV service delivered over direct to home (‘DTH’) satellite and IPTV platforms), as well as DTH FTA satellite and, in some cases (where available), UK FTA DTT.
- 3.12 Table 1 below outlines the household penetration rates of the main TV platforms/services in Ireland. Bearing in mind the prevalence of multihoming, these figures are not mutually exclusive.

Table 1: Household Penetration Rate per TV Service, July 2020 – July 2024

TV Service ⁴²	July 2020 ⁴³	July 2024 ⁴⁴	Percentage Point Change
Virgin Media Cable	16%	15%	-1%
IPTV ⁴⁵	6%	8%	+2%
Sky TV ⁴⁶	40%	36%	-4%
DTH FTA Satellite ⁴⁷	18%	16%	-2%

³⁹ See European Commission, Directorate-General for Communications Networks, Content and Technology, Barcevičius, E., Caturianas, D., Leming, A. et al., *Multi-homing – Obstacles, opportunities, facilitating factors – Analytical paper 7*, Publications Office, 2021, Available at: [Multi-homing - Publications Office of the EU \(europa.eu\)](https://publications.europa.eu/en/publication-detail/-/publication/00000000-0000-0000-0000-000000000000).

⁴⁰ Unless otherwise specified in this Consultation, **FTA DTT** means **Irish FTA DTT** and does not include **UK FTA DTT**.

⁴¹ Nielsen/TAM Establishment Survey (July 2024).

⁴² Virgin Media Cable, IPTV and Sky TV are all pay TV services.

⁴³ Nielsen/TAM Establishment Survey, available at: [July-2020-Reception-Types-1.pdf \(tamireland.ie\)](https://www.tamireland.ie/july-2020-reception-types-1.pdf).

⁴⁴ Nielsen/TAM Establishment Survey, available (July 2024) at: [July-2024-Reception-Sheet.xlsx \(live.com\)](https://www.live.com/july-2024-reception-sheet.xlsx).

⁴⁵ Includes Eir TV and Vodafone TV.

⁴⁶ Includes homes with an active Sky subscription (includes Sky Glass, Sky Satellite and Sky Stream).

⁴⁷ Includes Foreign Satellite and DTH FTA satellite reception on any set.

UK FTA DTT⁴⁸	8%	6%	-2%
FTA DTT	38%	36%	-2%

- 3.13 As illustrated in Table 1 above, FTA DTT and Sky TV⁴⁹ share the highest household penetration rates of all TV platforms in Ireland, standing at 36% each. This is followed by DTH FTA satellite at 16%, IPTV at 8%, and UK FTA DTT at 6%.⁵⁰ IPTV is the only TV service which has recorded an increase in its household penetration rate since July 2020 (+2%).
- 3.14 ComReg further notes that the proportion of households with a pay TV service has declined from 62% in July 2020 to 59% in July 2024, while households relying solely on FTA TV services increased from 38% in July 2020 to circa 41% in July 2024.⁵¹

3.2.2 Most Popular TV Content

- 3.15 The continued importance of Irish FTA TV programming content is evident where, despite the increase in the range of TV programmes and TV channels available across cable, satellite, and IPTV platforms, Irish FTA TV programming content and TV channels have continued, over time, to maintain a large share of overall linear TV viewership.
- 3.16 Table 2 below describes the top ten TV channels in Ireland measured by viewing share across all TV platforms. The consolidated⁵² national audience market shares⁵³ for Irish FTA TV Broadcasters, namely RTÉ, TG4 and VMI, indicates that as of July 2024, RTÉ TV channels (RTÉ One, RTÉ One +1, RTÉ

⁴⁸ UK DTT.

⁴⁹ Sky TV refers to the pay TV provided by Sky, consisting of TV services, both standalone and in a bundle, provided over the DTH satellite and IPTV platforms. Sky refers to the broadcaster in general terms.

⁵⁰ Nielsen/TAM Establishment Survey Available (July 2024).

⁵¹ Households with pay TV includes those households which rely on either Virgin Media Cable, Sky TV or IPTV as their TV service. FTA TV services include DTH FTA satellite, UK FTA DTT, Irish FTA DTT and Web TV. Figures available at: [July-2020-Reception-Types-1.pdf \(tamireland.ie\)](#) and [July-2024-Reception-Sheet.xlsx \(live.com\)](#).

⁵² Consolidated data means Live + Timeshift data. The measurement and reporting of Time-Shifted Viewing (TSV) was introduced in September 2010. Since then, Nielsen have been reporting on Live viewing, and time-shifted viewing, being any viewing that occurs post live broadcast. The sum of Live and TSV is the basis on which industry trades for advertising and, is the reference for all viewing, referred to as "Consolidated". Consolidated data is issued after 7 days of viewing on day 8.

⁵³ [July 2024 Reach and Share figures - TAM Ireland](#) The share of viewing by channel for July 2024 showed RTÉ One had 14.71%, RTÉ One + 1 had 1.10%, RTÉ Two had 16.40% and RTÉjr had 0.13%. VM1 had 10.30%, VM1+1 had 0.30%, TG4 had 1.25%. VM2 had 3.79% while VM 3 had 2.86% audience market share.

Two and RTÉ Junior) had a viewing market share of 32.3%, TG4 had 1.3% and VMI (VM1, VM+1, VM2 and VM3) had a viewing share of 17.3%. Collectively, these Irish FTA TV channels had an audience viewing share of circa 51% as of July 2024.

Table 2: Most popular TV channels measured by viewing share (July 2024)⁵⁴

TV Channel	% Viewing Share ^{55 56}
RTÉ2	16%
RTÉ One	15%
VM1	10%
BBC1	6%
VM2	4%
VM3	3%
BBC2	2%
Sky News	2%
Challenge	2%
TG4	1%
Channel 4 Ireland	1%
Other	38%
Total	100%

3.17 ComReg further notes that each of the top 50 TV programmes with the most views in Ireland, from 2020 to 2023, were watched on Irish FTA TV channels, with 49 of those top 50 programmes also being also produced in Ireland. Table

⁵⁴ Table 2 lists the 11 most popular TV channels, across all TV platforms available in the State. Data available at: [July 2024 Reach and Share figures - TAM Ireland](#).

⁵⁵ Share means the percentage of the total viewing audience watching over a given period of time. For example, a share of 15% for RTÉ One means that, of all the viewers watching TV at any given time, 15% of those viewers in Ireland are watching RTÉ One. See: [Glossary - TAM Ireland](#).

⁵⁶ Note: figures are rounded to the nearest whole number.

3 below shows the proportion of these TV programmes, per TV channel on which they were broadcast. Of the top 50 programmes in terms of viewership in 2023, 33 were sporting events, and three were news broadcast or current affairs programmes.

Table 3: Top 50 TV Programmes in Ireland, 2020 to 2023^{57 58}

TV Channel	Number of TV Programmes			
	Year 2023	Year 2022	Year 2021	Year 2020
RTÉ One	16	21	25	36
RTÉ2	26	23	19	7
VM1	8	4	6	7
VM2	0	2	0	0
Total	50	50	50	50

- 3.18 As outlined in Table 3 above, RTÉ channels had the largest proportion of the top 50 most popular TV programmes each year from 2020 to 2023. 42 of the top 50 TV programmes were broadcast on RTÉ One and RTÉ2 in 2023. This is followed by VMI with 8 programmes broadcast on VM1, an increase from the 7 programmes recorded in 2020. These figures indicate the ongoing importance of Irish programming content, as well as Irish FTA channels, to Irish TV viewers.

3.2.3 Changes in TV Consumption Patterns

- 3.19 Over-the-top ('OTT') providers, such as SVOD providers like Netflix, Apple TV, Disney, Amazon Prime, Now TV etc. continue to be an important development in how consumers choose to watch television. SVOD providers allow users to stream and/or download films and TV programming content in return for a monthly subscription fee. The applications supporting these SVOD services are also available via a smart TV or internet-enabled set top boxes or other devices. Alongside SVOD services, linear broadcaster video-on-demand ('VOD') players associated with FTA services, such as Virgin Media Player and

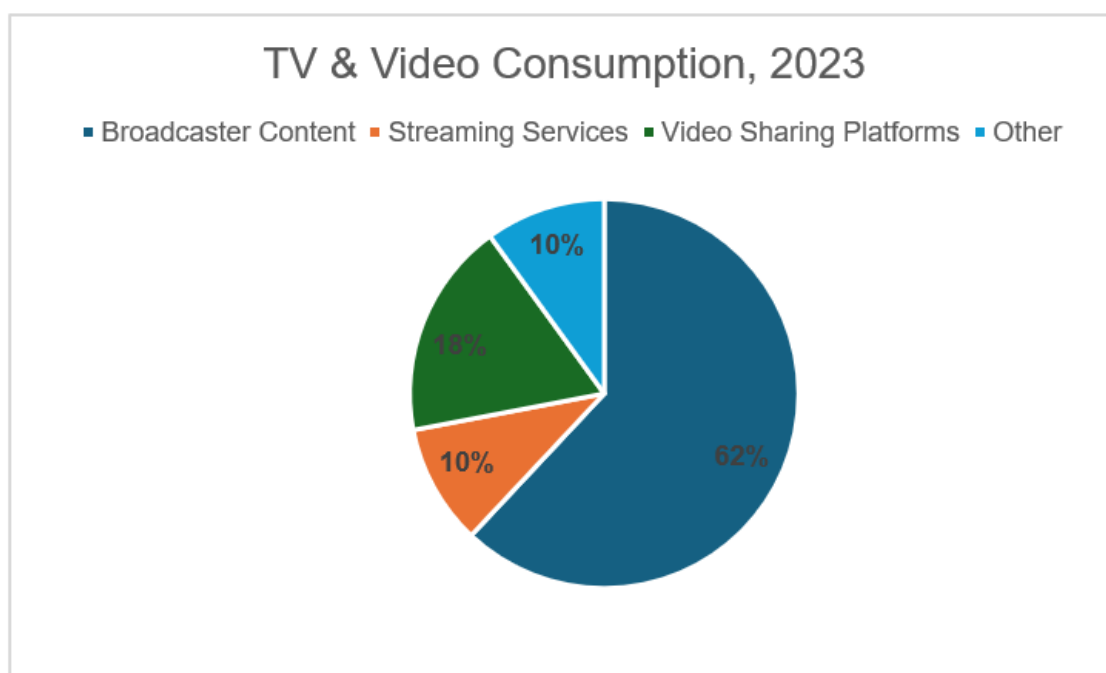
⁵⁷ TAM Ireland/Nielsen Media: The Top Programmes list is based on Individuals aged 4+, All Subscribing Channels, Averaging Option: Any Day, Any Time, **Best Episode**, Minimum Duration 10 Minutes. Please note: This list uses best episode of a series.

⁵⁸ Available at: [Top 50 TV Programmes 2023 - TAM Ireland](#).

RTÉ Player, have also grown in popularity. For example, between Q4 2020 and Q2 2024, Now TV subscriptions have increased from [X] [redacted] [redacted] in Ireland.⁵⁹

- 3.20 In 2024, TV viewers watched broadcaster TV⁶⁰ on a TV set for an average of 2 hrs 30 minutes per day,⁶¹ a decrease from 2 hours and 58 minutes per day in 2020.⁶² 84% of daily viewing was consumed live (i.e. at the time the programme is broadcast) and 16% was time-shifted viewing.

Figure 2: TV and Video Consumption, 2023⁶³



- 3.21 As seen in Figure 2 above, in 2023, broadcaster TV (including linear television, as well as time-shifted viewing) was by far the most popular video content, with TV viewers spending 62% of their daily viewing time watching broadcaster TV,

⁵⁹ ComReg QKDR Data Q4 2020 and Q3 2024.

⁶⁰ Broadcaster TV includes linear television, as well as time-shifted viewing. For example, TV viewers might watch VM1 live or as time shifted viewing on Virgin Media Player.

⁶¹ Source: TAM Ireland / Nielsen Media Ireland , Adults 15+, Total TV, Avg. mins per person, consolidated, all day, 2024 Available at: [Top 50 TV Programmes 2024 - TAM Ireland](#)

⁶² Available at: [The Top 50 TV Programmes 2020 - TAM Ireland.](#)

⁶³ TAM Ireland/Nielsen Media Total Video Panel (Consolidated 7 day linear & Streaming)– Jan – Dec 2023. Note: Figures not yet available for 2024.

10% with SVOD services, and 18% with video sharing platforms such as YouTube and TikTok etc.⁶⁴

3.2.4 Distribution of TV Channels

- 3.22 Both the retail TV broadcast market and retail radio broadcast market are two-sided markets⁶⁵ whereby TV channels and radio stations provide a platform through which advertisers and consumers are brought together through means of commercial breaks. The two-sided nature of these markets is such that the reach, coverage and viewership/listenership of a Retail Broadcaster's programme services impact the level of advertising revenue they receive, with higher viewership/listenership associated with higher advertising revenue.
- 3.23 The two-sided nature of retail broadcasting markets often leads to Retail TV Broadcasters using several TV platforms to distribute their programme services to end users. For example, Table 4 below outlines the TV channels carried on RTÉ's DTT platform (marketed as Saorview) and specifies the other TV platforms on which they are also available.

Table 4: Distribution of TV channels per TV platform, August 2024

Broadcaster	TV Channel	Irish FTA DTT ⁶⁶	Sky	Cable ⁶⁷	IPTV ⁶⁸	DTH FTA Satellite ⁶⁹
RTÉ	RTÉ One	✓	✓	✓	✓	-
	RTÉ One +1	✓	✓	✓	✓	-
	RTÉ News	✓	✓	✓	✓	-
	RTÉ2	✓	✓	✓	✓	-
	RTÉ2 +1	✓	✓	✓		-

⁶⁴ *Ibid.*

⁶⁵ The term 'two-sided market' is one in which two sets of agents interact through an intermediary or platform.

⁶⁶ Marketed as Saorview.

⁶⁷ Marketed as Virgin Media Television.

⁶⁸ Marketed as either eirTV and/or Vodafone TV.

⁶⁹ Marketed as Freesat.

TG4	TG4	✓	✓	✓	✓	-
	Cula4	✓	✓	✓	✓	-
Virgin Media	VM1	✓	✓	✓	✓	-
	VM2	✓	✓	✓		-
	VM3	✓	✓	✓	✓	-
	Virgin Media Four (' VM4 ')	✓	✓	✓	✓	-
Sky	Sky News	✓	✓	✓	✓	✓
	Challenge	✓	✓	✓	-	✓

3.24 As shown in Table 4 above, each of the TV channels available on Saorview is carried on, at least, two other TV platforms. Due to specific issues with content rights,⁷⁰ Sky News and Challenge are the only TV channels which are available on FTA DTT and DTH FTA satellite.

3.2.5 Conclusion on TV Transmission/ Viewership Trends

3.25 The most notable current and foreseeable trends and developments in the supply of, and demand for, retail TV broadcast services⁷¹ include:

- (a) FTA DTT remains one of the leading TV platforms in the State with a household penetration rate of 36% as of June 2024;
- (b) There is a continued preference for multihoming, whereby TV viewers most often have more than one TV platform in their household;
- (c) Retail TV Broadcasters continue to make their TV channels available on as many TV platforms as possible;
- (d) TV viewers show a continued strong preference for Irish programming services; and

⁷⁰ Discussed further in paragraph 3.58.

⁷¹ Retail TV broadcast services refer only to linear television and not audiovisual content which is streamed to a specific user on-demand.

- (e) OTT providers, such as SVOD providers like Netflix, Apple TV, Disney, Amazon Prime, Now TV and many more providers continue to be an important development in how consumers choose to watch TV.

3.3 Retail TV Broadcast Market Definition

3.3.1 Designation of the appropriate retail TV broadcast focal product

- 3.26 Having regard to the TV distribution and viewership trends identified above, ComReg's view is that the appropriate focal product, being the starting point for the market definition exercise, is the provision of FTA DTT. As of Q2 2024, FTA DTT has one of the highest penetration rates of any TV platform in the State,⁷² received by 36% of homes, albeit down from 41% of homes in Q2 2020,⁷³ and is the only form of TV received by 12% of homes across the State.⁷⁴
- 3.27 Starting with this focal product, ComReg assesses whether the retail TV broadcast market definition should be broadened, based on effective demand-side substitutability and supply-side substitutability considerations.

3.3.2 Direct Constraints

- 3.28 Retail TV and radio broadcast services are zero-priced products, meaning that they are provided on an FTA basis and, therefore, no charge is levied on the end user for their consumption. Products such as these are unsuitable for the application of the Small but Significant Non-Transitory Increase in Price ('**SSNIP**')⁷⁵ as the effects of a SSNIP by a hypothetical monopolist ('**HM**') supplier of FTA TV services cannot be examined.
- 3.29 According to the Notice on Market Definition,⁷⁶ non-price parameters can be particularly useful in cases for assessing substitution in such markets. It further notes that the 'Small but Significant Non-Transitory Decrease of Quality' test ('**SSNDQ test**') is a relevant alternative to the SSNIP test and can serve as a

⁷² FTA DTT and Sky TV each have a 36% household penetration rate. This is higher than any other TV platform.

⁷³ Homes in this context refers only to those homes which have a TV.

⁷⁴ As at Q1 2024.

⁷⁵ Described in greater detail in Annex 4.

⁷⁶ Commission Notice on the definition of relevant market for the purposes of Union competition law, (the '**Notice on Market Definition**'), C/2024/1645. Available at: [Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law](#) page 31, paragraph 98.

qualitative framework for assessing demand side substitution in the context of zero-price services. It is noted, however, that:

“... defining a precise quantitative standard of degradation of quality of the target product cannot constitute a pre-requisite for the application of the SSNDQ test [...]. All that matters is that the quality degradation remains small, albeit significant and non-transitory.”

- 3.30 On that basis, ComReg takes a holistic approach to its assessment of direct constraints in the retail TV and radio broadcast markets. It applies the SSNDQ⁷⁷ conceptually, rather than empirically, and focuses on other price-based, and non-price-based, factors such as pricing characteristics, product functionality, evidence of past substitution, intended use, and barriers or costs of switching,⁷⁸ to determine whether a potential substitute would levy a sufficient constraint on the focal product to warrant its inclusion in the product market. This methodology is applied for both the retail TV and radio broadcast market assessments.
- 3.31 For the purposes of the following assessment of direct constraints in the retail TV broadcast markets, the SSNDQ might come in the form of a 5% - 10% degradation of services, including, for example, a deterioration in quality of the TV guide feature, or a reduction in the number of broadcast hours etc.

Demand Side Substitution

- 3.32 For the reasons set out below, ComReg finds that in respect of the scope of demand for retail TV broadcast services:
- (a) Pay TV services are not likely to be effective substitutes for FTA DTT;
 - (b) SVOD services are not likely to be effective substitutes for FTA DTT; and
 - (c) DTH FTA satellite TV services are not likely to be an effective substitute for FTA DTT.

Pay TV Services

- 3.33 Pay TV services (including retail TV broadcast services delivered over cable, IPTV and Sky TV) are unlikely to be effective demand side substitutes for the focal product over the lifetime of this market review. In addition to clear differences in pricing, as well as differences in product characteristics (the

⁷⁷ ComReg notes that the outcome of its direct constraints assessment, using the SSNDQ, is the same as if the SSNIP were applied, given the same factors (set out in paragraph 3.30 above) would be assessed in either case.

⁷⁸ *Ibid.*

prevalence of product bundling), evidence suggests that there is insufficient prior substitution between pay TV services and FTA DTT to indicate effective substitutability.

- 3.34 ComReg notes that the content provided on pay TV services (whether provided over cable, IPTV or Sky TV) is far greater and more diverse than that which is usually available via FTA DTT platforms. Indeed, those end users that subscribe to pay TV services are likely to do so in order to view the particular content (sports, films, other specific programme content etc.) which they are unable to receive via the FTA DTT platform. To date, existing FTA DTT end users have largely shown an unwillingness to switch to a pay TV service, suggesting that for such end users, the perceived benefits of receiving additional content through the pay TV platforms do not sufficiently outweigh the costs (such as recurring subscription fees, equipment fees and minimum contract term commitments).⁷⁹

Cable

- 3.35 As of Q1 2025, VMI operates the only cable television ('**CATV**') network in the State, providing retail TV broadcast services as well as broadband and other services. In late 2021, VMI signalled its intention to upgrade its CATV network to Fibre to the Premises ('**FTTP**'), meaning any TV services offered over cable technology will be phased out throughout the lifetime of this review as VMI begins to offer an IPTV solution in its place. VMI's entire network footprint, including cable and fibre technology, passes circa [REDACTED] [REDACTED] [REDACTED].⁸⁰ In ComReg's view, even in the immediate to short term, retail TV broadcast services provided over cable ('**cable TV**') are unlikely to be an effective substitute for FTA DTT due to differences in product characteristics, pricing differences and a lack of evidence suggesting any prior substitution has taken place.
- 3.36 FTA DTT is offered on an FTA basis and is a standalone service, while cable TV requires end users to pay a monthly subscription fee and is marketed only as a bundled service which must be purchased with broadband. Therefore, an end user wishing solely to switch their retail TV broadcast service, as a result

⁷⁹ Pay TV services entail minimum contract commitments (typically 12 months) which are subject to early cancellation fees. This would be likely to reduce the incentive of end users to switch between FTA and Pay TV services.

⁸⁰ ComReg QKDR Q3 2024. In the range of 750,000 to 1,000,000 premises, representing in the range of 30% to 40% of all premises in the State.

of an SSNDQ of FTA DTT, would be required to purchase broadband, as well as cable TV, from Virgin Media as a dual-play bundle. This means that an end user who does not have a broadband subscription would need to avail of one, and if an end user had a broadband subscription, but with another SP, they would need to switch to VMI.

- 3.37 Table 5 below outlines the prices which an end user must pay to avail of a cable TV subscription from VMI, ranging from €104.00 to €114.00 per month.⁸¹ When compared with standalone broadband subscriptions, also outlined in Table 5, it is reasonable to infer that the TV element of these bundles' cost end users circa €34.00 per month, on top of their broadband subscription.

Table 5: VMI Standalone Broadband v and Dual-play, Broadband and TV Bundles Q3 2024^{82 83 84}

	500Mb Broadband	500Mb Broadband + Loaded TV	1Gb Broadband	1Gb Broadband + Loaded TV	1Gb Broadband	1Gb Broadband + Loaded TV
	Standalone broadband	Dual-play bundle, Broadband and TV	Standalone broadband	Dual-play bundle, Broadband and TV	Standalone broadband	Dual-play bundle, Broadband and TV
Contract Length	12 months	12 months	12 months	12 months	24 months	24 months
Price (incl. VAT, per month)	€35.00 for 12 months, €70.00 thereafter	€50.00 for 12 months, €104.00 thereafter	€45.00 for 12 months, €80.00 thereafter	€60.00 for 12 months, €114.00 thereafter	€50.00 for 12 months, €80.00 thereafter	€65.00 for 12 months, €114.00 thereafter
Broadband Speed	500Mb	500Mb	1Gb	1Gb	1Gb	1Gb
Once off charges	None	None	None	None	None	None

⁸¹ These bundles include broadband (as there is no standalone cable TV service marketed) and are non-promotional prices. Website accessed 13/09/24.

⁸² Standalone broadband offers available at: [€35 500Mb Broadband Deals + No Activation Fee | Virgin Media Ireland](#).

⁸³ Dual-play, Broadband and Cable TV offers available at: [€50 500Mb Broadband & TV Deals = No Activation Fee | Virgin Media Ireland](#).

⁸⁴ These bundles are delivered over VMI's broadband network (including Cable and FTTP) Prices are not differentiated based on underlying technology.

Other services included	None	None	Wi-Fi Guarantee	Wi-Fi Guarantee	Wi-Fi Guarantee	Wi-Fi Guarantee
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- 3.38 In addition to pricing differences and the prevalence of product bundling, the tendency to multi-home means that end users don't tend to choose, or switch, between TV platforms but, in fact, have a propensity to retain multiple TV platforms at the same time⁸⁵ meaning each is unlikely to provide a competitive constraint on the other.
- 3.39 As discussed in paragraphs 3.11 to 3.14, 15% of end users⁸⁶ subscribe to cable TV, each of which also has another means of TV reception in their household.⁸⁷ In other words, there are no TV viewers in the State solely reliant on cable as their only means of TV reception. 36% of the TV viewers have Irish DTT, but only 12% have it as their only means of reception. This means that 24% of TV viewers have Irish DTT, as well as something else. Therefore, as a result of any potential SSNDQ of the focal product, end users are unlikely to *switch* to cable, thereby constraining the behaviour of a HM provider of FTA DTT, but may instead choose to avail of the service, in addition to their FTA DTT.
- 3.40 Finally, ComReg notes that VMI CATV network passes approximately [X [REDACTED] X]⁸⁸ premises, equating to [X [REDACTED] X]⁸⁹ of all premises in the State. Its overall network footprint (including CATV and FTTP) passes approximately [X [REDACTED] X]⁹⁰ premises, representing a coverage level of [X [REDACTED] X]⁹¹ across all premises in the State.⁹² Therefore, even if some end users switch from FTA DTT to VMI (including cable TV or IPTV (and broadband)), it is unlikely that

⁸⁵ See paragraph 3.40

⁸⁶ End users refer to TV viewers in this instance.

⁸⁷ Nielsen/TAM Establishment Survey (July 2024).

⁸⁸ ComReg QKDR Q3 2024. In the range of 500,000 to 750,000 premises. Where a premises is passed by both CATV and FTTP it is counted as passed by FTTP only. This figure represents premises passed by CATV only.

⁸⁹ ComReg QKDR Q3 2024. In the range of 20% to 30%.

⁹⁰ ComReg QKDR Q3 2024. In the range of 750,000 to 1,000,000 premises.

⁹¹ ComReg QKDR Q3 2024. In the range of 30% to 40%.

⁹² The CATV figure does not include its FTTP footprint. As VMI passes a premises with FTTP, it is considered to be passed by IPTV only for the purposes of ComReg's QKDR. As its TV service is provided over both its CATV and FTTP networks, ComReg takes account of its combined unique footprint in paragraph 3.40.

enough end users could, or would, switch given limited network footprint, to render a SSNDQ of the focal product by a HM unprofitable.⁹³

Sky TV⁹⁴

- 3.41 Evidence, including differences in pricing and product characteristics between Sky TV and FTA DTT, indicates that Sky TV is not a demand side substitute for FTA DTT.
- 3.42 While Sky TV is predominantly provided over a DTH satellite, Sky has launched its IPTV services, marketed as Sky Stream and Sky Glass, in Ireland in 2022 and 2023 respectively. Table 6 below describes the number Sky TV subscribers, per Sky TV platform, as at Q3 2024.

Table 6: Sky TV Platforms Q3 2024 [~~REDACTED~~]⁹⁵

	DTH Satellite	IPTV ⁹⁶
Subscribers		

- 3.43 As of July 2024, 36% of TV viewers pay a monthly subscription for Sky TV.⁹⁷ Sky TV can be purchased as a standalone service or as part of a bundle with other services, such as broadband, or SVOD services such as Netflix.
- 3.44 Table 7 below describes Sky TV services.⁹⁸ Sky offers a range of different TV packages but also allows customers to ‘build your own’ TV package. These can range from €25 per month for the most basic package to €97 per month.

⁹³ VMI’s cable TV service will, over the lifetime of this review, become an IPTV based service. ComReg’s view is that those factors discussed in paragraph 3.28 to 3.42, with respect to VMI cable, are likely to apply once VMI fully upgrades its network to FTTP as pricing and other factors aren’t dependent on the underlying technology. VMI IPTV is not likely to an effective substitute for FTA DTT over the lifetime of this review.

⁹⁴ Sky TV includes retail TV broadcast services delivered via satellite, as well as Sky Glass and Sky Stream (launched in 2022 and 2023 respectively) which are IPTV-type solutions.

⁹⁵ ComReg QKDR Q3 2024.

⁹⁶ These figures do not include Now TV subscribers which can be classed as a SVOD service.

⁹⁷ Nielsen/TAM Establishment Survey (July 2024).

⁹⁸ These packages are those advertised on Sky’s website as of 26.07.2024. See [Latest Sky TV deals for new customers | Sky.com](#).

Table 7: Sky TV Packages Q3 2024

	Sky Sports, Sky Stream & Netflix	Sky Stream, Sky TV & Netflix	Sky Cinema, Sky Stream & Netflix Basic	Sky Sports, Sky Extra, Sky Stream & Netflix	Build your own	
Contract Length	12 months	12 months	12 months	12 months	12 months	No minimum term
Price (incl. VAT, per month)	€40 p/m	€25 p/m	€37 p/m	€55 p/m	€25 p/m	€30 p/m
Once off charges	None	None	None	None	None	€49.95
Other services included	Sky TV		Sky TV, Paramount +, including 2 cinema tickets p/m		Sky Stream Sky TV Netflix	
Other information	New Sky TV customers only					
TV Packages					Sky Cinema (€12 p/m) Sports Extra (€17 p/m)	Sky Cinema (€20 p/m) Sports Extra (€17 p/m)

					Sky Kids (€10 p/m)	Sky Kids (€10 p/m)
					Sky Sports (€15 p/m)	Sky Sports (€20 p/m for 6 months)

- 3.45 Evidence suggests that there is insufficient prior effective substitution between FTA DTT and Sky TV as end users don't show a propensity to switch between these platforms but, as outlined in paragraph 3.39, tend to retain several retail TV broadcast services at the same time, meaning each are unlikely to provide a competitive constraint on the other. The prevalence of multihoming, as well as the differences in pricing characteristics, suggests that as a result of any potential SSNDQ of FTA DTT, end users are unlikely to view Sky TV as a substitute for FTA DTT.

IPTV

- 3.46 IPTV is unlikely, over the period of this review, to exert a sufficiently effective constraint on a HM supplier of FTA DTT. This is driven by three primary factors, namely the prevalence of product bundling, differences in pricing, as well as no evidence of effective prior substitution.
- 3.47 IPTV is the delivery of retail TV broadcast services via the internet, and thus, its availability is inextricably linked to the availability of high-speed broadband and the roll out of next generation ('**NG**') FTTP broadband networks. Since Q4 2020, FTTP broadband coverage in Ireland has increased from 37% of premises to 71% of premises as at Q3 2024 due to the rollout of FTTP broadband networks by network operators such as Eircom, SIRO, Virgin Media and NBI. ComReg expects that this coverage will reach 95%+ throughout the lifetime of this review and, thus, widespread high-speed broadband will be available to support the delivery of IPTV services. However, even with FTTP broadband take-up rates reaching circa 32%, as at Q3 2024, only 8% of end

users avail of an IPTV service.⁹⁹ Furthermore, as is the case with the majority of pay TV platforms, all subscribers of IPTV also avail of retail TV broadcast services delivered over other platforms.

- 3.48 Eircom and Vodafone are the primary SPs offering IPTV in the State.¹⁰⁰ Each of these SPs offer IPTV as part of a dual-play bundle with NG broadband, without the availability of a standalone TV service.¹⁰¹ Therefore, an end user wishing to purchase IPTV from Eircom ('**eir TV**'),¹⁰² must also subscribe to Eircom broadband, and cannot avail of eir TV over another broadband platform. This is also the case with Vodafone, as an end user wishing to avail of IPTV from Vodafone ('**Vodafone TV**') must also subscribe to Vodafone broadband. Product bundling in this manner likely acts as a deterrent for a cohort of end users of FTA DTT who purchase (and could be satisfied with) their broadband from non-IPTV providers, wishing only to switch their TV service as a result of an SSNDQ. Table 8 and Table 9 below provide an overview of the IPTV packages offered by Eircom and Vodafone.¹⁰³

Table 8: Eircom Standalone Broadband v Dual-Play Broadband and TV Bundles¹⁰⁴

	500Mb Broadband	500Mb Broadband + TV	500Mb Broadband	500Mb Broadband + TV	1Gb Broadband	1Gb Broadband + TV
	Standalone broadband	Dual-play bundle, Broadband and TV	Standalone broadband	Dual-play bundle, Broadband and TV	Standalone broadband	Dual-play bundle, Broadband and TV
Contract Length	12 months	12 months	24 months	24 months	24 months	24 months

⁹⁹ July 2024 Nielsen/ JNLR data, available at: [July-2024-Reception-Sheet.xlsx \(live.com\)](#).

¹⁰⁰ As noted in FN 94, Sky also provides IPTV services, marketed as Sky Glass and Sky Stream, however, these services are assessed under Sky TV in paragraphs 3.41 to 3.45 above. VMI is also accounted for in paragraphs 3.35 to 3.40 above. As noted in FN 93, VMI IPTV is not likely to be an effective substitute for FTA DTT over the lifetime of this review.

¹⁰¹ See Vodafone and Eircom websites, available at: [New Vodafone TV PLAY](#), and [eir TV with Apple TV](#).

¹⁰² Data from Eircom's 'eir Group Results' presentation shows that, as of Q3 2024, there are approximately 112,000 eirTV subscribers. Available at: [eir Group Results](#).

¹⁰³ *Ibid.*

¹⁰⁴ Standalone broadband, and dual-play broadband and TV offers available at: [Best Gigabit Fibre Broadband Deals | €100 off \(eir.ie\)](#). Accessed on 02 July 2024.

Price (incl. VAT, per month)	€34.99 for 12 months, €75.99 thereafter	€44.99 for 12 months, €95.99 thereafter	€39.99 for 12 months, €75.99 thereafter	€49.99 for 12 months, €95.99 thereafter	€44.99 for 12 months, €85.99 thereafter	€54.99 for 12 months, €105.99 thereafter
Broadband Speed	500Mb	500Mb	500Mb	500Mb	1Gb	1Gb
Once off charges	None	None	None	None	None	None

Table 9: Vodafone Standalone Broadband v Dual-Play Broadband and TV Bundles¹⁰⁵

	500Mb Broadband	Broadband + TV	Broadband + Entertainment	Broadband + Sports
	Standalone broadband ¹⁰⁶	Dual-play bundle, Broadband and TV ¹⁰⁷	Dual-play bundle, Broadband and TV	Dual-play bundle, Broadband and TV
Contract Length	12 months	12 months	12 months	12 months
Price (incl. VAT, per month)	€30.00 for 6 months, €40.00 thereafter	€50.00 for 6 months, €65.00 thereafter	€55.00 for 6 months, €70.00 thereafter	€80.00 for 6 months, €95.00 thereafter
Broadband Speed	500Mb	500Mb	500Mb	500Mb
Once off charges	None	None	None	None
Other services included	None	None	NOW Entertainment Membership	NOW Sports Membership

¹⁰⁵ Table 9 includes a standalone broadband package at speeds of 500Mb only, in order to provide an accurate price comparison with Vodafone's advertised dual-play bundles. While standalone broadband is advertised on Vodafone's website at speeds of up to 2Gb, dual-play bundles of broadband and TV are only advertised at speeds of 500Mb.

¹⁰⁶ Available at: [Best Home Broadband Deals | Vodafone Ireland, accessed on 02 July 2024.](#)

¹⁰⁷ Available at: [New Vodafone TV PLAY, accessed on 02 July 2024.](#)

- 3.49 As illustrated above, IPTV is an additional subscription-based service for which users must pay an extra fee for their IPTV service, on top of their standard broadband subscription each month. As outlined in Table 8, to avail of eir TV, end users must also purchase Eircom broadband and pay an additional fee of €19.99 per month on top of their broadband subscription. As outlined in Table 9, Vodafone end users must pay in the range of €25.00 to €55.00 more than the price of standalone broadband to avail of IPTV from Vodafone.
- 3.50 As is the case with cable TV and Sky TV, evidence available to ComReg shows insufficient prior effective substitution between FTA DTT and IPTV as end users tend to retain several retail TV broadcast services at the same time, meaning each is unlikely to provide a competitive constraint on the other. The prevalence of multihoming, bundling of IPTV services, as well as the differences in pricing characteristics, suggests that as a result of any potential SSNDQ of FTA DTT, end users are unlikely to view IPTV as a substitute for FTA DTT.

SVOD Services

- 3.51 Figure 2 above indicates that in 2023, TV viewers spent 10% of daily TV consumption viewing SVOD, such as Netflix, Amazon Prime, Disney + and Now TV. However, SVOD services are unlikely to be an effective substitute for FTA DTT due to the marked difference in product characteristics, pricing characteristics and intended use.¹⁰⁸
- 3.52 FTA DTT is a linear TV service, insofar as content follows a sequential, predetermined programming schedule whereby TV programmes and films are shown at specific times throughout the day. It is provided on an FTA basis as sales are predominantly generated by Retail TV Broadcasters through advertising. SVOD, however, is a service by which individual viewers watch programming content based on their own preferences and schedule. Subscribers pay a flat subscription fee in return for unlimited access to a massive library of video content, advertisement free. Table 10 provides a sample of SVOD services available in the State and describes the subscription fees which end users must pay, per month, to avail of each.

¹⁰⁸ Differences in intended use means that end users use each of these platforms for different purposes.

Table 10: Pricing for SVOD, January 2025¹⁰⁹

SVOD Provider	Pricing per month
Netflix ¹¹⁰	€8.99 to €20.99
Amazon Prime ¹¹¹	£8.99 ¹¹²
Disney + ¹¹³	€9.99 to €13.99
Now TV ¹¹⁴	€11.99 to €72.99

- 3.53 Apart from differences in pricing and the differences in product characteristics, ComReg's view is that differences in intended use also plays a key role for why FTA DTT end users are unlikely to view SVOD services as an effective substitute for FTA DTT. While TV viewers spent 10% of daily TV consumption in 2023 watching SVOD, the vast majority of time (62%) was spent watching broadcaster TV content (including linear television and time-shifted viewing). Unlike SVOD, TV viewers typically watch linear TV for live events such as sports, news and current affairs programmes and news broadcasts. As discussed in paragraph 3.17 above, 33 of the top 50 TV programmes in Ireland in 2023 were live sporting events, and 3 were live news broadcasts or current affairs programmes. These types of programmes are not available on SVOD platforms.
- 3.54 Accordingly, given that characteristics of FTA DTT and SVOD are vastly different, while SVOD is becoming more popular each year, and is often used in conjunction with FTA DTT, an SSNDQ of FTA DTT by a HM is unlikely to entice enough end users to cease consumption of FTA DTT, in favour of SVOD services, so as to constrain a HM provider of FTA DTT from profitably sustaining an SSNDQ for FTA DTT.

¹⁰⁹ Prices do not reflect promotional pricing but are standard rates.

¹¹⁰ Available at: <https://help.netflix.com/en/node/24926>, accessed on 07.01.25.

¹¹¹ Available at: <https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=G6V3LUCB9M6VQNQAD>, accessed on 07.01.25.

¹¹² Amazon prime is a UK based service and is therefore advertised to Irish customers in British pound sterling rather than euro.

¹¹³ Available at: <https://help.disneyplus.com/en-GB/article/disneyplus-price>, accessed on 07.01.25.

¹¹⁴ Available at: <https://www.nowtv.com/ie/membership>, accessed on 07.01.25.

DTH FTA Satellite

- 3.55 Similarly, DTH FTA satellite services are unlikely to be an effective substitute for FTA DTT due to differences in intended use¹¹⁵ as well as there being insufficient prior substitution to suggest effective substitutability.
- 3.56 Freesat, a British free-to-air satellite TV service, is the primary DTH FTA satellite TV platform in Ireland, with a penetration rate of circa 15%.¹¹⁶ While end users can avail of Freesat as a standalone service, it can also be bundled with Saorview through means of a combi box, whereby end users incur a once off fee to purchase equipment capable of receiving both DTH FTA satellite TV and FTA DTT.
- 3.57 The cost difference associated with a Freesat box, or combi box, versus a Saorview box is minimal. However, the additional cost for equipment such as a satellite dish, as well as the expertise required for setup makes the process of switching to DTH FTA satellite more complex, as well as adding a significant cost burden for end users, albeit once-off. This is likely to limit the attractiveness of such an option as a potential substitute for end users in reaction to an SSNDQ.
- 3.58 In paragraphs 3.17 to 3.18, ComReg discussed the most popular TV programmes in Ireland from 2020 to 2023. For each time period, each of these programmes were aired on FTA DTT channels, namely RTÉ One, RTE2 and VM1. ComReg notes that due to content rights issues (i.e., the costs associated with purchasing broadcasting content rights to enable the satellite broadcast of such content to a footprint outside of Ireland), these Irish FTA DTT programme services are not available via Freesat, meaning it is unlikely, due to viewer preferences, that enough FTA DTT users would be willing to switch away from FTA DTT to DTH FTA satellite, as a result of an SSNDQ, given channel availability and programming preferences.
- 3.59 ComReg's view is, therefore, that end users availing of FTA DTT are unlikely to view DTH FTA satellite services as a potential substitute and are more likely

¹¹⁵ Differences in intended use means that end users use each of these platforms for different purposes.

¹¹⁶ Saorsat is another DTH FTA satellite TV service which was launched in Ireland to provide FTA access to television services via satellite for the 2% of households who are not able to receive Saorview (See [Welcome to Saorsat](#)). It provides viewers with the same TV content which is provided via the FTA DTT platform and was launched by RTÉ (the sole provider of FTA DTT) only as an alternative to FTA DTT, should it not be available. For this reason, ComReg does not identify Saorsat as a candidate service for the purposes of its demand side substitution assessment as it is not designed to, nor does it, compete with, or provide a constraint on, the FTA DTT focal product. Therefore, any reference to DTH FTA satellite from this point on does not include Saorsat.

to avail of DTH FTA satellite in addition to FTA DTT, as a result of any potential SSNDQ.

Supply Side Substitution

- 3.60 ComReg must also consider whether any alternative products could represent an effective supply-side substitute to FTA DTT. Supply-side substitution measures how potential (rather than actual) competitors not currently active in the market would, in this case, react to a decrease in quality. The HMT assesses whether a SSNDQ of a focal product supplied by a HM would cause sufficient new timely entry into the relevant market by potential competitors, such that it would render the quality decrease unprofitable.
- 3.61 In analysing supply-side substitution, ComReg examines whether, in response to a SSNDQ of the focal product, an operator(s) in another market could potentially enter the market for the focal product in the short term, without incurring significant sunk costs. Where supply-side substitution is possible, a potential entrant could enter the market and render a hypothetical quality decrease unprofitable for the HM. In this instance, it may be appropriate to broaden the market definition to include products similar to the focal product on the basis of the supply-side substitution. ComReg notes that the impact of supply-side substitution must be equivalent to the impact of demand-side substitution, in terms of effectiveness and immediacy.
- 3.62 On that basis, ComReg is of the view that there are no clear candidate supply-side substitutes to assess given the length of time required, as well as extensive costs to be incurred, to commence the supply of FTA DTT using National Terrestrial BTS and DTT Multiplexing Services as necessary inputs.
- 3.63 ComReg has already assessed retail TV broadcast services delivered over cable, IPTV, Sky TV and DTH FTA satellite as part of its demand-side assessment above, and it is not necessary to reassess these products at supply-side substitution stage. Supply-side substitution occurs in the instance where a potential entrant could enter the market and render a hypothetical quality decrease unprofitable for the incumbent hypothetical monopolist. However, all the platforms discussed above are already used (to varying degrees) to deliver retail TV broadcast services, which removes the hypothetical nature of the potential substitution. Therefore, the potential for such platforms to act as supply side substitutes (and therefore warrant inclusion in the market) is moot.

3.3.3 Overall Conclusion on Retail TV Broadcast Product Market

- 3.64 As discussed, ComReg is not required to conclude on, or precisely define the scope of, the retail market. However, it has carried out the preceding analysis to inform its analysis of the Relevant Wholesale Markets.
- 3.65 For the reasons set out above, ComReg concludes that pay TV services, SVOD services and DTH FTA satellite TV services are unlikely to be effective demand side substitutes for the focal product over the lifetime of this market review.¹¹⁷
- 3.66 ComReg, therefore, defines a retail TV broadcast product market consisting solely of FTA DTT (the '**Relevant Retail TV Broadcast Product Market**').

3.3.4 Retail TV Broadcast Geographic Assessment

- 3.67 The Notice on Market Definition explains that the relevant geographic market corresponds to the area where:
- .. the undertakings involved supply or demand relevant products, in which the conditions of competition are sufficiently homogeneous for the effects of the conduct or concentration under investigation to be able to be assessed, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas.*¹¹⁸
- 3.68 For the reasons set out below, ComReg is of the view that the Relevant Retail TV Broadcast Product Market is national in scope.
- 3.69 RTÉ is the sole provider of the DTT platform, with 100% market share, and is licensed by ComReg, pursuant to section 114 of the 2009 Act, to operate two national television multiplexes (the '**Public Service Broadcasting ('PSB') multiplexes**'). RTÉ's PSB multiplex licence stipulates that it must, insofar as reasonably practicable, be FTA and have national level coverage. As a result, the availability of FTA DTT and, ultimately, its functionality, pricing, and the content provided does not vary by geography, but is uniform across the State.¹¹⁹

¹¹⁷ ComReg notes that the outcome of its direct constraints assessment, using the SSNDQ, is the same as if the SSNIP were applied, given the same factors (set out in paragraph 3.30 above) would be assessed in either case.

¹¹⁸ Notice on Market Definition, paragraph 12.

¹¹⁹ Except for 2% of TV homes where viewers receive Saorview channels via Saorsat. This, however, is not driven by competition, but by topographical issues whereby given terrain issues these areas would not be technically/economically be capable of being served by terrestrial means.

- 3.70 Bearing this in mind, ComReg is of the view that the Relevant Retail TV Broadcast Market is national in geographic scope.

3.3.5 Conclusion on the retail TV broadcast market

- 3.71 ComReg concludes that there is a single, national market for the provision of FTA DTT (the '**Relevant Retail TV Broadcast Market**').

3.4 Radio Transmission/Listenership Trends

3.4.1 Radio Penetration Rates

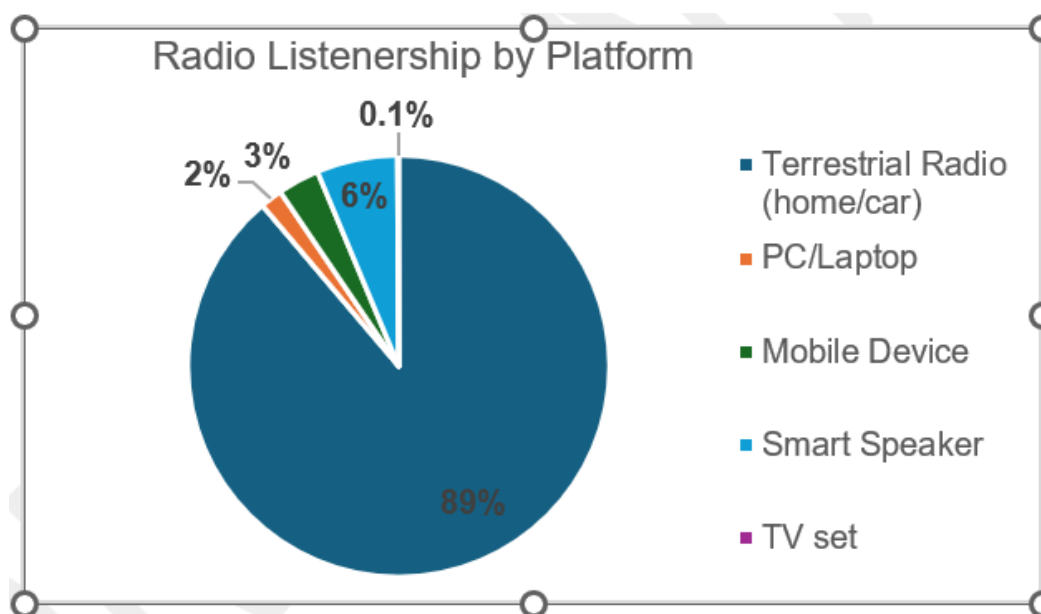
- 3.72 In March 2021, Digital Audio Broadcast ('**DAB**') services ceased in Ireland,¹²⁰ leaving terrestrial broadcasting networks as the primary means of radio transmission in the State. Terrestrial broadcasting networks are used to provide national, regional and local FM radio services ('**Terrestrial Radio**') to listeners.
- 3.73 The JNLR/Ipsos report ('**2024 JNLR data**') for the 12-month period from July 2023 to June 2024¹²¹ shows that more than 3.43 million listeners, equating to nearly 80% of all Irish adults, tune into radio every weekday, with a total of 90% of Irish adults listening to radio each week. The ability to access content easily and the quality, and popularity, of Irish radio means that radio still remains the dominant form of audio listening in Ireland, with a 74% share, compared to on-demand audio, with a share of circa 26%.¹²²
- 3.74 Terrestrial Radio is the most common radio service in Ireland, followed by Internet Radio. As shown in Figure 3 below, 89% of the time spent listening to radio is spent listening to Terrestrial Radio in the home or car, while the remaining 11% is spent listening to Internet Radio on a digital device, such as PC/laptop, mobile device or smart speaker.

¹²⁰ See: [Farewell DAB, the radio technology we didn't need – The Irish Times](#)

¹²¹ Ipsos B&A/JNLR 2024/2 Summary Results, available at: [Ipsos B&A/JNLR 2024/2 Summary Results | Ipsos](#).

¹²² The Irish Audio Report 2023, [22-090290-JNLR Report-Radio And The Irish Audio Market \(website-files.com\)](#). Audio listening includes live radio, podcasts, listen back (time-shifted radio listening), music streaming, YouTube music etc.

Figure 3: Share of Radio Listenership by Platform, July 2023 to June 2024^{123 124}

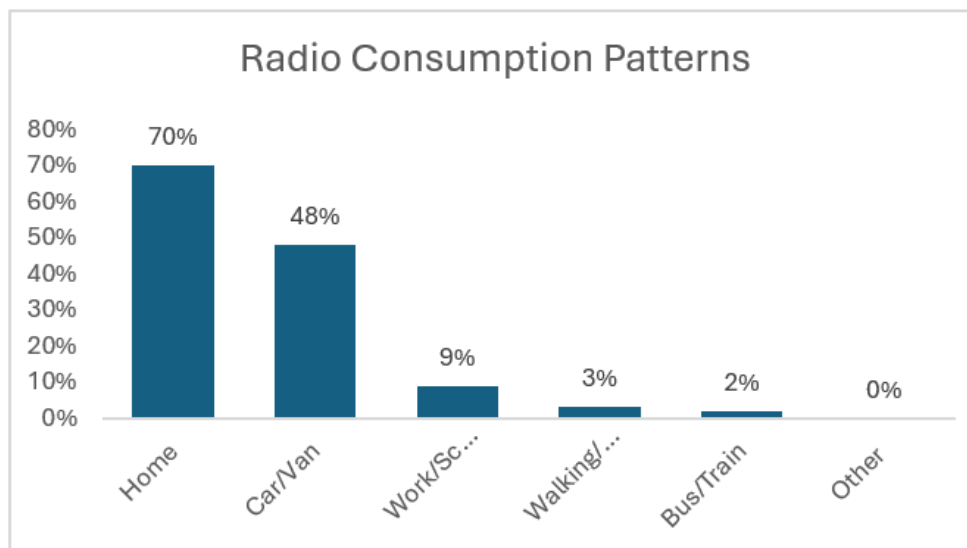


3.75 ComReg further notes that individuals typically choose to listen to these different types of radio under different circumstances, and in different contexts. Figure 4 below shows the places in which individuals listen to radio.¹²⁵ 70% of listeners reportedly listen to radio in their home, 48% listen to radio in their car or van, 3% listen to radio while walking or cycling, and 2% listen while on a bus or train. Terrestrial Radio is the predominant form of radio listening in these circumstances; however, Internet Radio is more prevalent while ‘on-the-go’, i.e. while out walking/cycling, or on a bus or train.

¹²³ Ipsos B&A/JNLR 2024/2 Summary Results.

¹²⁴ Based on share of time spent per day (minutes).

¹²⁵ These figures are not mutually exclusive as individuals listen to radio in different places and on multiple platforms throughout the average day.

Figure 4: Radio Consumption Patterns¹²⁶

3.4.2 Market Shares

- 3.76 Irish radio audiences listen to a significant amount of radio everyday - tuning in, on average, for almost 4 hours (228 minutes) per day, down from 239 minutes per day reported in Q3 2020.¹²⁷
- 3.77 National Terrestrial Radio¹²⁸ currently has 47.8% share of all minutes, while local/regional radio holds the majority share position at 52.2%.¹²⁹ Figure 5 below shows the percentage market shares (nationally) for both national and regional/local radio.¹³⁰ RTÉ continues to hold the majority share in terms of national listenership, with an overall share of circa 30% (includes RTÉ Radio 1, RTÉ 2FM and RTÉ Lyric FM).

¹²⁶ Ipsos B&A/JNLR 2024/2 Summary Results.

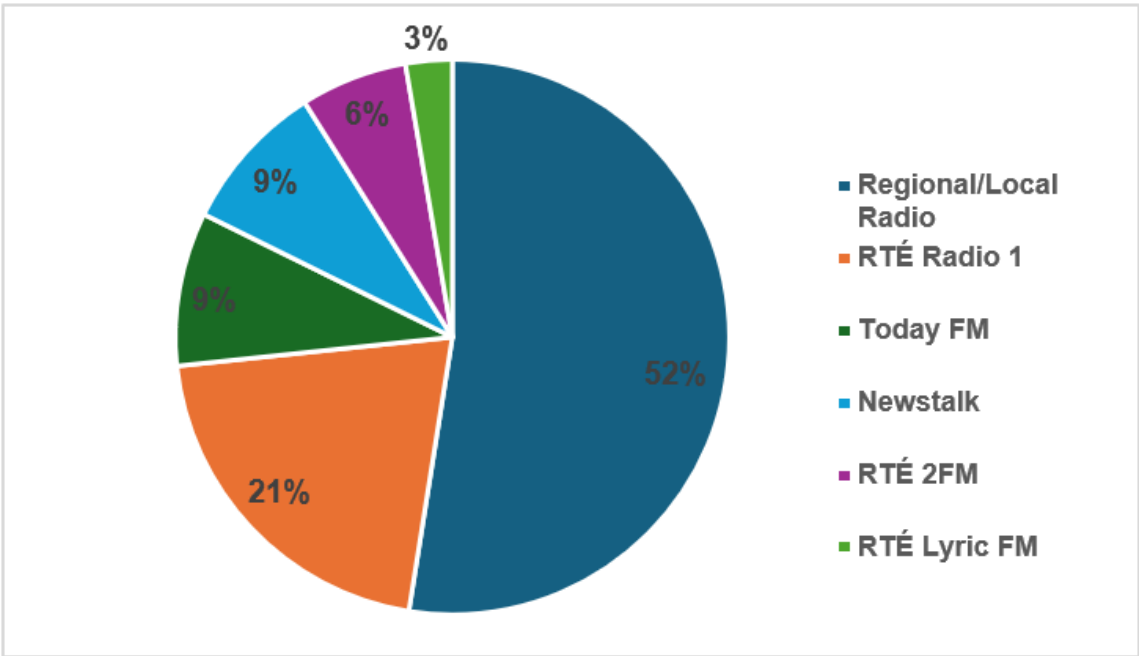
¹²⁷ Ipsos B&A/JNLR 2024/2 Summary Results, and Ipsos MRBI/JNLR 2020/3 Summary Results (available at: [Ipsos MRBI/JNLR 2020/3 Summary Results | Ipsos](#)) Figures reflect prime time listenership i.e. 7am to 7pm, Monday to Friday.

¹²⁸ National Terrestrial Radio includes Terrestrial Radio with national coverage, as well as quasi-national coverage.

¹²⁹ Local/regional radio consists of all local and regional radio stations which are broadcast in different catchment areas across the State. While some might compete at a local or regional level, others have no overlap in terms of their catchment area and/or audience. For the purposes of calculating national market share figures, these types of radio are grouped together.

¹³⁰ Measured by minutes consumed, Weekdays from 7am to 7pm.

Figure 5: National Market Share (Minutes), by Radio Station, July 2023 – June 2024¹³¹



3.78 ComReg further notes that RTÉ holds 17 of the top 20 radio programmes broadcast in Ireland, down from 20 in the year 2020. As seen in Table 11 below, this is followed by Today FM at two radio programmes, and Newstalk with one. *Morning Ireland*, broadcast on RTÉ Radio 1, remains Ireland’s most listened to radio programme with 486,000 weekly listeners.

Table 11: Share of 20 most popular radio programmes, per radio station 2020 - 2024

Radio Station	Number of Radio Programmes				
	Year 2024 ¹³²	Year 2023 ¹³³	Year 2022 ¹³⁴	Year 2021 ¹³⁵	Year 2020 ¹³⁶

¹³¹ Ipsos B&A/JNLR 2024/2 Summary Results.

¹³² Ipsos B&A/JNLR 2024/2 Summary Results.

¹³³ JNLR/Ipsos MRBI 2022-4 vs. 2021-4.

¹³⁴ JNLR/IPSOS MRBI 2022-3 release.

¹³⁵ JNLR/IPSOS MRBI 2021 release.

¹³⁶ JNLR/IPSOS MRBI 2020/3.

RTÉ Radio 1	17	17	17	18	20
Newstalk	1	1	0	0	0
Today FM	2	2	3	2	0
Total	20	20	20	20	20

3.4.3 Distribution of Radio Stations

- 3.79 As discussed in sub-section 3.2.4 above, both the retail TV and radio broadcast markets are two-sided markets, bringing together listeners, as well as advertisers. For that reason, like Retail TV Broadcasters, Retail Radio Broadcasters often use multiple platforms to distribute their programme services to end users due to the positive relationship between reach and advertising revenue.
- 3.80 Table 12 below outlines the national radio stations¹³⁷ in Ireland, and their availability across both terrestrial (Terrestrial Radio) and online (Internet Radio) radio platforms. In each case, Retail Radio Broadcasters, namely RTÉ (owners of RTÉ Radio 1, RTÉ 2FM, RTÉ Raidió na Gaeltachta ('**RnaG**') and RTÉ Lyric FM) and BMAI broadcast their radio stations via both platforms in order to maximise their potential reach.

Table 12: Availability of Radio Stations July 2023 – June 2024

National Radio Station	Available as:	
	Terrestrial Radio	Internet Radio
Today FM	✓	✓
Newstalk	✓	✓
RTÉ Radio 1	✓	✓
RTÉ 2FM	✓	✓
RTÉ Raidió na Gaeltachta	✓	✓
RTÉ Lyric FM	✓	✓

¹³⁷ This includes national and quasi-national radio stations.

- 3.81 The distribution of radio stations across platforms in this manner is also common amongst regional and local radio broadcasters. There are currently 34 commercial radio stations broadcast throughout the State.¹³⁸ These are a mix of national, regional and local radio stations, which provide a mix of news/speech-driven, music-driven and local content-driven services. Each of these radio stations are available both as Terrestrial Radio, as well as Internet Radio.

3.4.4 Conclusion on Radio Transmission/ Listenership Trends

- 3.82 The most notable current and foreseeable trends and developments in the supply of, and demand for, retail radio broadcast services include:
- (a) Circa 80% of all adults in the State listen to the radio on a daily basis;
 - (b) Terrestrial Radio remains the leading radio platform in Ireland; and
 - (c) Internet Radio continues to be the second most popular radio platform in the State.

3.5 Retail Radio Broadcast Product Market Definition

3.5.1 Designation of the appropriate retail radio broadcast focal product

- 3.83 In the 2021 Decision, ComReg designated Terrestrial Radio as the focal product in the retail radio broadcast markets. ComReg's assessment suggests that there is insufficient evidence of any major developments within the markets since the publication of this decision.
- 3.84 ComReg's view is that the appropriate focal product, being the starting point for the market definition exercise, is, again, the provision of Terrestrial Radio.¹³⁹ Terrestrial Radio has the highest penetration rate of any platform in the State, with 89% of daily radio listeners opting to listen to live radio via the terrestrial BTS platform.
- 3.85 Starting with this focal product, ComReg assesses whether the retail radio broadcast market definition should be broadened, based on effective demand-side substitutability and supply-side substitutability considerations.

¹³⁸ Available at: [Radio - Broadcasting Authority of Ireland \(bai.ie\)](https://www.bai.ie) Accessed on 20.08.24.

¹³⁹ Terrestrial Radio includes Local, Regional, and National radio broadcast over terrestrial networks.

3.5.2 Direct Constraints

- 3.86 As discussed in sub-section 3.3.2 above, retail TV and radio broadcast services are zero-priced products, meaning that they are provided on an FTA basis and, therefore, no monetary charge is levied on the end user for their consumption. For that purpose, ComReg takes a holistic approach to its assessment, applying the SSNDQ, and focusing on factors such as product functionality, evidence of past substitution, intended use, barriers or costs of switching, to determine whether a potential substitute would levy a sufficient constraint on the focal product to warrant its inclusion in the retail radio product market.
- 3.87 For the purposes of the following assessment of direct constraints in the retail radio broadcast markets, the SSNDQ might come in the form of a 5% - 10% degradation of services. This could include, for example, a deterioration in coverage, or a reduction in the number of broadcast hours of Terrestrial Radio.^{140 141}

Demand Side Substitution

- 3.88 Radio delivered via the internet (**'Internet Radio'**) is unlikely to be an effective demand side substitute for Terrestrial Radio over the lifetime of this market review.¹⁴² Despite some overlap in the underlying product characteristics, the degree of substitution between the two platforms is likely insufficient for Internet Radio to sufficiently constrain Terrestrial Radio, and thus be included in the retail market. This conclusion is primarily driven by the lack of sufficient evidence suggesting any prior substitution has taken place, as well as the likely limited impact of an SSNDQ in terms of enticing end users to switch to Internet

¹⁴⁰ ComReg notes that the outcome of its direct constraints assessment, using the SSNDQ, is the same as if the SSNIP were applied, given the same factors (set out in paragraph 3.30 above) would be assessed in either case.

¹⁴¹ Individual providers of Terrestrial Radio (Retail Radio Broadcasters operating local, regional and national radio stations) are subject to specific licensing conditions, requiring them to have a certain level of coverage. Therefore, in reality, it is unlikely that a provider of Terrestrial Radio could decrease coverage. However, the SSNDQ is a thought experiment designed to determine whether alternative products should be included in the same market as the focal product, therefore, a hypothetical decrease in coverage/programme hours is used merely as an example of a SSNDQ of Terrestrial Radio. As noted in paragraph 3.29, "...defining a precise quantitative standard of degradation of quality of the target product cannot constitute a pre-requisite for the application of the SSNDQ test [...]. All that matters is that the quality degradation remains small, albeit significant and non-transitory".

¹⁴² ComReg does not assess radio delivered over cable or satellite in this market review as their penetration rates are too low to warrant consideration as potential substitutes for Terrestrial Radio.

Radio. ComReg further notes that the 2009 Act excludes Internet Radio from the definition of “Broadcasting Service”.¹⁴³

- 3.89 As discussed in sub-section 3.4.1 above, almost 80% of individuals listen to live radio in the average day. Of these radio listeners, 87% listen to Terrestrial Radio, 9% of individuals consume radio via smart phone, and 8% consume radio via PC or tablet.¹⁴⁴ These figures illustrate the comparative popularity of Terrestrial Radio relative to Internet Radio amongst radio listeners in Ireland and, thus, even though both platforms have near ubiquitous coverage (approximately 83% of the households¹⁴⁵ have access to NG broadband and, as of Q1 2024, 96% of individuals own a smart phone),¹⁴⁶ substitution between these radio platforms is possible, but not likely.
- 3.90 Instead, ComReg notes that there is evidence of a low degree of multihoming in the retail radio broadcast market, whereby some individual end users show a preference to listen to both Terrestrial Radio and Internet Radio throughout their day. Evidence suggests, however, that the consumption of these types of radio depends on the end users’ environment, or activity, and does not suggest that these platforms are interchangeable. For example, as shown in Figure 3, data from Q2 2024 shows that 89% of radio listeners, listen to Terrestrial Radio in their home/car, however only 11% listen via the internet in another setting such as when walking or cycling. It is ComReg’s view that the retention, and utilisation, of these radio platforms in this manner does not support an argument of substitution, and that a HM supplier of Terrestrial Radio is likely to be able to sustain a profitable SSNDQ, as a sufficient number of end users are unlikely to switch to Internet Radio in response.

¹⁴³ Section 2 of the 2009 Act states: a “broadcasting service” means a service which comprises a compilation of programme material of any description and which is transmitted, relayed or distributed by means of an electronic communications network, directly or indirectly for simultaneous or near-simultaneous reception by the general public, whether that material is actually received or not, and where the programmes are provided in a pre-scheduled and linear order, but does not include:

(a) a service provided in a non-linear manner where each user of the service chooses a programme from a catalogue of programmes, or

(b) any other service which is provided by way of the internet, if the service does not provide audiovisual programmes”.

¹⁴⁴ These figures are not mutually exclusive.

¹⁴⁵ ComReg QKDR Q3 2024. Figure includes FTTP and cable broadband.

¹⁴⁶ ‘The Deloitte Digital Consumer Trends report’ Q1 2024, Available at: [Consumer trends on smartphones usage | Deloitte Ireland](#).

Supply Side Substitution

- 3.91 ComReg is of the view that there are no clear candidate supply-side substitutes to assess in the retail radio broadcast markets.
- 3.92 As noted in paragraph 3.60 and 3.61 above, supply-side substitution occurs in the instance where a potential entrant could enter the market and render a hypothetical quality decrease of the focal product unprofitable for the incumbent hypothetical monopolist. However, radio delivered over the internet (Internet Radio) is already in existence, which removes the hypothetical nature of the potential substitution. Therefore, the potential for retail radio broadcast services delivered over the internet to act as supply side substitute, and therefore warrant inclusion in the market, is moot.

3.5.3 Overall conclusion on retail radio broadcast product market

- 3.93 Having concluded its product market assessment, ComReg defines a retail radio broadcast product market consisting solely of Terrestrial Radio, (the **'Relevant Retail Radio Broadcast Product Market'**).¹⁴⁷

3.6 Retail Radio Broadcast Geographic Assessment

- 3.94 The Notice on Market Definition explains that the relevant geographic market corresponds to the area where:

*"...the undertakings involved supply or demand relevant products, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas."*¹⁴⁸

- 3.95 While it is not required to conclude on, or precisely define the scope of, the retail markets, ComReg's view is that there is sufficient evidence to suggest that the retail radio broadcast market can be distinguished on a local/regional and national basis. However, it proposes to leave its precise conclusion open, on the grounds that it will not impact the determination in respect of its assessment of the relevant upstream wholesale market.
- 3.96 Terrestrial Radio Broadcasters operate under 'Sound Broadcasting Contracts', with defined coverage limits (**'catchment areas'**). Some Terrestrial Radio

¹⁴⁷ ComReg notes that the outcome of its direct constraints assessment, using the SSNDQ, is the same as if the SSNIP were applied, given the same factors (set out in paragraph 3.30 above) would be assessed in either case.

¹⁴⁸ Notice on Market Definition, paragraph 12.

Broadcasters hold national licences, while others operate under local or regional licences. Entry to the market or, more specifically, the opportunity to obtain one of these licence types is controlled and monitored by CnaM.¹⁴⁹ The target audience as well as the scope of services, for example, the percentage of time dedicated to news broadcast versus music or advertising, is predetermined and varies depending on licence type and catchment area in order to meet end user demand. News and advertising content also vary according to catchment area. National radio stations' target audience for the provision of news and advertising content is typically the State as a whole and, therefore, national news, as well as nationally relevant advertising, is prioritised. However, news and advertising broadcast on regional and local radio stations typically differ by locality.

- 3.97 ComReg is of the view that these factors are indicative of differences in competitive conditions for the provision of Terrestrial Radio, insofar as each catchment area, in which local, regional, and national radio stations operate, likely constitute separate markets. ComReg's view is that within each catchment area, competitive conditions are likely to be sufficiently homogenous, but are sufficiently heterogenous, from neighbouring areas.
- 3.98 On that basis, ComReg views is that the retail radio broadcast market can likely be distinguished on a local/regional and national basis.

3.7 Overall conclusion on the retail radio broadcast market

- 3.99 ComReg concludes that there are likely local, regional, and national markets consisting only of Terrestrial Radio ('the **Relevant Retail Radio Broadcast Markets**').

- Q. 1. Do you agree with ComReg's proposed definition of the Relevant Retail TV Broadcast Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**
- Q. 2. Do you agree with ComReg's proposed definition of the Relevant Retail Radio Broadcast Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

¹⁴⁹ Under section 65 of the 2009 Act.

4 Wholesale Market Definition

4.1 Introduction

- 4.1 As noted in paragraph 2.11, the wholesale BTS market(s) has not been listed by the EC as a market susceptible to *ex ante* regulation since 2007, when it was removed from the 2007 Recommendation. Therefore, ComReg must carry out a 3CT to determine whether SMP regulation continues to be warranted. However, before doing so, it is first necessary to define the parameters of the wholesale BTS markets on which the 3CT will be carried out.
- 4.2 ComReg's starting point for its wholesale market assessment are those vertically-related, wholesale BTS markets which are currently regulated under the 2021 Decision, namely:
- (a) **Market A:** a market for Wholesale Access to National Terrestrial Broadcast Transmission Services; and
 - (b) **Market B:** a market for Wholesale Access to DTT Multiplexing Services.
- 4.3 According to the SMP Guidelines:¹⁵⁰
- "[NRAs]...must start by identifying and analysing the wholesale market that is most upstream of the retail market in which said competition problems have been found..."*
- 4.4 For the avoidance of doubt, ComReg does not assume the presence, or absence, of products/services from the wholesale BTS markets on this basis, or pre-emptively assume their geographic scope. It is merely used as a starting point for its assessment, in recognition of the fact that both National Terrestrial BTS and DTT Multiplexing Services each operate at different levels in the wholesale supply chain and one, or both, are used for the provision of FTA DTT and Terrestrial Radio.¹⁵¹
- 4.5 In defining the wholesale BTS markets, ComReg begins by identifying the appropriate focal product(s). From here, ComReg examines whether this focal product constitutes a market of its own, or whether a broader market should be defined, taking into account direct demand-side or supply-side substitutes. ComReg also assesses the degree to which indirect retail constraints arising

¹⁵⁰ SMP Guidelines, page 3, paragraph 26.

¹⁵¹ The relationship between Market A and Market B, and their relationship with other market participants in the broadcasting value chain, is described in paragraph 2.29 of this Consultation, and illustrated in Figure 2.

from downstream retail markets might effectively and sufficiently constrain behaviour in the wholesale BTS markets, before then assessing their geographic scope.

- 4.6 In summary, the Notice on Market Definition defines a relevant market as follows:
- (a) A relevant **product market** comprises all those products and/or services which are regarded as interchangeable or substitutable by the end user by reason of the products' characteristics, prices and intended use;
 - (b) A relevant **geographic market** comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.
- 4.7 In line with the MGA¹⁵² ComReg's assessment starts from the assumption that SMP regulation is not present in the markets under consideration. However, regulation present in other related markets, or through other aspects of a regulatory framework,¹⁵³ may be assumed to be present.
- 4.8 Market definition is not an end in itself but is undertaken to provide the context for the subsequent competition assessment. It allows ComReg to consider the competitive constraints imposed by demand and supply side substitutes (and, consequently, the buyers and suppliers of those substitute products/services) on a forward-looking basis; that is, taking into account expected or foreseeable technological or economic developments over a reasonable time horizon linked to this market review.
- 4.9 As noted above, ComReg's starting point for its analysis are those markets defined in the 2021 Decision, namely Market A and Market B. Starting with Market A as the most upstream market, ComReg assesses each of these markets separately in this section.¹⁵⁴

¹⁵² Described in paragraphs 2.16 and 2.17 above.

¹⁵³ For example, the 2009 Act, and operator licensing conditions.

¹⁵⁴ See section 2 in the Notice on Market Definition for the general methodology.

4.2 Market A – Market Definition

4.2.1 Overview

- 4.10 The section consists of the product and geographic market assessment for Market A, and considers the following issues:
- (a) Identifying the focal product, which is the initial product against which potential substitute products are assessed (discussed in paragraphs 4.11 to 4.25 below);
 - (b) Whether any alternative BTS¹⁵⁵ should be included in Market A, having regard to the effectiveness of any direct constraints from demand-side substitutes or supply-side substitutes, including self-supplied inputs (discussed in paragraphs 4.26 to 4.49);
 - (c) Whether any retail products should be included in Market A, having regard to the effectiveness of any indirect retail constraints from the retail market (discussed in paragraphs 4.50 to 4.52); and
 - (d) The geographic scope of Market A (discussed in paragraphs 4.55 to 4.65 below).

4.2.2 Relevant Product Market Assessment

Identifying the Focal Product(s)

- 4.11 ComReg's view is that the appropriate wholesale focal product, being the starting point for the market definition exercise, is the provision of National Terrestrial BTS.¹⁵⁶ National Terrestrial BTS includes national terrestrial radio BTS purchased by national analogue Retail Radio Broadcasters and national DTT BTS purchased by Multiplex Operator(s) who in turn provide Retail TV Broadcasters with multiplexing services for the purposes of terrestrial broadcasting.
- 4.12 A focal product is a product where a competition bottleneck is considered to occur, that is, a product which Access Seekers rely on to offer effective competition on downstream markets. If a firm does not grant effective access

¹⁵⁵ Alternative BTS refers to BTS other than Terrestrial BTS.

¹⁵⁶ The selection of National Terrestrial BTS as the appropriate focal product does not pre-emptively assume the geographic scope of Market A. The geographic market assessment is set out in paragraphs 4.56 to 4.66 below after having defined Market A Product Market. National Terrestrial BTS is described as such due to its product characteristics, for example, its national-level coverage as well as programming content consisting of the broadcast of national news, advertising, and other content.

to the focal product which it controls, then it is likely to be in a position to exclude competitors from downstream markets. Bearing this in mind, ComReg focuses on National Terrestrial BTS – which has only one provider - but rules out non-National Terrestrial BTS (terrestrial BTS used for the provision of local and regional radio broadcast transmission) which is provided by multiple operators, as its provision is, in ComReg’s view, associated with relatively low barriers to entry.¹⁵⁷

4.13 According to BEREC,

“The focal product is defined as the main product under investigation and the focal area is the area under investigation, in which the focal product is sold. The definition of the focal product may depend on specific market conditions and on the issues that NRAs want to address during the market analysis

“(.....) an NRA should start by identifying the focal product considering their national market conditions. One of the possible criteria chosen by NRAs might be to define the focal product as the one where competition problems are believed to exist.”¹⁵⁸

4.14 Accordingly, in identifying a focal product, it is necessary only to define the product itself and it is not necessary to identify a specific provider of the focal product. The focal product is, therefore, capable of being provided by one or more SPs.¹⁵⁹ In this case, however, 2rn happens to be the sole provider of National Terrestrial BTS in the State.

4.15 In the 2021 Decision, ComReg designated National Terrestrial BTS as the focal product in Market A. ComReg considers that this designation remains appropriate and that there is insufficient evidence of any major developments within the markets since then to warrant a change to this conclusion.

4.16 ComReg notes that Access Seekers, which currently purchase National Terrestrial BTS, operate under either a television multiplex licence (under

¹⁵⁷ Entry to the market as a provider of non-national terrestrial BTS means that national level coverage is not required. This means that the construction of towers and masts at strategic high sites, high sunk costs and relevant planning permissions/ land access associated with this, are unnecessary, and, thus, barriers to entry are likely to be sufficiently low.

¹⁵⁸ BEREC Report on Impact of Fixed-Mobile Substitution in Market Definition, at p.12. BoR 12 (52), 24 May 2012. Available online at https://www.berec.europa.eu/eng/document_register/subject_matter/berec/reports/363-berec-report-impact-of-fixed-mobile-substitution-fms-in-market-definition.

¹⁵⁹ See, for example, Ofcom’s focal product assessment set out at paragraphs 6.25 to 6.33 of its “Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 - Volume 2: Market assessment”, available online at https://www.ofcom.org.uk/data/assets/pdf_file/0029/188822/wftmr-volume-2-market-assessment.pdf.

section 132 of the 2009 Act), or sound broadcasting contracts (under section 63 of the 2009 Act), requiring them to operate on an FTA basis, and have national/quasi-national coverage. Accordingly, if the supply of National Terrestrial BTS were to cease, this could potentially lead to competition issues¹⁶⁰ in downstream markets if DTT Multiplex Operators, as well as Retail TV Broadcasters and Retail Radio Broadcasters, were unable to switch in a sufficiently short period of time to an alternative means of BTS, to facilitate the delivery of FTA DTT and nationally/quasi-nationally available Terrestrial Radio (**'National Terrestrial Radio'**) in line with their statutory obligations and/or licensing conditions.

2rn National Terrestrial BTS

- 4.17 2rn is a wholly owned subsidiary of RTÉ and is the sole provider of National Terrestrial BTS in the State, using its digital terrestrial network to transmit and distribute the programming services of its two primary National Terrestrial BTS Access Seekers,¹⁶¹ namely RTÉ and BMAI (owner of Today FM and Newstalk). RTÉ purchases (through means of self-supply) National Terrestrial BTS for the purposes of delivering National Terrestrial Radio, DTT Multiplexing Services, and, ultimately, FTA DTT. BMAI purchases National Terrestrial BTS for the purposes of delivering National Terrestrial Radio.¹⁶²
- 4.18 2rn provides a fully managed broadcast¹⁶³ transmission and distribution service, including associated facilities.
- 4.19 Table 13 below sets out a breakdown of transmission services offered by 2rn, including the number of transmission sites per TV and radio broadcast programming service and the associated geographic coverage.

¹⁶⁰ ComReg only assesses potential competition problems which might occur in Market A after having defined the market from a product and geographic perspective, determined whether the market is susceptible to regulation based on national circumstances, and made a finding of SMP.

¹⁶¹ Access Seekers refers to wholesale BTS customers, including those customers purchasing National Terrestrial BTS, as well as DTT Multiplexing Services.

¹⁶² See Figure 1 above for relationship between National Terrestrial BTS, DTT Multiplexing Services, and the provision of FTA DTT and Terrestrial Radio.

¹⁶³ 'Broadcast' means the transmission, relaying or distribution by electronic communications network of communications, sounds, signs, visual images or signals, intended for direct reception by the general public.

Table 13: 2rn Transmission sites for National Terrestrial BTS¹⁶⁴

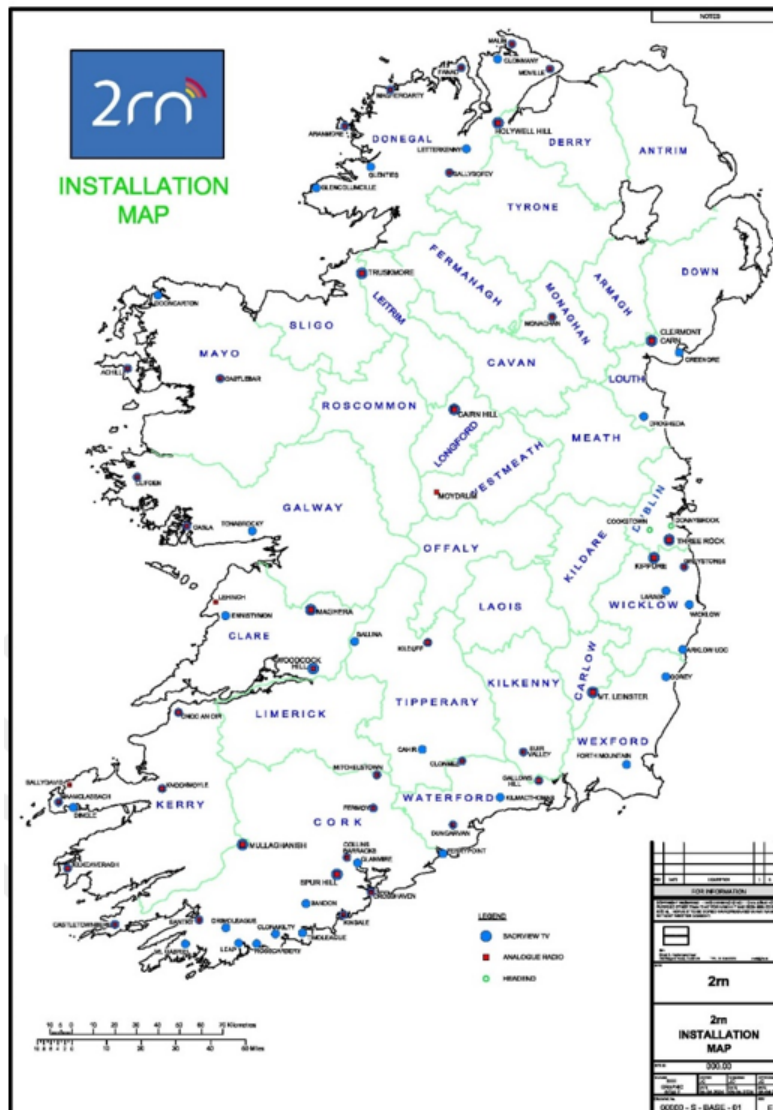
2024	Number of Transmission Sites	Geographic Coverage
Radio		
RTÉ Radio 1 FM	42	National
RTÉ Radio 2FM	41	National
RTÉLyric	41	National
Raidió na Gaeltachta	41	National
Today FM	24	Available Nationally
Newstalk	17	Available Quasi-Nationally
Television		
RTÉ PSB Multiplex 1	67	National
RTÉ PSB Multiplex 2	67	National

- 4.20 Information contained in 2rn's published separated accounts for year-end 2023, indicates that the net book value of infrastructure in Market A is currently circa €35 million.¹⁶⁵ This consists of tower and mast infrastructure, reinforced buildings built to withstand severe weather events, and specialised equipment.
- 4.21 Due to Ireland's geographical characteristics and sparse population density, the sites where 2rn's infrastructure is located tend to be high altitude sites which ensures adequate coverage is provided to remote areas.
- 4.22 Figure 6 below displays the locations of 2rn's Transmission Sites around Ireland.

¹⁶⁴ Source: 2rn submission, as at Q1 2024.

¹⁶⁵ RTÉ Transmission Network DAC (T/A 2rn), Regulated Accounts, Market A, for year ended 31 December 2023, Page 8. Available at: [SKM 2024062512210 \(2rn.ie\)](https://www.2rn.ie/SKM2024062512210).

Figure 6: 2rn Transmission Sites



- 4.23 While Donnybrook is traditionally associated with the provision of RTÉ services, all 2rn operations are managed from its Network Monitoring Centre in Cookstown Court, Tallaght. Donnybrook and Cookstown Court are connected via a diverse fibre network which includes a disaster recovery element in the event of failure at one of these two sites.
- 4.24 2rn utilises interconnected equipment at Cookstown Court and at Donnybrook to achieve diverse connectivity to its distribution system. Content is available, and can be distributed by 2rn, from both Cookstown and Donnybrook to its main transmitter sites. Traditionally, 2rn's distribution system has consisted of a fixed radio link network (Microwave), connecting all main transmitter sites in

both a clockwise and anticlockwise direction. 2rn is currently in the process of migrating its distribution system to a hybrid fibreoptic/fixed radio link network.

Overall Conclusion on Market A Focal Product

- 4.25 ComReg's view is that National Terrestrial BTS remains the most appropriate focal product in Market A for the reasons discussed in paragraphs 4.11 to 4.16 above. 2rn is currently the sole provider of the National Terrestrial BTS in the State.

4.2.3 Assessment of Direct Constraints

Demand-Side Substitution

- 4.26 As set out in sub-section 3.3.2, demand-side substitution measures how customers react to small but significant and permanent price increases. The measurement of demand-side substitution is formalised in the HMT which assesses whether a SSNIP above the competitive level – taken to be in the range of 5% to 10% - of a focal product supplied by a HM would provoke a sufficient number of customers to switch to an alternative product, such that it would render the price increase unprofitable. If enough customers switch to the alternative product, rendering the price increase unprofitable, then the alternative product is also included in the relevant product market.
- 4.27 The HMT is carried out for any number of alternative products which, by means of their characteristics, prices and intended use, may constitute an effective substitute to the focal product. If switching to these alternative products renders the SSNIP (above the competitive level) of the focal product (and any alternatives already deemed substitutable) unprofitable, then these are also included in the relevant product market.
- 4.28 According to EC Notice on Market Definition:¹⁶⁶
- "Situations of sufficiently strong demand substitution arise when customers would switch easily from the products of the undertaking(s) involved to readily available alternative products. The Commission includes those products in the same relevant product market as they constitute effective and immediate competitive constraints."*
- 4.29 Bearing this in mind, ComReg is of the view that there are no clear candidate demand-side substitutes to assess in Market A owing to the structural makeup

¹⁶⁶ See paragraph 25 of EC Notice on Market Definition.

of the market,¹⁶⁷ as well as the statutory obligations and/or broadcast licensing conditions governing the behaviour of each Access Seeker purchasing National Terrestrial BTS. Therefore, ComReg instead sets out its assessment of the barriers to switching in Market A and the reasons for which Access Seekers could not switch away from the focal product as a result of a potential SSNIP, even if they so wished.

Barriers to Switching

- 4.30 Switching barriers encompass all those obstacles that Access Seekers encounter when switching from one product or service to another. This can include, but is not limited to, costs, licensing conditions, contractual obligations, risks, interruptions of service, or other general inconveniences. The level to which these types of barriers constrain an Access Seeker from moving from one service to another can vary, however, ComReg's view is that Access Seekers' statutory obligations and/or licensing conditions act as a sufficiently high barrier to switching in Market A to inhibit switching in response to a SSNIP of the National Terrestrial BTS.
- 4.31 As outlined in paragraph 4.17, there are two Access Seekers who purchase National Terrestrial BTS, namely RTÉ (on a self-supply basis) and BMAI. These Access Seekers are discussed below, with consideration given to their ability and, in respect of RTÉ, its incentive to switch to an alternative BTS supplier.

RTÉ

- 4.32 RTÉ purchases National Terrestrial BTS for:
- (a) the purpose of delivering its downstream National Terrestrial Radio services (e.g. radio stations such as RTÉ Radio 1 and RTÉ 2FM etc.); and
 - (b) use as an input into the delivery of DTT Multiplexing Services (facilitating the delivery via this service of their own, and others, retail TV services).
- 4.33 RTÉ operates under a PSB licence, for the provision of National Terrestrial Radio, pursuant to section 121 of the 2009 Act¹⁶⁸ and must ensure that its radio

¹⁶⁷ The largest purchaser of 2m National Terrestrial BTS is RTÉ. As discussed in paragraph 4.17 above, 2m is a subsidiary of RTÉ, and purchases (self-supplies) National Terrestrial BTS for the provision of DTT multiplexing services, as well as retail radio and TV broadcast services.

¹⁶⁸ Public Service Broadcasting Licence issued by the Commission for Communications Regulation to Radió Teilifís Éireann (RTÉ). Available at: [Microsoft Word - Public Service Broadcasting Licence_Rev1 \(comreg.ie\)](#).

broadcast services are offered on an FTA basis and, in so far as it is reasonably practicable, have national level coverage.¹⁶⁹ Furthermore, in respect of DTT Multiplexing Services, RTÉ holds a PSB multiplex licence¹⁷⁰ and must operate a national terrestrial television multiplex which must also be FTA and available to approximately 90% of the State.¹⁷¹

- 4.34 2rn is the only provider of wholesale terrestrial BTS in the State which can facilitate the delivery of FTA services such as these, with national/quasi-national level coverage. In response to the 2024 Information Request, RTÉ noted that it must purchase (on a self-supply basis) National Terrestrial BTS from 2rn for the provision of National Terrestrial Radio and must operate its DTT platform using these inputs in order to fulfil its statutory obligations and licensing conditions.
- 4.35 ComReg's view is that even if RTÉ had the ability to switch to alternative BTS, it likely has no incentive to do so, especially not in response to a SSNIP by its own subsidiary, 2rn. As the parent company to 2rn, RTÉ would have little commercial incentive to switch away from 2rn National Terrestrial BTS to any alternative BTS provider, even if one with sufficient coverage and pay structure existed. RTÉ operates on multiple levels of the BTS supply chain, generating revenue at retail and at wholesale levels. As such, RTÉ would not be commercially incentivised to switch to an alternative provider of BTS and therefore cease the generation of its wholesale profits, especially in response to a SSNIP from its own upstream arm, which it can recover from Access Seekers in downstream and related markets.¹⁷²

BMAI

- 4.36 BMAI, the owner of Today FM and Newstalk, purchases National Terrestrial BTS for the delivery of downstream national/quasi-national terrestrial radio services.

¹⁶⁹ Pursuant to section 114 (a) of the 2009 Act.

¹⁷⁰ Pursuant to section 132 of the 2009 Act.

¹⁷¹ Pursuant to section 130 (1)(b) of the 2009 Act. ComReg notes that FTA DTT (Saorview) has near ubiquitous coverage, with the circa 2% of the population who cannot receive FTA DTT, still able to avail of these programming services via Saorsat.

¹⁷² As discussed in paragraph 2.17, in its analysis of Market A, and applying the MGA, ComReg assumes regulation is absent in both Market A and in downstream markets (Market B). RTÉ, absent regulation in Market B, would have the ability and incentive to pass 2rn SSNIP of the focal product in Market A, through to Market B customers.

- 4.37 Today FM and Newstalk are licensed under sound broadcasting contracts¹⁷³ for delivery of Terrestrial Radio. Today FM is licensed to provide national level coverage, while Newstalk is licensed to operate quasi-nationally. Each radio station must provide radio broadcast services on an FTA basis.¹⁷⁴
- 4.38 According to BMAI,¹⁷⁵ it has an obligation under its broadcasting licences to operate transmitters at specific site locations. For example, the national transmission licence awarded to Today FM includes, but is not limited to, six high powered frequencies coordinated for sites owned by 2rn. These are:
- (a) 100.9MHz Kippure;
 - (b) 101.4MHz Mount Leinster;
 - (c) 101.8MHz Mullaghanish;
 - (d) 100.6MHz Maghera;
 - (e) 100.0MHz Truskmore; and
 - (f) 105.50MHz Clermont Carn.
- 4.39 BMAI notes that, to date, no other transmission provider has developed infrastructure at these locations and there are no alternative sites that can provide comparable coverage. Due to these specific licence conditions, ComReg's view is that BMAI could not reasonably cease its purchases of National Terrestrial BTS in response to a SSNIP of the focal product by a HM and switch to an alternative BTS supply, as there is no alternative BTS available which would enable BMAI to meet its licensing conditions for the provision of Today FM and Newstalk.

Supply-Side Substitution

- 4.40 ComReg must also consider whether any alternative products could represent an effective supply-side substitute to the focal products. Supply-side substitution measures how potential (rather than actual) competitors react to price increases. The HMT assesses whether a SSNIP of a focal product supplied by a HM would cause sufficient new entry into the relevant market by potential competitors, such that it would render the price increase unprofitable.

¹⁷³ Section 63 of the 2009 Act.

¹⁷⁴ See Table 13.

¹⁷⁵ In response to the 2024 Information Request.

- 4.41 The Notice on Market Definition makes clear that the impact of supply-side substitution must be equivalent to the impact of demand-side substitution, in terms of effectiveness and immediacy:

*“The substitutability of products from the perspective of suppliers (supply substitution) can be relevant for market definition where suppliers use the same assets and processes to produce related products that are not substitutes for customers, and where this leads to similar conditions of competition across the range of such related products. **In such cases, it may be appropriate to include such related products in the relevant product market, provided the constraining effect of supply substitution across the range of products is equivalent to that of demand substitution in terms of effectiveness and immediacy**”*

The necessary conditions for the market to be broadened based on supply substitution are that most, if not all, suppliers are able to switch production between products in the range of related products; that suppliers incur only insignificant additional sunk costs or risks when they switch production; that suppliers have the incentive to and would do so when relative prices or demand conditions change; and that they can offer all products in the range effectively in the short term”¹⁷⁶

- 4.42 In particular, ComReg considers whether an SP would be likely, in response to a HM’s SSNIP of National Terrestrial BTS above the competitive level, switch to the provision of National Terrestrial BTS in the immediate to short term (typically within one year), without incurring significant costs, and start supplying services of equivalent characteristics to the focal product.
- 4.43 In carrying out this assessment, ComReg has considered SPs’ responses to the 2024 Information Requests, particularly views and evidence provided by SPs that indicate the strength of any direct constraint arising from supply-side substitution.

Potential for Supply-Side Substitution

- 4.44 ComReg’s view that there are no clear candidate supply-side substitutes to assess in Market A.
- 4.45 The question raised is whether, in response to a 5 – 10% increase in the price of National Terrestrial BTS, potential suppliers could reasonably be expected to switch to supply competing National Terrestrial BTS relatively promptly, and

¹⁷⁶ Notice on Market Definition, paragraphs 32 and 33.

without incurring any significant costs or risks, such as to be credible in, and capable of, preventing this price increase from being sustained.

- 4.46 A potential entrant to Market A, wishing to provide National Terrestrial BTS, would need to incur significant sunk costs to facilitate the physical rollout of a digital terrestrial network (tower and mast infrastructure) capable of competing with 2rn (as the only provider of National Terrestrial BTS). To construct a network capable of supporting DTT multiplexes, as well as National Terrestrial Radio, would likely take several years to complete – if at all possible. As well as substantial capital investment, a new entrant would need to acquire the relevant expertise to develop very specific strategic high sites in order to optimise coverage and minimise radio frequency interference. It would also need to seek the relevant planning permissions required for the establishment of each site. ComReg's view is that securing these relevant planning permissions and securing the relevant access rights for required mountain top sites would prove difficult, with a high risk of rejection.
- 4.47 As noted by both RTÉ and 2rn in response to their 2024 Information Requests, securing the planning permissions required to build mast and support infrastructure on mountain top sites would prove exceptionally difficult, specifically in those mountain top areas where they have already been identified as areas of conservation, or areas of outstanding natural beauty.¹⁷⁷
- 4.48 Taking the above into consideration, ComReg's view is that it is unlikely that new entrants could credibly enter the market to provide National Terrestrial BTS on an FTA basis, and with comparable coverage levels, to 2rn's network (sufficient to meet these broadcasters' statutory obligations and licensing conditions) without incurring significant additional costs, risks and time delays. Prompt or effective supply-side substitution is highly unlikely due to the high entry costs associated with building such networks most of which would be sunk in the case of market exit.

Summary of overall conclusions on direct constraints

- 4.49 ComReg's view is that Access Seeker statutory obligations and/or licensing conditions, as well as, but not limited to, the extensive sunk costs involved in building out alternative digital terrestrial networks eliminates the possibility of direct constraints on a HM supplier of the National Terrestrial BTS in Market A.

¹⁷⁷ Planning and Development Act, 2000. Available at: [Planning and Development Act, 2000 \(irishstatutebook.ie\)](https://www.irishstatutebook.ie/2000/PLD/).

4.2.4 Assessment of Indirect Retail Constraints

- 4.50 Aside from direct demand-side or supply-side constraints, an alternative, vertically integrated, SP's self-supply of BTS could fall within Market A if its presence on downstream retail markets were to exert a sufficiently strong, immediate and effective indirect constraint on a HM supplier's pricing of National Terrestrial BTS. In this respect, end user behaviour may, through demand-side substitution at the retail level, indirectly impact the ability of the HM National Terrestrial BTS supplier to profitably sustain a SSNIP¹⁷⁸ of National Terrestrial BTS prices above the competitive level, i.e., indirect retail constraints arising from the retail market may affect wholesale price setting behaviour in Market A.
- 4.51 ComReg considers whether retail (demand-side) substitution to alternative TV platforms and types of radio broadcasting, in response to an increase in the price of National Terrestrial BTS by the HM, indirectly prevents the HM from imposing a profitable SSNIP of National Terrestrial BTS. This might occur, for example, if the HM faced a reduction in overall profitability after increasing the price of National Terrestrial BTS due to, for example, a decrease in its number of customers. Such a fall in profitability might occur if, and to the extent that, Access Seekers bearing the National Terrestrial BTS price increase had to reduce the quality of their programming material (due to a reduction in expenditure) as a result of an increase in their costs. This in turn could result in their retail customers switching away, in sufficient numbers, to alternative TV and radio platforms. To constrain a HM in Market A, this shift in end user demand would need to result in Access Seekers ceasing the broadcast of their TV or radio channels using National Terrestrial BTS inputs and moving in sufficient numbers to an alternative TV or radio platform to render the HM's price increase unprofitable.
- 4.52 ComReg considers it unlikely that this would occur. In paragraphs 3.26 to 3.66, ComReg found that retail TV broadcast services provided over cable, Sky TV, IPTV and DTH FTA satellite fell outside of the Relevant Retail TV Broadcast Product Market. Furthermore, ComReg's assessment set out in paragraphs

¹⁷⁸ For retail products that come with a monetary cost to end users, the pass through of a SSNIP by an Access Seeker to retail end users means that the retail product increases in price as a result of a price increase at the wholesale level. As discussed in paragraphs 3.66 and 3.99, the Relevant Retail TV Broadcast Market and the Relevant Radio Broadcast Market, as defined, consist solely of FTA DTT, and Terrestrial Radio. These are zero-priced goods, meaning that the pass through of a SSNIP would not result in an increase in price for retail end users but could manifest in a different manner, for example, a decrease in the quality of programme material. This is the basis on which ComReg assesses indirect retail constraints for Market A as well as Market B.

3.83 to 3.93 concluded that radio broadcast via the internet (Internet Radio) also fell outside of the Relevant Retail Radio Broadcast Product Market. Taking account of this, ComReg is of the view that such services are unlikely to exert a sufficiently effective indirect retail constraint on National Terrestrial BTS, given the clear lack of effective demand-side substitution at the retail level.

4.2.5 Overall conclusions on Relevant Market A Product Markets

4.53 Having concluded its product market assessment, ComReg defines Market A as consisting solely of National Terrestrial BTS (**'Market A Product Market'**).

4.54 ComReg now considers the geographic scope of Market A Product Market.

4.2.6 Geographic Assessment of Market A

Introduction

4.55 In this section, ComReg considers the geographic scope of Market A, as defined in paragraph 4.53 above. In doing so, ComReg follows the approach adopted by the EC in the 2020 Recommendation and the SMP Guidelines.

4.56 The Notice on Market Definition states that the relevant geographic market is:

*.. the geographic area in which the undertakings involved supply or demand relevant products, in which the conditions of competition are sufficiently homogeneous for the effects of the conduct or concentration under investigation to be able to be assessed, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas"*¹⁷⁹

4.57 The EC further notes in its SMP Guidelines that:

"According to established case-law, the relevant geographic market comprises an area in which the Undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different. The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous, and accordingly, only those areas in which the conditions of competition are 'heterogeneous' may not be

¹⁷⁹ Notice on Market Definition, paragraph 12.

considered to constitute a uniform market. In general, the process of defining the geographic boundaries of markets involves identifying any geographic areas where a distinct break in competitive conditions can be observed. This approach places weight on the underlying structural and behavioural factors that are relevant in determining the competitiveness of a market.”¹⁸⁰

- 4.58 A geographic market assessment is typically a two-phase process, used to assess the homogeneity (or heterogeneity) of competitive conditions between geographic areas, taking account of both structural and behavioural criteria. Phase 1 considers criteria of general application to determine whether there are grounds to define national or sub-national markets. If Phase 1 suggests that there are sufficient grounds to warrant defining sub-national markets, only then does Phase 2 apply in order to distinguish the boundaries of those sub-national markets.
- 4.59 Having carried out its Phase 1 assessment at paragraphs 4.60 to 4.65 below, ComReg defines Market A as being national in geographic scope.

Phase 1 Approach

- 4.60 In assessing potential geographic variances in competitive conditions, ComReg takes utmost account of the Notice on Market Definition and the BEREC Common Position on Geographic Aspects of Market Analysis (the ‘**BEREC Common Position**’).¹⁸¹ Having regard to the above, ComReg assesses the geographic scope of Market A, having regard to the following factors:
- (a) Geographic differences in entry conditions;
 - (b) Variation in the number and size of potential competitors;
 - (c) Distribution of market shares;
 - (d) Evidence of differentiated pricing strategies or marketing; and
 - (e) Geographical differences in product functionality and demand characteristics.

¹⁸⁰ SMP Guidelines, paragraph 56.

¹⁸¹ BEREC “[Common Position on Geographic Aspects of Market Analysis](#)”, BoR (14) 73, 05.06.2014 (the ‘**BEREC Common Position**’).

- 4.61 These factors are collectively considered in paragraphs 4.62 to 4.65 below. ComReg applies the MGA¹⁸² in assessing the geographic scope of Market A Product Market. This assumes a hypothetical scenario in which there is no *ex ante* SMP regulation in the candidate Market A, or related downstream markets, however, ComReg must take account of other legislation or regulation pertaining to the wholesale BTS markets, such as the 2009 Act and operator licensing conditions.

Geographic Market Assessment

- 4.62 ComReg considers competitive conditions across the State to be sufficiently homogenous to warrant the delineation of a national geographic market.
- 4.63 2rn is the only operator of a terrestrial BTS network in the State which has near ubiquitous coverage and provides National Terrestrial BTS to facilitate the provision of nationally available DTT Multiplexing Services, FTA DTT¹⁸³ and National Terrestrial Radio. As such, product functionality remains the same across the State. As the only provider of National Terrestrial BTS, 2rn has no competitors and has consistently held 100% market share over time.
- 4.64 ComReg notes that Access Seekers in Market A, namely DTT Multiplex Operators and national terrestrial Retail Radio Broadcasters, have coverage obligations which are set out either in legislation or in their CnaM awarded licensed programme service contracts. As a result, each of the Access Seekers in Market A require terrestrial BTS coverage on a national/quasi-national basis, meaning that there are no discernible differences in demand characteristics across the State. It is also of note that there is no evidence to suggest that pricing for National Terrestrial BTS varies by geography.
- 4.65 Considering the above factors, ComReg's view is that conditions of competition are sufficiently homogenous across the State to warrant defining Market A as being national in geographic scope.

4.2.7 Overall Conclusion on Market Definition for Market A

- 4.66 Having regard to the assessment in paragraphs 4.1 to 4.65 above, ComReg defines a national market for wholesale access to National Terrestrial BTS (referred to as **Market A**). This is a wholesale market whereby a BTS network provider supplies a distribution and transmission service via its towers/masts

¹⁸² Described in paragraphs 2.16 and 2.17.

¹⁸³ Except for 2% of TV homes where viewers receive Saorview (FTA DTT) channels via Saorsat. This is not driven by competition, but by topographical issues.

and relevant associated facilities including distribution and transmission equipment in order to enable:

- (a) The broadcast of National Terrestrial Radio; and,
- (b) The broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end users.

4.67 Having set out a definition of Market A, ComReg next considers the definition of a separate wholesale market for access to DTT Multiplexing Services (being Market B). This wholesale market operates downstream from Market A.

4.3 Market B – Market Definition

4.3.1 Overview

4.68 The section consists of the product and geographic market assessment for Market B, and considers the following issues:

- (a) Identifying the focal product, which is the initial product against which potential substitute products are assessed (discussed in paragraphs 4.70 to 4.82 below);
- (b) Whether any alternative BTS should be included in Market B, having regard to the effectiveness of any direct constraints from demand-side substitutes or supply-side substitutes, including self-supplied inputs (discussed in paragraphs 4.83 to 4.106);
- (c) Whether any retail products should be included in Market B, having regard to the effectiveness of any indirect retail constraints from the retail markets (discussed in paragraphs 4.107 to 4.108); and
- (d) The geographic scope of Market B (discussed in paragraphs 4.112 to 4.121 below).

4.69 As described in paragraphs 2.16 and 2.17, when assessing Market B, the MGA requires that ComReg to take account of any regulation present in upstream Markets. Therefore, ComReg assumes regulation to be present in Market A for the purposes of the following assessment. ComReg also takes account of other legislation or regulation pertaining to the wholesale BTS markets, such as the 2009 Act and operator licensing conditions.

4.3.2 Relevant Product Market Assessment

Identifying the Focal Product(s)

- 4.70 ComReg's view is that the appropriate wholesale focal product, being the starting point for the market definition exercise, is the provision of DTT Multiplexing Services. DTT Multiplexing Services are provided by a DTT Multiplex Operator, using wholesale inputs from Market A, combined with carriage on its own DTT platform, to supply wholesale managed BTS to Retail TV Broadcasters,¹⁸⁴ thereby enabling the transmission of their DTT broadcasting programme signals to end users free-to-air.
- 4.71 To legally operate a DTT multiplex in the State, a DTT Multiplex Operator must apply for,¹⁸⁵ and negotiate, a contract with CnaM.¹⁸⁶ A Retail TV Broadcaster then needs to negotiate with the contracted DTT Multiplex Operator for carriage on its DTT platform.
- 4.72 As discussed above, a focal product is a product where a competition bottleneck is believed to occur, that is, a product which Access Seekers rely on to offer effective competition on downstream markets. If a firm does not grant access to the focal product which it controls, then it is likely to be in a position to exclude competitors from downstream markets.
- 4.73 ComReg notes that RTÉ is the only provider of DTT Multiplexing Services in the State. RTÉ accounts for circa 50%¹⁸⁷ of purchases (through means of self-supply) of DTT Multiplexing Services, which it uses for the purposes of delivering FTA DTT to end users. It, therefore, competes with other purchasers of its DTT Multiplexing Services, in the downstream Relevant Retail TV Broadcast Market. Many of the channels on the DTT platform are subject to licensing conditions or statutory obligations, requiring them to be provided FTA and have a national level reach.¹⁸⁸ Accordingly, if the supply of DTT

¹⁸⁴ Retail TV Broadcasters also includes broadcasters which broadcast radio channels via the DTT platform.

¹⁸⁵ Section 132 of the 2009 Act provides that CnaM may enter into a multiplex contract with a person who makes an application for such a contract in accordance with that section.

¹⁸⁶ Section 132 of the 2009 Act provides that ComReg must, at the request of RTÉ, issue up to two DTT multiplex licence(s) and, separately, at the request of CnaM, issue to CnaM at least four DTT multiplex licences. CnaM may then enter into DTT multiplex contracts with DTT Multiplex Operators for the operation of the licensed multiplexes.

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

¹⁸⁷ This refers to the fact that approximately 50% of channels on the DTT platform are owned by RTÉ itself.

¹⁸⁸ Insofar as reasonably practicable.

Multiplexing Services were to cease, this would likely lead to competition problems in downstream retail markets if Retail TV Broadcasters were unable to switch, in a sufficiently short period of time, to an alternative means of wholesale managed BTS, to facilitate the delivery of FTA DTT in line with their licensing conditions or statutory obligations.

- 4.74 In the 2021 Decision, ComReg designated DTT Multiplexing Services as the focal product in Market B. In July 2020,¹⁸⁹ FTA DTT (the retail service delivered using DTT Multiplexing Services)¹⁹⁰ had a household penetration rate of 38%. This has decreased only to 36% as of July 2024 and, along with Sky TV, remains the most popular TV service in the State. Taking all of the above factors into consideration, ComReg considers that this designation remains appropriate and that there is insufficient evidence of any major developments within the markets since then to warrant a change to this conclusion.
- 4.75 ComReg notes that in defining a focal product, it is necessary only to define the product itself and it is not necessary to identify a specific provider of the focal product. The focal product is, therefore, capable of being provided by one or more SPs.¹⁹¹ In this case, however, RTÉ is the sole provider of DTT Multiplexing Services in the State.

RTÉ DTT Multiplexing Services

- 4.76 RTÉ is a national public service broadcaster in Ireland.¹⁹² It is a vertically integrated entity which self-supplies National Terrestrial BTS, used for the provision of DTT Multiplexing Services,¹⁹³ via its wholly owned subsidiary, 2rn. Section 114(1)(i) of the 2009 Act makes it an object of RTÉ, “*to establish, maintain, and operate one or more national multiplexes*”. RTÉ launched its DTT platform in 2011 which facilitates the delivery of FTA DTT and is marketed as

¹⁸⁹ July 2020 data was used in the 2021 Decision.

¹⁹⁰ FTA DTT is the service delivered to retail end users using those DTT multiplexing services which are currently available in the State. However, DTT multiplexing services do not always result in an FTA service at the retail level. Should a commercial multiplex operator exist, it is possible it may levy a fee on retail end users to avail of their retail DTT service.

¹⁹¹ See, for example, Ofcom's focal product assessment set out at paragraphs 6.25 to 6.33 of its “Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 - Volume 2: Market assessment”, available online at https://www.ofcom.org.uk/data/assets/pdf_file/0029/188822/wftmr-volume-2-market-assessment.pdf.

¹⁹² As detailed in section 2 of the 2009 Act, RTÉ is the authority originally established under section 3 of the Broadcasting Authority Act 1960. Part of RTÉ's PSB objects include “...*to establish, maintain and operate one or more national multiplexes*.”

¹⁹³ As well as retail radio and TV services.

‘Saorview’ to retail end users. Its current DTT platform consists of two PSB DTT multiplexes (**‘PSB multiplexes’**),¹⁹⁴ for each of which it holds a ‘multiplex licence’ under section 132 of the 2009 Act.

- 4.77 Multiplex licences are required from ComReg to provide spectrum rights of use, which entitle the holder to provide DTT Multiplexing Services for the transmission of DTT. ComReg can only issue a multiplex licence to RTÉ and CnaM. Section 132 of the 2009 Act provides that ComReg must, at the request of RTÉ, issue up to two DTT multiplex licences and, separately, at the request of CnaM, issue to CnaM at least four DTT multiplex licences. CnaM may then enter into DTT multiplex contracts with DTT Multiplex Operators, following a tender process.¹⁹⁵
- 4.78 RTÉ, as the national public service broadcaster in Ireland, has public service broadcasting objects listed in statute.¹⁹⁶ RTÉ’s national TV broadcasting service must have the character of a public service, be FTA, and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.¹⁹⁷

Purchasers of DTT Multiplexing Services

- 4.79 RTÉ’s DTT platform comprises of both TV and radio channels. Of the 27 channels carried on the DTT platform, 15 are TV channels and the remaining 12 are radio channels. Circa 50% of all channels on the DTT platform are owned by RTÉ, which self-supplies DTT Multiplexing Services for the provision of those FTA DTT channels outlined in Table 14 below.

Table 14: RTÉ Self-Supply of DTT Multiplexing Services

RTÉ TV Channels	RTÉ Radio Channels
RTÉ One	RTÉ Pulse
RTÉ One +1	RTÉ Radio 1
RTÉ News	RTÉ Radio 1 Extra

¹⁹⁴ There PSB multiplexes were established, maintained and operated by RTÉ as provided for at sections 114(1)(i) and 130 of the 2009 Act. Further information available at: [Microsoft Word - DTT Channel Line Up LCN Policy v14 \(rte.ie\)](#).

¹⁹⁵ Pursuant to section 131 of the 2009 Act.

¹⁹⁶ These objects are outlined in section 114(1), paragraphs (a) to (i) of the 2009 Act.

¹⁹⁷ Section 114(1)(a) of the 2009 Act.

RTÉ 2	RTÉ Raidió na Gaeltachta
RTÉ 2 +1	RTÉ 2FM
	RTÉ 2XM
	RTÉ Gold
	RTÉ Jr
	RTÉ Junior Radio
	RTÉ Lyric

- 4.80 RTÉ also provides DTT Multiplexing Services to Access Seekers. These Access Seekers, their relevant channels, and the relevant, corresponding, licensing conditions and/or statutory obligations, are outlined in Table 15 below. TG4, VMI (for VM1 and VM2), and the Houses of the Oireachtas Channel each are subject to specific licensing conditions or statutory requirements, specifying that they must operate on an FTA basis and have national level coverage.

Table 15: Access Seekers for DTT Multiplexing Services¹⁹⁸

Access Seeker	TV Channel	Contract/Licence Type	FTA Obligation	Coverage Obligation
TG4	TG4	PSB Licence	✓	National ¹⁹⁹
	Cúla4	None	✓	National
	TG4 +1	None	✓	National
VMI	VM1	Television Programme Service Contract	✓	90% of the population of the State
	VM2	Television Programme Service Contract	✓	90% of the population of the State

¹⁹⁸ Table 15 excludes RTÉ's self-supply of DTT Multiplexing Services.

¹⁹⁹ According to the 2009 Act, TG4 "...must be available, in so far as it is reasonably practicable, to the whole community on the island of Ireland."

	VM3	Content Provision Contract	None	None
	VM4	Content Provision Contract	None	None
Sky	Challenge	Luxembourg Broadcasting Licence	None	None
	Sky News	Luxembourg Broadcasting Licence	None	None
Houses of the Oireachtas Channel	Tithe an Oireachtas	PSB Licence	✓	National ²⁰⁰
UCB Ireland	UCB Ireland	Content Provision Contract	None	None
Radio Maria	Radio Maria Ireland	Content Provision Contract	None	None

- 4.81 ComReg notes that under section 77(4) of the 2009 Act, a ‘must carry’ obligation applies in relation to the FTA services of RTÉ and TG4, as well as to VM1 and VM2, requiring “*appropriate network provider(s)*” such as cable and satellite networks to ensure their re-transmission through their networks. Under section 130(10) of the 2009 Act, carriage for VM1 and VM2 has been secured on the multiplex by direction of the Minister, on foot of a request by CnaM after consultation with RTÉ.

²⁰⁰ According to the 2009 Act, Tithe an Oireachtas “...*must be available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.*”

Overall Conclusion on Market B Focal Product

- 4.82 ComReg's view is that DTT Multiplexing Services remains the most appropriate focal product in Market B for the reasons discussed in paragraphs 4.70 to 4.75 above. RTÉ is currently the sole provider of DTT Multiplexing Services in the State.

4.3.3 Assessment of Direct Constraints

- 4.83 ComReg considers the strength of any direct constraints on the provision of DTT Multiplexing Services to determine whether Market B should be broadened beyond the focal product to include effective substitutes. In particular, ComReg considers:

- (a) Potential demand-side substitution (paragraphs 4.84 to 4.99 below); and
- (b) Potential supply-side substitution (see paragraphs 4.100 to 4.105 below).

Demand-Side Substitution

- 4.84 Demand-side substitution measures how customers react to small but significant and permanent price increases.
- 4.85 ComReg applies the HMT²⁰¹ to determine whether alternative products provide a sufficient, and immediate, competitive constraint on the focal product, so as to warrant their inclusion in the wholesale product market for Market B. The HMT is carried out for a number of alternative products which, by means of their characteristics, prices and intended use, may constitute an effective substitute to the focal product.
- 4.86 ComReg notes that, pursuant to section 130(1)(a)(ii) of the 2009 Act, TG4 is obliged to be carried on the DTT platform and, therefore, could not switch to an alternative TV platform in response to a SSNIP of DTT Multiplexing Services. TG4 must further seek ministerial consent should it wish to remove its channels TG4 +1 and Cúla4 from the DTT platform. For this reason, these channels are not assessed as part of ComReg's demand-side substitution assessment below.
- 4.87 Furthermore, as noted in paragraph 4.79, circa 50% of purchases of DTT Multiplexing Services are by RTÉ itself, by way of self-supply. It would be illogical to assume that RTÉ, being the only supplier of DTT Multiplexing Services and, thus, the HM supplier in this case, would apply a SSNIP to itself.

²⁰¹ Described in paragraph 4.26 to 4.28.

Therefore, ComReg's assessment of direct constraints (specifically in terms of its application of the HMT) focuses solely on those Access Seekers (and corresponding channels) outlined in Table 15 (excluding TG4, TG4 +1, and Cúla4) (the '**Relevant Access Seeker Channels**'²⁰²). However, RTÉ and TG4 channels' carriage on the DTT platform is relevant to ComReg's consideration of it's the likely impact on the behaviour of other Access Seekers in reaction to a SSNIP of the focal product.

4.88 ComReg's view, with respect to potential demand-side substitution in Market B is that:

- (a) Pay TV platforms (cable, IPTV and Sky TV) are not likely to be effective substitutes for DTT Multiplexing Services (discussed in paragraphs 4.89 to 4.94 below); and
- (b) DTH FTA satellite platforms are not likely to be an effective substitute for DTT Multiplexing Services (discussed in paragraphs 4.95 to 4.99 below).

Pay TV Platforms

4.89 Pay TV platforms (including cable, IPTV and Sky TV) are unlikely to be an effective demand side substitute for DTT Multiplexing Services over the lifetime of this market review.²⁰³ Three of the nine Relevant Access Seeker Channels²⁰⁴ carried on the DTT platform, namely Tithe an Oireachtas, VMI1 and VMI2 are governed by specific licensing conditions and statutory requirements²⁰⁵ which require them to be broadcast on an FTA basis. For this reason, they cannot, in response to a SSNIP of the focal product, switch to a pay TV platform. While the remaining channels, namely VM3, VM4, Challenge, Sky News, Radio Maria, and UCB Ireland do not operate under FTA obligations, their response to a SSNIP is unlikely to warrant the inclusion of any pay TV platforms in the Market B product market.

4.90 In this regard, evidence shows that insufficient effective prior substitution has taken place between pay TV platforms and DTT Multiplexing Services. This is reflected in the relatively stable household penetration rates for both pay TV

²⁰² For the avoidance of doubt, the Relevant Access Seeker Channels include VM1, VM2, VM3, VM4, Challenge, Sky News, Tithe an Oireachtas, Radio Maria and UCB Ireland.

²⁰³ The retail prices associated with the purchase of these services are outlined in Table 5, Table 7, Table 8, and Table 9.

²⁰⁴ Of the relevant Access Seeker channels outlined in Table 15, VM1, VM2 and Tithe an Oireachtas have an obligation to be broadcast on an FTA basis.

²⁰⁵ Pursuant to the 2009 Act.

services and for FTA DTT since the 2021 Decision.²⁰⁶ There is, however, a prevalence of multihoming whereby TV channels are carried on multiple TV platforms at the same time. In practice, this means that in response to a SSNIP, an Access Seeker could remove their channel from the DTT platform, but, in most cases, Access Seekers cannot ‘switch’ to an alternative platform, given they are already present.

- 4.91 Table 16 below outlines the channels which are not subject to FTA licensing conditions or statutory requirements, and their availability across different pay TV platforms. Challenge, Radio Maria and UCB Ireland are the only channels which are not carried on all other pay TV platforms and therefore could, theoretically, switch to an alternative TV platform in response to a SSNIP of the focal product. These channels account for a maximum of 11% of overall purchases of DTT Multiplexing Services.²⁰⁷

Table 16: Access Seeker Availability, per TV Platform

TV Channel	DTT Multiplex	Satellite	Cable	IPTV	Other
VM3 ²⁰⁸	Saorview	Sky	VMI	Eir TV/ Vodafone TV	-
VM4	Saorview	Sky	VMI	Eir TV/ Vodafone TV	-
Sky News ²⁰⁹	Saorview	Sky	VMI	Vodafone TV	-
Challenge	Saorview	Sky	VMI	-	-
Radio Maria	Saorview	-	-	-	Internet ²¹⁰
UCB Ireland	Saorview	-	-	-	Internet

²⁰⁶ Pay TV services decreased from 62% in July 2020 to 59% in July 2024, while FTA DTT decreased from 38% in July 2020 to 36% July 2024 (Nielsen/TAM Establishment Survey Available (July 2020 and July 2024)).

²⁰⁷ Figure is calculated including RTÉ self-supply of DTT Multiplexing Services. There are a total of 27 channels carried on the DTT platform.

²⁰⁸ VMI 2024 Information Requests, as at Q1 2024.

²⁰⁹ See: [TV Guide | Sky.com](https://www.sky.com).

²¹⁰ While Radio channels may be broadcast via an IPTV platform, for example on eir TV, they may also be broadcast via the internet generally i.e. not as part of a TV bundle. Therefore, ‘Internet’ only applies to the two radio channels in this case, namely Radio Maria and UCB Ireland, as this is not the case for TV channels.

- 4.92 While it is possible for these three channels to cease purchases of DTT Multiplexing Services in favour of moving to pay TV platforms only, they are unlikely to move, and in sufficient numbers, to a particular pay TV platform to render the SSNIP by the HM supplier unprofitable. It is more likely that the benefits of being on the platform, either direct benefits from advertising revenue, or indirect benefits from simply being on as many platforms as possible, far outweigh the costs of a potential SSNIP of DTT Multiplexing Services.
- 4.93 While IPTV has almost ubiquitous coverage, it has a household penetration rate of 8%.²¹¹ Furthermore, Cable has 28% coverage²¹² but a penetration rate of only 15%.²¹³ It is unlikely, given the DTT platform has a household penetration rate of 36%²¹⁴ that Sky (on behalf of Challenge), Radio Maria and UCB Ireland, would remove their respective channels from the DTT platform and switch to IPTV or cable given the resulting loss of viewership and potential corresponding advertising revenue.²¹⁵ ComReg's view is that Sky, Radio Maria and UCB Ireland would most likely absorb the extra costs and remain present on the DTT platform rather than switch to these platforms.
- 4.94 The Sky TV platform would be the most likely alternative for Radio Maria and UCB Ireland should they wish to switch away from the DTT platform as a result of the SSNIP given its penetration rate reaches circa 36%.²¹⁶ However, given that these channels, combined, account for a total of [X [REDACTED] X] of RTÉ's revenues in Market B,²¹⁷ ComReg's view is that any potential loss of revenue can be recovered from other operators on the DTT platform.

DTH FTA Satellite

- 4.95 DTH FTA satellite is also unlikely to be an effective demand side substitute for DTT Multiplexing Services over the lifetime of this market review due to content

²¹¹ Nielsen/TAM Establishment Survey (July 2024).

²¹² VMI Cable figures for Q3 2024. In the range of 25% to 30%.

²¹³ Nielsen/TAM Establishment Survey (July 2024).

²¹⁴ *Ibid.*

²¹⁵ See paragraph 3.22.

²¹⁶ Nielsen/TAM Establishment Survey (July 2024).

²¹⁷ [X [REDACTED] X] Figures are in the range of 0% - 10%.

rights restrictions, the prevalence of multihoming, as well as the differences in household penetration rates. ComReg considers each of the Access Seekers for DTT Multiplexing Services, with respect to each of these factors, in the paragraphs below.

- 4.96 DTH FTA satellite has a coverage footprint which extends beyond the Irish market and into other European countries. ComReg notes that although UK TV programme services, among others, can be viewed in Ireland via FTA unencrypted satellite services, owing to restrictions relating to programming content rights in non-Irish jurisdictions, Irish DTT programme services such as those offered by TG4 and VMI are not carried on DTH FTA satellite, and could not be without the removal of large chunks of programming material.
- 4.97 Evidence further suggests that there has been insufficient prior substitution between DTH FTA satellite and DTT Multiplexing Services to support an argument of substitutability, however, there are instances of multihoming. Sky News and Challenge are carried on the DTT platform as well as DTH FTA satellite. Therefore, in response to a SSNIP of the focal product, Sky could only remove its channels from the DTT platform but could not *switch* its channels to DTH FTA satellite.
- 4.98 Finally, ComReg notes that Access Seekers are likely to be deterred from switching away from the DTT platform due to the popularity of FTA DTT at the retail level. Like the DTT platform, DTH FTA satellite has almost ubiquitous coverage, however, its household penetration rate is less than half of FTA DTT at 16%.²¹⁸ It is unlikely, given FTA DTT has a household penetration rate of 36%²¹⁹ that Tithe an Oireachtas, Radio Maria, and UCB Ireland²²⁰ would remove their respective channels from the DTT platform and switch to DTH FTA satellite given the resulting loss of viewership/listenership.²²¹ However, even if these channels were removed from the multiplex, in favour of the DTT platform, it is likely that RTÉ as the HM supplier of DTT Multiplexing Services could recover this loss of revenue from other broadcasters which remain on the platform.

²¹⁸ Nielsen/TAM Establishment Survey (July 2024).

²¹⁹ *Ibid.*

²²⁰ Or any other Access Seekers for DTT Multiplexing Services.

²²¹ For those channels which generate revenue through advertising, a loss of viewership would result in a corresponding loss of advertising revenue.

- 4.99 As such, ComReg is of the view that DTH FTA satellite could not sufficiently constrain RTE, as the HM provider of DTT Multiplexing Services from profitably sustaining a SSNIP of the focal product above the competitive level so as to warrant its inclusion in the product market.

Supply-Side Substitution

- 4.100 There are no clear candidate supply-side substitutes to assess in Market B.
- 4.101 ComReg must consider whether any alternative products could represent an effective supply-side substitute to the focal product. Supply-side substitution measures how potential (rather than actual) competitors would react to an increase in price. The question raised is whether, in response to a 5 – 10% increase in the price of DTT Multiplexing Services, potential suppliers could reasonably be expected to switch to supply competing DTT Multiplexing Services relatively promptly, and without incurring any significant costs or risks, such as to be credible in, and capable of, preventing this price increase from being sustained. Of note, the impact of supply-side substitution must be equivalent to the impact of demand-side substitution, in terms of effectiveness and immediacy.²²²
- 4.102 ComReg is of the view that there are no clear candidate supply-side substitutes to assess given the length of time required, as well as extensive costs to be incurred, to commence the supply of DTT Multiplexing Services using National Terrestrial BTS as a necessary input. ComReg has already assessed managed BTS delivered over cable, IPTV, Sky TV and DTH FTA satellite as part of its demand-side assessment above, and it is not necessary to reassess these products at supply-side substitution stage. Supply-side substitution occurs in the instance where a potential entrant could enter the market and render a hypothetical price increase unprofitable for the incumbent hypothetical monopolist. However, all the platforms discussed above are already used (to varying degrees) to deliver managed BTS, which removes the hypothetical nature of the potential substitution. Therefore, the potential for such platforms to act as supply side substitutes (and therefore warrant inclusion in the market) is moot.
- 4.103 A potential entrant to Market B, wishing to provide DTT Multiplexing Services, would need to avail of a multiplex licence and must submit an application to

²²² Notice on Market Definition, page 13, paragraph 32.

CnaM for consideration as part of a tendering process.²²³ However, there has been no such applications or competition for these DTT licences since 2008,²²⁴ and even in response to a hypothetical SSNIP of DTT Multiplexing Services, the time required for this process and strict terms and conditions associated with obtaining a commercial DTT multiplex licence would likely prevent credible, or timely, future supply-side substitution from occurring.

4.104 In addition to a multiplex licence, a potential entrant must acquire National Terrestrial BTS as a necessary input in order to offer DTT Multiplexing Services at an equivalent level of coverage. Bearing this in mind, there are only two credible options available to a potential entrant:

- (a) **Seek access to 2rn's National Terrestrial BTS:** In this case, assuming SMP regulation is present in Market A (under the MGA scenario) and therefore 2rn is required to grant access to prospective DTT Multiplex Operators, it would likely take a significant amount of time for a new market entrant to attract enough Retail Broadcasters to its platform to sufficiently constrain a HM supplier of DTT Multiplexing Services from sustaining a SSNIP above the competitive level.
 - (i) RTÉ, TG4, and VMI (for VM1 and VM2) are subject to 'must-carry' obligations pursuant to section 77 of the 2009 Act, therefore, contingent upon negotiations with the new DTT multiplex operator, these Retail TV Broadcasters must make themselves available for carriage on a new DTT platform. However, to entice other Retail TV Broadcasters to switch (in sufficient numbers to render a SSNIP of DTT Multiplexing Services unprofitable), to the new DTT platform, it would need a sufficiently high household penetration rate (nearing that of the current FTA DTT platform) given the two-sided nature of these markets whereby advertising revenue is linked to TV viewership.
 - (ii) ComReg's view is that the time taken to achieve this level of household penetration (currently at 36% as of July 2024) means it is unlikely that a potential entrant to the market (purchasing 2rn's National Terrestrial BTS) could enter, within a sufficiently short

²²³ In line with section 136 and 137 of the 2009 Act.

²²⁴ In 2008, the Boxer consortium was awarded a commercial DTT multiplex licence for the operation of three DTT multiplexes. However, it pulled out of the project in 2009. See: [O'Brien-backed consortium wins digital TV licence | Irish Independent](#), [Boxer consortium withdraws from digital TV deal - Comms | siliconrepublic.com - Ireland's Technology News Service](#).

period of time, and act as sufficient supply-side constraint a HM supplier of DTT Multiplexing Services.

- (b) **Build out its own terrestrial network:** In addition to the factors discussed above in point (a), which also apply in this scenario, the extensive network build required would be too costly and require too much time in order to credibly act as a supply side substitute to the focal product in Market B. This is discussed as part of the supply side substitution assessment in Market A.²²⁵

- 4.105 Taking the above into consideration, ComReg's view is that it is unlikely that new entrants could credibly enter the market to provide DTT Multiplexing Services, and with comparable coverage levels to RTÉ (sufficient to meet these broadcasters' licensing conditions and statutory requirements), without incurring significant additional costs, risks and time delays. Therefore, prompt and effective supply-side substitution is highly unlikely so as to constraint a HM supplier of DTT Multiplexing Services from sustaining a SSNIP.

Summary of overall conclusions on direct constraints

- 4.106 ComReg's view is there are no sufficient direct constraints on a HM provider of DTT Multiplexing Services in Market B.

4.3.4 Assessment of Indirect Retail Constraints

- 4.107 Aside from direct demand-side or supply-side constraints, an alternative, vertically integrated, SP's self-supply of BTS could be included as part of Market B if its presence on downstream retail markets were to exert a sufficiently strong, immediate and effective indirect constraint on a HM supplier's pricing of DTT Multiplexing Services. End user behaviour may, through demand-side substitution at the retail level, indirectly impact the ability of the HM DTT Multiplexing Services supplier to profitably sustain a SSNIP of DTT Multiplexing Services prices above the competitive level, i.e., indirect retail constraints arising from the retail market may affect wholesale price setting behaviour in Market B.
- 4.108 ComReg considers whether retail (demand-side) substitution to alternative TV platforms, in response to an increase in the price of DTT Multiplexing Services by the HM, indirectly prevents the HM from imposing a profitable SSNIP of DTT Multiplexing Services. This might occur, for example, if the HM supplier faced

²²⁵ See paragraphs 4.46 to 4.48.

a reduction in overall profitability after increasing the price of DTT Multiplexing Services due to, for example, a decrease in its number of customers. Such a fall in profitability might occur if, and to the extent that, Access Seekers bearing the DTT Multiplexing Services price increase had to reduce the quality of their programming material (due to a reduction in expenditure) as a result of an increase in their costs. This in turn could result in their retail customers switching away, in sufficient numbers, to alternative TV platforms. To constrain a hypothetical monopolist in Market B, this shift in end user demand would need to result in Access Seekers ceasing the broadcast of their TV or radio channels using DTT Multiplexing Services inputs and moving in sufficient numbers to an alternative TV platform to render the HM supplier's price increase unprofitable.

- 4.109 ComReg considers it unlikely that this would occur in a sufficient capacity so as to act as an effective indirect constraint. In sub-section 3.3.2, ComReg found that retail TV broadcast services provided over cable, Sky TV, IPTV and DTH FWA satellite fell outside of the retail TV broadcast product market. Taking account of this, ComReg is of the view that such services are unlikely to exert a sufficiently effective indirect retail constraint on DTT Multiplexing Services, given the clear lack of effective demand-side substitution at the retail level.

4.3.5 Overall conclusions on Relevant Market B Product Markets

- 4.110 Having concluded its product market assessment, ComReg defines Market B as consisting solely of DTT Multiplexing Services (**'Market B Product Market'**).
- 4.111 ComReg now considers the scope of Market B's geographic market(s).

4.3.6 Geographic Assessment of Market B

Introduction

- 4.112 In this section, ComReg considers the geographic scope of Market B Product Market, as defined in paragraph 4.110. In doing so, ComReg follows the approach adopted by the EC in the 2020 Recommendation and the SMP Guidelines (described in paragraphs 4.56 to 4.58 above).
- 4.113 ComReg assesses the geographic scope of Market B, having regard to the factors outlined in paragraph 4.60. These factors are collectively considered in paragraphs 4.116 and 4.120 below.

- 4.114 ComReg applies the MGA²²⁶ in assessing the geographic scope of Market B Product Market. This assumes a hypothetical scenario in which there is no *ex ante* SMP regulation in the candidate Market B, or related downstream markets, however, it does assume the presence of regulation upstream, in Market A. Furthermore, ComReg must take account of other legislation or regulation pertaining to the wholesale BTS markets, such as the 2009 Act and operator licensing conditions.
- 4.115 Having carried out its geographic assessment at paragraphs 4.116 and 4.120 below, ComReg defines Market B as being national in geographic scope.

Geographic Market Assessment

- 4.116 ComReg considers the competitive conditions across the State to be sufficiently homogenous to warrant the delineation of a national geographic market.
- 4.117 RTÉ is the only provider of DTT Multiplexing Services in the State and is mandated under section 114(1)(i) of the 2009 Act “*to establish, maintain, and operate one or more national multiplexes*” to facilitate the provision of nationally available FTA DTT. As the only provider of DTT Multiplexing Services, RTÉ has 100% market share.
- 4.118 ComReg notes that Access Seekers in Market B, purchase access to the DTT platform for the provision of nationally available FTA DTT. While some Access Seekers purchase this service based on commercial incentives, other Access Seekers, such as TG4 (for TG4, TG4 +1 and Cúla4), Tithe an Oireachtas and VMI (for VM1 and VM2), have statutory obligations and/or licensing conditions requiring them to have national level coverage, meaning that there are no discernible differences in demand characteristics across the State.
- 4.119 ComReg also notes that pricing for DTT Multiplexing Services does not vary by geography, rather pricing for DTT Multiplexing Services varies by the capacity consumed on the DTT platform.
- 4.120 Considering the above factors, ComReg’s view is that conditions of competition are sufficiently homogenous across the State to warrant defining Market B as being national in geographic scope.

²²⁶ Described in paragraphs 2.16 and 2.17.

4.3.7 Overall Conclusion on Market Definition for Market B

- 4.121 Having regard to the assessment in paragraphs 4.116 and 4.120 above, ComReg defines a national market for wholesale access to DTT Multiplexing Services (referred to as **Market B**).
- 4.122 This is a wholesale market, downstream of Market A, for the supply of a managed digital multiplexing service by a DTT Multiplex Operator, using wholesale inputs from Market A to Retail TV Broadcasters.
- 4.123 ComReg notes that Market A, as defined in paragraph 4.66, and Market B, as defined in paragraph 4.121 are collectively referred to as the **Relevant BTS Markets**.

Q. 3. Do you agree with ComReg's product and geographic market assessment for Market A? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 4. Do you agree with ComReg's product and geographic market assessment for Market B? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

5 Market A Competition Analysis - 3CT and SMP Assessment

5.1 Overview

- 5.1 The 2020 Recommendation does not include BTS on its list of markets deemed susceptible to *ex ante* regulation. Accordingly, at EU level, there is no presumption in favour of continuing to regulate these markets. Prior to any intervention, ComReg must therefore determine whether, at national level, the Relevant BTS Markets are susceptible to *ex ante* regulation, that is, they meet the 3CT as set out in Regulation 49(3) of the ECC Regulations.
- 5.2 Under the 3CT, a relevant market not identified in the 2020 Recommendation can be considered susceptible to *ex ante* regulation where each of the following three criteria are cumulatively met:
- (a) The presence of high and non-transitory barriers to entry;
 - (b) A market structure which does not tend towards effective competition within the relevant time horizon; and
 - (c) The insufficiency of competition law alone to adequately address the market failure(s) concerned.
- 5.3 If the 3CT is passed, that is to say, all three criteria are cumulatively satisfied, a competition assessment ('**SMP Assessment**') is then carried out to determine whether that market is characterised by the presence of any SP(s) having SMP.
- 5.4 If, on the other hand, at least one of the 3CT criteria fails, *ex ante* regulation is not justified and is no longer required. In such instances, the market in question should be deregulated (if currently regulated).
- 5.5 ComReg carries out its competition analysis²²⁷ in line with the MGA.²²⁸

²²⁷ The competition analysis in the case of the Relevant BTS Markets consist of a 3CT and SMP Assessment.

²²⁸ Described in paragraphs 2.16 to 2.17 above.

5.2 3CT for Market A

5.2.1 Criterion 1: High and non-transitory barriers to entry

Introduction

5.6 ComReg examines the nature and extent of any barriers to firms entering Market A. The Explanatory Note to the 2020 Recommendation identifies that high and non-transitory barriers to entry may be either structural, or legal and regulatory in nature:

- (a) **Structural barriers to entry** arise where technology or network characteristics create asymmetric conditions between SPs which raise barriers to entry. Examples in Market A include the control of infrastructure not easily replicated, high sunk costs, vertical integration, the presence of absolute cost advantages, substantial economies of scale or scope etc.;²²⁹
- (b) **Legal and regulatory barriers** to entry, unlike structural barriers to entry, are derived not from economic conditions, but rather from legislative, administrative or other state measures which have a direct impact on a firm's ability to enter a new market. In Market A, this could include, for example, legal requirements related to the rollout of physical infrastructure such as planning permission, permission for civil works, or the need to obtain rights of way to roll out a network over private property.²³⁰

Structural barriers to entry

5.7 2rn is the only operator of a terrestrial BTS network in the State capable of providing National Terrestrial BTS and therefore retains 100% market share in Market A.²³¹ This position has remained unchanged over time, including since the 2013 Decision.

5.8 2rn's ownership of a such substantial network infrastructure, and the cost and time period involved in potential new entrants replicating this network, poses a significant barrier to entry to Market A. The proportion of expenditure on, for example, the construction of broadcast transmission infrastructure, including

²²⁹ Explanatory Note to the 2020 Recommended Markets, p.61.

²³⁰ 2020 Explanatory Note, page 12.

²³¹ Table 13 above shows the number of transmission sites owned by 2rn which are used to provide National Terrestrial BTS.

towers, masts, and on-site buildings to house broadcast transmission equipment, is likely to be high and substantially sunk if the enterprise were to fail. ComReg notes that the net book value of 2rn Market A infrastructure is currently stands at circa €35 million.²³²

- 5.9 While potential entrants could endeavour to self-supply National Terrestrial BTS (thereby avoiding the costs associated with the construction of an entirely new network), through the possible use of a dense network of existing lower towers/masts,²³³ using such network sites would still likely lead to high costs associated with the need to establish a greater number of sites due to their lower height and, resulting, lower level of coverage. In this respect, a number of 2rn's sites are strategically located and, along with their height, are designed to achieve high coverage levels, with such outcomes not likely to be easily replicated through the use of other commercial mast/tower access.²³⁴ Moreover, signing commercial agreements with multiple site owners (to the extent that this may be possible) to create a national footprint is also considered to be very difficult operationally and would raise transaction costs for the new entrant.²³⁵ In ComReg's view, it is unlikely such an approach would be technically, or commercially, feasible in terms of enabling a new entrant to replicate 2rn's overall coverage levels within a reasonable timeframe - if at all. Furthermore, regardless of the means in which a new entrant might opt to deliver National Terrestrial BTS (and whether this may be even possible), the vertically integrated nature of 2rn, as well as its existing terrestrial BTS network, would undermine the business case for such investment in the first place.
- 5.10 Upon entry to the market, a new entrant which would need to recoup a greater level of return given the higher investment (relative to 2rn) required to commence supply of National Terrestrial BTS, however, the presence of RTÉ at multiple levels of the broadcast distribution chain (through 2rn in Market A, RTÉ in Market B and RTÉ in the Relevant Retail TV Broadcast Market and the Relevant Radio Broadcast Market) means the number of Access Seekers available to the potential entrant in Market A to recoup those costs is more limited. As of September 2024, there is only one independent Access Seeker

²³² RTÉ Transmission Network DAC (T/A 2rn), Regulated Accounts, Market A, for year ended 31 December 2023, Page 8. Available at: [SKM 2024062512210 \(2rn.ie\)](https://www.skm.ie/SKM2024062512210/2rn.ie).

²³³ For example, a potential entrant could seek to arrange access to individual towers and sites such as those utilised by mobile operators and or local/regional radio stations.

²³⁴ See Table 13 and Figure 6 for detail on 2rn transmission sites.

²³⁵ Including on the basis that there would be lower economies of scale.

purchasing National Terrestrial BTS, namely BMAI. The only other purchaser is 2rn's own downstream arm, RTÉ, for which it self-supplies National Terrestrial BTS for the provision of National Terrestrial Radio and DTT Multiplexing Services. Absent regulation, it is unlikely to be of commercial interest for RTÉ to cease the self-supply of National Terrestrial BTS on its own network, in favour of a new National Terrestrial BTS provider, to provide these services. Therefore, even if BMAI were capable, and willing, to switch to a potential new market entrant, the new entrant is unlikely to win enough customers and, therefore, generate enough revenue to support or, indeed, justify market entry that would recoup its costs.

- 5.11 Finally, ComReg notes that 2rn's terrestrial BTS network is designed to accommodate both radio and television equipment on its mast/tower structures (as well as use by mobile operators) enabling it to spread its investment for these services over the same network. Given the structural barriers to entry already identified, ComReg considers that it would be difficult for a new entrant to exploit the same economies of scope in this market. And would thus face a higher effective cost structure.

Legal and regulatory barriers to entry

- 5.12 A terrestrial BTS network is typically designed to provide the maximum possible coverage of the target population, with a minimum number of broadcast transmission sites. These sites are optimised to minimise interference of frequencies used for broadcasting services, and to prevent overspill into other jurisdictions. Given the propagation characteristics of the spectrum used for broadcasting, site location is important in terms of the height required for national-level broadcasting. 2rn has high powered, high masts located in important key, high-altitude sites around the country which enable large coverage areas of Ireland to be reached. 2rn owns many of the sites from which it operates while others are held by lease or licence. To build a terrestrial BTS network such as this, with equivalent characteristics to 2rn, specific access rights and planning permissions are required for suitable high-altitude sites which can yield the greatest level of coverage. ComReg's view is that achieving this would prove extremely arduous, with a high risk of planning rejection for a potential new entrant. Furthermore, the timeframe and technological expertise required to build an alternative network would likely make it uneconomical to compete with an established operator such as 2rn.
- 5.13 In response to the 2024 Information Request, stakeholders (including RTÉ, 2rn, BMAI, TG4 and VMI) each noted that absent regulation in Market A, the market would be characterised by high and non-transitory barriers to entry.

RTÉ and 2rn each noted, specifically, that securing the planning permissions required to build mast and support infrastructure on mountain top sites would prove exceptionally difficult, specifically in those mountain top areas where they have already been identified as areas of conservation, or areas of outstanding natural beauty.²³⁶ Even if the relevant permissions and access requests were granted, RTÉ suggested that the length of time required to successfully complete an infrastructure build program such as this, in advance of services actually commencing, would act as a significant barrier to entry to Market A. These projects require multi-year programs which can only commence following successful land purchase/access, planning permission approvals and the necessary frequency licenses are confirmed.

Conclusion on barriers to entry

- 5.14 Taking account of the relevant structural, and legal and regulatory barriers assessed above, ComReg's view is that Market A is characterised by high and non-transitory barriers to entry. Therefore, in respect of Market A, the first criterion has passed.
- 5.15 All three 3CT criteria must pass in order for the presumption in favour of *ex ante* regulation to be retained. The assessment now proceeds to the second and third criteria.

5.2.2 Criterion 2: Is the market tending towards effective competition within the relevant time horizon?

- 5.16 The second criterion to be assessed is whether Market A is likely to tend towards effective competition over the lifetime of this market review. By definition, it is necessary to carry out the assessment of the second criterion on a dynamic and forward-looking basis.
- 5.17 ComReg's view is that Market A is unlikely to tend towards effective competition over the lifetime of this market review. Market A is characterised by a single provider of National Terrestrial BTS, 2rn, with 100% market share. This has remained unchanged over time, including since the publication of the 2013 Decision.
- 5.18 ComReg considers that there is unlikely to be future entry in Market A over the relevant time horizon, having regard to the clear structural, and legal and

²³⁶ Planning and Development Act, 2000. Available at: [Planning and Development Act, 2000 \(irishstatutebook.ie\)](http://irishstatutebook.ie).

regulatory barriers assessed above, as well as the limited number of potential Access Seekers available to support new entry.

- 5.19 ComReg notes that the majority of National Terrestrial BTS is currently self-supplied to RTÉ for the provision of National Terrestrial Radio and DTT Multiplexing Services. BMAI is the only independent Access Seeker of 2rn in Market A, using National Terrestrial BTS for the purposes of delivering national/quasi-national Terrestrial Radio. ComReg notes that there are limited radio and multiplex licences available, and broadcasters/multiplexing operators must apply to CnaM for these licences, which are then distributed based on strict conditions set out by CnaM.²³⁷ Evidence available to ComReg suggests that there are no further available Sound Broadcasting Contracts for the provision of National Terrestrial Radio (due to limitations associated with the required radio spectrum), outside of those currently owned and utilised. For this reason, ComReg's view is that a potential network operator is unlikely to enter Market A for the provision of National Terrestrial BTS due to the finite number of potential customers, making it unlikely they would succeed in recovering their investment.
- 5.20 In response to the 2024 Information Request, four of the five stakeholders surveyed, namely BMAI, VMI, RTÉ and TG4 each suggested that, in light of high and non-transitory barriers to entry,²³⁸ Market A would not tend towards effective competition over time. 2rn, however, disagreed with this supposition and suggested that while the market is characterised by high and non-transitory barriers to entry, and competition law would be unlikely to suffice to deal with market failures,²³⁹ there is no evidence to suggest that the market would not tend towards effective competition. 2rn, however, did not provide any further reasoning to support this statement.
- 5.21 Having considered the available evidence, ComReg's view is that Market A will not tend towards effective competition within this five-year market review period, including based on observable trends and the lack of entry to date. ComReg is therefore of the view that the second 3CT criterion is met.

²³⁷ See paragraph 4.77.

²³⁸ Discussed in sub-section 5.2.1 above.

²³⁹ Discussed in sub-section 5.2.3 below.

5.2.3 Criterion 3: The insufficiency of competition law alone to adequately address the market failure(s) concerned

- 5.22 *Ex ante* regulation should only be imposed where competition law remedies are likely to be insufficient to address identified competition problems. The third criterion therefore assesses the sufficiency of competition law by itself to deal with any market failures identified in the market analysis, in the absence of *ex ante* regulation.
- 5.23 In this respect, *ex ante* regulation should only apply in markets where an NRA is satisfied on the basis of its analysis, and the evidence available to it, that national and EU competition law are unlikely to be sufficient to redress market failures where they arise, and to ensure effective and sustainable competition.
- 5.24 *Ex ante* regulation may, in general, be more appropriate to markets which, due to underlying structural characteristics (such as, for example, the presence of natural monopoly), are deemed more likely to exhibit ongoing competition problems which would, ultimately, lead to persistent harm to end users which the market would be unlikely to remedy, due to the absence of the self-correcting mechanisms which are normally present in competitive markets, and which typically discipline efforts by firms present on a market to exercise market power. Accordingly, regulation may be appropriate where it can be predicted, with a high level of probability, that competition problems are likely to occur.
- 5.25 In contrast, *ex post* competition law may be more appropriate to markets which are not structurally prone to competition problems. In such markets, competition may be generally presumed to be working well, due to the presence of sufficient competitive constraints which are capable of disciplining market participants, to the ultimate benefit of end users. Competition law may be a more appropriate means of assuring competitive outcomes in such markets, on the assumption that anti-competitive conduct is likely to be the exception, rather than the rule. In such cases, it may not be reasonable to impose an ongoing burden of compliance with regulatory obligations on a firm or firms designated with SMP, and it may be preferable instead to rely on the protections afforded by *ex post* competition law.
- 5.26 Competition law requires the commission and detection of an anti-competitive act. A National Competition Authority ('NCA'), or NRA, must then assess the allegedly anti-competitive act to determine whether it likely breaches the Competition Act 2002, or Articles 101 or 102 of the Treaty on the Functioning of the European Union ('TFEU'). In order to apply effective sanctions, an NCA

or NRA may then need to initiate court proceedings, which may or may not be successful. This is a lengthy process which would likely be less effective in deterring and preventing anti-competitive conduct in the short to medium term in markets which are structurally prone to anticompetitive conduct.

- 5.27 Accordingly, ComReg is of the view that competition law is unlikely to be sufficient to adequately address market failures on Market A. This view is mirrored by industry stakeholders (namely RTÉ, 2rn, VMI, BMAI and TG4) which, in response to the 2024 Information Request, agreed that competition law was insufficient to address any potential competition problems in Market A, which is structurally prone to competition problems.
- 5.28 Market A is characterised by a natural monopoly, with only one operator retaining 100% market share, and is unlikely to tend towards effective competition over time. *Ex post* intervention would not be sufficient to deter and prevent anti-competitive conduct in a market such as this in the short to medium term and would not provide the necessary regulatory certainty for SPs for investment and entry in downstream markets. On that basis, ComReg's view is that the third 3CT criterion is met.

5.2.4 Overall Conclusion on 3CT for Market A

- 5.29 Having regard to the above analysis ComReg's view is that Market A satisfies the 3CT. ComReg is therefore required to carry out a competition assessment to determine whether any SP, or SPs, hold positions of SMP.

5.3 Framework for Assessing SMP

- 5.30 Having defined Market A and concluding that it passes the 3CT, ComReg must establish whether the market is effectively competitive, namely, whether the SP operating within it has SMP. Where an SP has SMP, the market is considered not to be effectively competitive and regulatory intervention is required.
- 5.31 Regulation 45(1) of the ECC Regulations defines an undertaking as having SMP where it:

“... (whether individually or jointly with others) enjoys a position which is equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.”

- 5.32 The ECC Regulations and the SMP Guidelines therefore align the concept of SMP with the competition law definition of dominance advanced by the Court of Justice of the European Union in *United Brands v. Commission*:²⁴⁰

“The dominant position referred to [by Article 102 of the Treaty on the Functioning of the European Union] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its end users.”

- 5.33 The European Commission’s SMP Guidelines, of which ComReg is required to take utmost account, describe a range of criteria that may be considered by NRAs when seeking to establish whether an undertaking(s) has SMP in a relevant market.

- 5.34 The SMP Guidelines state that:

*“According to established case-law, very large market share held by an undertaking for some time — in excess of 50 % — is in itself, save in exceptional circumstances, evidence of the existence of a dominant position. Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of SMP.”*²⁴¹

- 5.35 Market shares in excess of 50% therefore give rise to a strong presumption of SMP. However, the SMP Guidelines also state that the existence of a high market share alone is not sufficient to establish the existence of SMP, rather it means that the undertaking concerned may be in a dominant position and this needs to be considered alongside other potentially relevant criteria for assessing the existence of SMP, such as:

- (a) Overall size of the undertaking;
- (b) Control of infrastructure not easily duplicated;
- (c) Technological advantages or superiority;
- (d) Absence of, or low, countervailing buyer power;
- (e) Easy or privileged access to capital markets or financial resources;

²⁴⁰ Case 27/76 *United Brands v European Commission* [1978] ECR 207, Paragraph 65. See also paragraph 52 of the 2018 SMP Guidelines.

²⁴¹ Paragraph 55 of the SMP Guidelines.

- (f) Product/services diversification (e.g. bundled products or services);
- (g) Economies of scale;
- (h) Economies of scope;
- (i) Vertical integration;
- (j) A highly developed distribution and sales network;
- (k) Absence of potential competition; and
- (l) Barriers to entry and expansion.

5.36 The relative importance of each factor may vary from one analysis to another as the characteristics or dynamics of the market under assessment change. Consequently, flexibility is needed in applying the above criteria. In addition, many of the above factors, while presented separately, may, in fact, be interrelated and all available evidence is considered by ComReg collectively before a determination on SMP is made. The SMP Guidelines note that:²⁴²

“...If taken separately, the above criteria may not necessarily be determinative of a finding of SMP. Such finding must be based on a combination of factors.”

5.4 Assessment of SMP in Market A

- 5.37 In assessing whether an undertaking has SMP in Market A, ComReg carries out a forward-looking analysis, on the basis of existing and likely future market conditions and considers the range of factors identified above that are of most relevance to the market being examined.
- 5.38 ComReg considers the following criteria to be most relevant to the assessment of SMP in Market A:
- (a) Overall size of the undertaking;
 - (b) Control of infrastructure not easily duplicated;
 - (c) Absence of, or low, countervailing buyer power (**‘CBP’**);
 - (d) Economies of scale and scope;
 - (e) Vertical integration;
 - (f) Absence of potential competition; and

²⁴² Paragraph 58 of the SMP Guidelines.

(g) Barriers to entry and expansion.

5.39 Each of these factors are considered below for Market A. Given the inherent degree of overlap, ComReg combines its assessment of these factors under the following three broad headings:

- (a) **Existing competition:** factors such as the overall size of the undertaking, market shares, and relative strength of existing competitors;
- (b) **Potential competition:** factors such as barriers to entry and expansion. Under this hypernym, ComReg considers factors such as the control of infrastructure not easily duplicated, vertical integration, economies of scale/scope, and the overall strength of potential competitors; and
- (c) **Strength of any CBP:** an assessment of the impact posed by any strong buyers in the Relevant BTS Markets.

5.40 Other factors in addition to those set out at paragraph 5.38 above which could be used to assess the presence of SMP have been considered of less (or no) relevance for the purposes of the SMP Assessment in Market A are discussed in Annex 5 of this Consultation.

5.41 ComReg notes that the analysis in the following sub-sections relies heavily on the assessment already carried out by ComReg as part of the 3CT for Market A.

5.4.1 Existing Competition in Market A

5.42 2rn is the sole provider of National Terrestrial BTS in the State, operating from a network of strategically located transmission sites around Ireland.²⁴³

5.43 2rn's largest customer in Market A is its own downstream arm, RTÉ, which purchases National Terrestrial BTS for the provision of National Terrestrial Radio and DTT Multiplexing Services (and, ultimately, FTA DTT). BMAI is the only independent Access Seeker of 2rn in Market A, using National Terrestrial BTS for the purposes of delivering national/quasi-national Terrestrial Radio. As 2rn is the only operator of a terrestrial BTS network in the State capable of providing these services, any potential new entrant to downstream markets, namely Market B or the Relevant Retail Radio Market, must purchase National Terrestrial BTS from 2rn. On that basis, 2rn currently has (and is likely to

²⁴³ Discussed in sub-section 4.3.2.

continue to have) 100% market share for the supply of Market A services, a position which has remained unchanged over time.

5.4.2 Potential Competition in Market A

- 5.44 Noting the absence of an effective competitive constraint posed by existing competition in Market A, ComReg assesses the likely effectiveness of any constraints stemming from potential competition in those markets. This assessment considers whether entry (and expansion) in Market A is likely, timely, and credible, to such an extent that it would effectively constrain 2rn's ability to act independently of its competitors, customers and consumers over the medium term.²⁴⁴
- 5.45 In considering constraints posed by potential competition, ComReg considers the presence of barriers to entry and expansion, insofar as they may impact upon the effectiveness of the constraints posed by potential competitors. Having done so, ComReg determines the strength of such potential competition, having regard to identified barriers to entry and expansion.

Barriers to entry and expansion

- 5.46 The assessment of barriers to entry and expansion in the context of potential competition in Market A is, analytically, the same as the discussion at sub-section 5.2.1 above in respect of Criterion 1 of the 3CT – whether the market is characterised by high and non-transitory barriers to entry. This sub-section already considers barriers to entry to Market A in the context of control of infrastructure not easily replicated, high sunk costs, vertical integration, the presence of absolute cost advantages, and economies of scale/scope etc. Accordingly, rather than repeating this analysis, ComReg notes instead that the assessment of Criterion 1 of the 3CT suggests that Market A is characterised by the presence of high and non-transitory barriers to entry which, in the context of the present SMP assessment, are likely to sufficiently inhibit the emergence of effective potential competition within the timeframe of this market review. This is further discussed in section 5.2.2 above, whereby, in the context of the 3CT, ComReg has set out its position that Market A is not likely to tend towards effective competition within the market review period.

²⁴⁴ See paragraph 74 of the SMP Guidelines.

Conclusion on Potential Competition in Market A

- 5.47 Having regard to the above assessment, ComReg's view is that absent regulation, it is unlikely that 2rn would be sufficiently constrained by potential competition in Market A, such that it would prevent 2rn from behaving to an appreciable extent, independently of competitors, customers and end users.

5.4.3 Countervailing Buyer Power

- 5.48 ComReg considers whether bargaining power on the buyer side of Market A is likely to impose a sufficiently effective competitive constraint on 2rn, such that it would credibly offset 2rn's notional power to behave, to an appreciable extent, independently of competitors, customers and ultimately consumers.
- 5.49 In so doing, ComReg examines whether sufficient CBP exists such that it prevents 2rn from sustaining National Terrestrial BTS prices above the competitive level, i.e., the effective exercise of CBP is one which results in such National Terrestrial BTS prices being constrained to the levels that would be achieved in a competitive market outcome.

Overview of Framework for CBP Assessment

- 5.50 The effectiveness of CBP is likely to be highly contingent on the strength of the bargaining power of the purchaser in its National Terrestrial BTS negotiations. The EC's 2009 enforcement priorities in applying Article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings²⁴⁵ (the '**2009 Enforcement Priorities**') are informative on the issue of CBP in competition assessments. These state that:

"Competitive constraints may be exerted not only by actual or potential competitors but also by customers. Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength. Such countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices. Buyer power may not, however, be considered a sufficiently effective

²⁴⁵ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF>.

constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking.”²⁴⁶

5.51 In its Horizontal Mergers Guidelines,²⁴⁷ the EC also notes that:

“Countervailing buyer power should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers.”

5.52 Accordingly, effective CBP results from customers being of sufficient size or importance to the seller and having the ability to credibly switch to alternative sources of supply, such that it deters the seller from profitably increasing its prices. Effective CBP therefore arises where buyers:

- (a) Account for a significant proportion of the supplier's total output;
- (b) Are well-informed about credible alternative sources of supply; and
- (c) Can switch to other suppliers at little cost to themselves, or to self-supply the relevant product relatively quickly and without incurring substantial sunk costs.

5.53 The above factors are collectively considered below.

CBP Assessment in Market A

5.54 CBP is not sufficient in Market A to prevent 2rn from behaving to an appreciable extent, independently of competitors, Access Seekers and end users.

5.55 2rn is the sole provider of National Terrestrial BTS in the State, with only two Market A customers, namely RTÉ and BMAI. BMAI is the only independent purchaser of National Terrestrial BTS and therefore is the only Access Seeker which could, or would, plausibly seek to exert CPB over 2rn to discipline its price setting behaviour.²⁴⁸ However, in ComReg's view, effective CBP is unlikely due to BMAI's size, its relative importance to 2rn, and the lack of credible alternative suppliers of National Terrestrial BTS.

²⁴⁶ Paragraph 18 of the 2009 Enforcement Priorities.

²⁴⁷ European Commissions “Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings”, [Official Journal C 31, 05.02.2004](#), para 64, (the ‘Horizontal Mergers Guidelines’).

²⁴⁸ As RTÉ is a wholly owned subsidiary of 2rn, ComReg considers solely whether BMAI, as the only independent Access Seeker in Market A, could effectively exercise CBP, as ComReg's position is that it would be illogical to assume that RTÉ would discipline the price setting behaviour of its subsidiary through means of CBP.

- 5.56 As the sole provider of National Terrestrial BTS in Market A, and given it is unlikely to be technically, or commercially, feasible for BMAI, or any alternative SP, to self-supply National Terrestrial BTS,²⁴⁹ BMAI must negotiate with 2rn to gain access to its terrestrial BTS network in order to fulfil its licensing obligations for its two national/quasi-national terrestrial radio stations, namely Today FM and Newstalk.²⁵⁰ Moreover, ComReg's view is that, absent regulation, BMAI would have minimal leverage in these negotiations given its share of purchases for National Terrestrial BTS is far exceeded by 2rn's own downstream arm, RTÉ.
- 5.57 As the only Multiplex Operator in Market B, RTÉ accounts for 100% of purchases by a Multiplex Operator, and circa 78%²⁵¹ of purchases for the provision of National Terrestrial Radio, operating seven of the nine national/quasi-National Terrestrial Radio stations in the State. In comparison, BMAI operates the remaining two radio stations, accounting for the remaining 22% of purchases, and only [~~]~~²⁵² of 2rn's overall revenue in Market A. Therefore, while BMAI could seek to discipline 2rn's price setting behaviour in Market A by threatening to cease transmission of its National Terrestrial Radio stations altogether, 2rn could likely recover any lost revenue via RTÉ through the additional advertising gained,²⁵³ as well as the pass through of costs to Access Seekers in Market B.
- 5.58 On that basis, ComReg's view is that buyers are incapable of credibly exerting a significant constraint on the price, or other terms and conditions of supply, offered by 2rn.

²⁴⁹ See paragraph 5.9.

²⁵⁰ Today FM and Newstalk must operate on an FTA basis and have national/ quasi-national level coverage.

²⁵¹ Calculated using number of RTÉ National Terrestrial Radio Stations as a percentage of the total number of national/quasi-national radio stations. Taken from 2rn regulated accounts.

²⁵² This figure represents the percentage of 2rn's overall Market A revenue, including sales of National Terrestrial BTS used for national/quasi-National Terrestrial Radio, as well as DTT multiplexing services, attributed to BMAI. This figure is in the range of 0% to 10% of overall revenue.

²⁵³ As discussed in sub-section 3.2.4, both the retail TV and radio broadcast markets are two-sided markets whereby TV channels and radio stations provide a platform through which advertisers and consumers are brought together through means of commercial breaks. The two-sided nature of these markets is such that the reach, coverage and viewership/listenership of a Retail Broadcaster's programme services impact the level of advertising revenue they receive, with higher viewership/listenership associated with higher advertising revenue.

Conclusion on CBP Assessment

- 5.59 Having regard to the analysis above, ComReg's view is that CBP is not sufficient to prevent 2rn from behaving to an appreciable extent, independently of competitors, customers and consumers

5.4.4 Conclusions and Designation of 2rn in respect of SMP Market A

- 5.60 ComReg's view is that Market A is not effectively competitive, and that 2rn would not be sufficiently constrained from behaving to an appreciable extent, independently of customers and end users, on that market.
- 5.61 Where ComReg determines, as a result of its market analysis, carried out in accordance with Regulation 49 of the ECC Regulations, that a given market identified in accordance with Regulation 46 of the ECC Regulations is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 49(8) of the ECC Regulations as having significant market power.
- 5.62 Having regard to the conclusions of the above market analysis, ComReg is of the view that 2rn should be designated as having SMP in Market A.

Q. 5. Do you agree with ComReg's 3CT and assessment of SMP on Market A? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

6 Market A Competition Problems and Impacts

6.1 Overview

- 6.1 In this Section, ComReg identifies competition problems which, absent regulation,²⁵⁴ could potentially arise in Market A and related downstream markets, noting that ComReg has designated 2m with SMP in Market A, the market for wholesale access to National Terrestrial BTS. ComReg then considers the imposition of appropriate remedies in Market A in Section 7 in order to address the competition problems identified.
- 6.2 ComReg notes that it is necessary neither to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuses in Market A and its impact on related downstream markets, rather the purpose of *ex ante* regulation is to prevent the possibility of abuses from materialising.
- 6.3 In accordance with Regulation 49(8) of the ECC Regulations, where an undertaking is designated as having a position of SMP in a relevant market, ComReg is required to impose on that undertaking each of the remedies (or obligations) set out in Regulations 51 to 56 of the ECC Regulations as it considers appropriate to address identified competition problems.
- 6.4 ComReg has identified two categories of competition problems which 2m, as the SP with SMP (**SMP SP**), has the ability and incentive to engage in, ultimately to the detriment of competition, customers and, ultimately, end users.
- (a) **Exploitative Practices:** where an SMP SP engages in exploitative behaviours, such as excessive pricing or practices leading to inefficiency and/or inertia, to the detriment of competition, Access Seekers and end users; and

²⁵⁴ National Terrestrial BTS and DTT Multiplexing Services have, to date, been provided by 2m, and RTÉ respectively, pursuant to the regulatory obligations imposed under the 2021 Decision. The assessment carried out in this Section applies the MGA to determine what competition problems could potentially arise, assuming that such regulatory (SMP) obligations were not in place in Market A and Market B.

- (b) **Leveraging:** where a vertically integrated SMP SP in one market leverages its SMP in order to exert undue influence in other adjacent markets, either at the same level (horizontal), or at a different level (vertical) in the distribution chain.

6.2 Exploitative Practices

- 6.5 Economic theory suggests that, where a firm possesses market power, it is in a position to increase prices above, and/or reduce output below, competitive levels, thereby enabling the accumulation of higher-than-normal profits. These higher profits effectively create a wealth transfer from the end user, or other market participants, to the firm with SMP. It is ComReg's view that 2rn, as the SMP SP in Market A, and given its control over infrastructure not easily duplicated and presence in a number of adjacent markets, has the ability and incentive to engage in exploitative practices, such as excessive pricing and some degree of inefficiency or inertia, to the detriment of Access Seekers and, ultimately, end users.

6.2.1 Excessive Pricing

- 6.6 Excessive pricing refers to a situation where the prices charged by an SMP SP for a product or service are not closely related to its value to the end user, and/or the cost of producing, or providing, that service.²⁵⁵ Concerns about excessive pricing arise where, absent regulation, price levels are likely to be persistently high with no effective pressure (e.g. from new entry or innovation) to bring them down to competitive levels over the period of the review.
- 6.7 2rn is the sole operator in Market A, with 100% market share. The market is characterised by an absence of effective competition, high and non-transitory barriers to entry (associated with high sunk costs and control over infrastructure not easily replicated), limited scope for potential competition, and insufficient CBP.²⁵⁶ These factors, and the absence of any likely entrant, means this market structure will likely persist over the lifetime of the market review. Thus, there is insufficient pressure to constrain 2rn's behaviour, including its ability and incentive to engage in excessive pricing in Market A.²⁵⁷

²⁵⁵ Case C 27/76 United Brands v. Commission, [1978] ECR 207, [1978] 1 CMLR 429, para. 250. In United Brands the Court of Justice of the European Union held that: "...charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be... an abuse".

²⁵⁶ As discussed in sub-section 5.2.1.

²⁵⁷ 2rn's prices are currently regulated under the 2021 Decision.

- 6.8 2rn, a subsidiary of RTÉ, is a vertically integrated organisation. Market A Access Seekers include RTÉ²⁵⁸ and BMAI, meaning RTÉ competes with BMAI in the downstream Relevant Retail Radio Broadcast Markets. Given 2rn's vertical relationship with RTÉ, excessive prices charged for Market A inputs would likely manifest as an internal price transfer within RTÉ but constitute a rising cost pressure for BMAI. BMAI could opt to pass this price increase on to its end users in order to recover their costs (for example, through a decrease in quality by reducing its budget for content creation), however, this could lead to a decrease in listenership and, ultimately, a decrease in advertising revenue for BMAI. Therefore, this type of behaviour could ultimately harm competition in the downstream Relevant Retail Radio Broadcast Market.
- 6.9 RTÉ also purchases National Terrestrial BTS from 2rn for the purposes of delivering DTT Multiplexing Services in Market B. Absent regulation, 2rn has the incentive to charge excessive prices which RTÉ could pass on to its Market B Access Seekers through Market B pricing, with whom RTÉ also competes in the Relevant Retail TV Broadcast Market for the provision of FTA DTT. This would, again, result only in an internal transfer within RTÉ, while increasing the costs for Market B Access Seekers. Operator licensing conditions and/ or statutory obligations pursuant to the 2009 Act, effectively prevent Access Seekers, such as VMI and TG4, from switching to alternative TV broadcast platforms, enabling RTÉ to collect higher-than-normal profits. The Market B Access Seekers which absorb these price increases in full may have to reduce spend on content creation to compensate. This could lead to reduced broadcast quality causing a loss of viewership and associated advertising revenue.
- 6.10 On the basis of the above assessment, ComReg's position is such that 2rn, as the SMP SP in Market A, would have the ability and incentive to profitably engage in excessive pricing and facilitate RTÉ in strengthening its position in downstream markets.

6.2.2 Inefficiency and Inertia

- 6.11 An SMP SP in a relevant market may, arising from the absence of effective competitive pressure in that market, be insulated from the need to innovate and improve efficiency and quality of service to stay ahead of rivals. This may limit the development of new technology or processes and/or lead to more

²⁵⁸ All of RTÉ's purchases of National Terrestrial BTS from 2rn is done so on a self-supply basis.

costly and less efficient methods of supply and, consequently, higher prices (or lower quality services) for end users than would likely otherwise exist under competitive market conditions. The SMP SP may also decide to withhold investment in related markets to delay or impede the development of competition in those markets. For example, where the SMP SP has control over certain key inputs necessary for downstream SPs to compete in adjacent markets, it could delay upgrading those inputs or providing newer, potentially more cost-effective inputs, in line with technological developments.

- 6.12 As RTÉ is obliged under the 2009 Act to provide DTT Multiplexing Services, FTA DTT, and National Terrestrial Radio, 2rn must maintain a base level of services to operate a terrestrial BTS network capable of facilitating the delivery of these national services. Despite this, 2rn has the ability and incentive to engage in inefficiency with respect to the provision of services to its commercial Access Seekers in Market A, namely, BMAI.
- 6.13 BMAI purchases access to 2rn's terrestrial BTS network, including its radio antennae and other equipment. These additional inputs are required, in conjunction with the physical tower and mast infrastructure, for the broadcast of BMAI (Today FM and Newstalk) National Terrestrial Radio. 2rn could cease or slow their investment in this equipment, fail to update the equipment, and/or restrict, or stop, the maintenance of this equipment, in a manner that would result in a lower quality service being provided to BMAI than RTÉ. Given 2rn retains a 100% market share in Market A, BMAI would have no option but to continue to purchase access from 2rn, enabling 2rn to charge above cost prices to BMAI while hindering its ability to effectively compete in Relevant Retail Radio Broadcast Market.
- 6.14 Finally, ComReg's view is that low levels of investment in the upkeep and maintenance of 2rn's terrestrial BTS network could act as a deterrent to potential new entrants in Market B and the Retail Radio Broadcast Markets. This would solidify RTÉ's dominant position in both markets by decreasing the likelihood of market entry.
- 6.15 ComReg's view is that 2rn, as the SMP SP, would have the incentive to engage in the type of behaviour outlined above to the detriment of Access Seekers and, ultimately, end users.

6.3 Leveraging

- 6.16 Leveraging describes conduct in which a vertically integrated SMP SP in one market leverages its power to exert influence in other vertically or horizontally related markets, thereby enabling it either to strengthen its position in these

markets, and/or further consolidate its position in the market in which it has SMP. Where a vertically integrated SMP SP in one market also has close links with other adjacent markets, either at a similar (horizontal leverage), or different (vertical leverage) level in the production or distribution chain, the SMP SP may attempt to leverage its SMP into those related markets.

- 6.17 Given the close relationship between Market A and other vertically related markets (including the downstream Market B and the Relevant Retail TV Broadcast Market and Relevant Retail Radio Broadcast Market), absent regulation, there is potential for vertical leveraging to occur. Each type of behaviour has the ability to:
- (a) Raise Access Seekers' costs;
 - (b) Introduce barriers to accessing downstream products, services and associated facilities (which could lead to the creation of, or raising of, barriers to entry/expansion in related markets);
 - (c) Reduce competitive pressures exerted on related wholesale and retail services; and
 - (d) Enable the SMP SP to extract additional revenues from its competitors, customers, and end users.

6.3.1 Vertical Leveraging

- 6.18 Vertical leveraging arises where a vertically integrated operator has the ability to leverage its SMP position at one level in the production or distribution chain into downstream markets in which it is also active. Vertical leveraging can be non-price-based or price-based, as outlined below.
- 6.19 ComReg is of the view that vertical leveraging could occur in Market A, given that 2rn, as a vertically integrated SMP SP, likely has both the ability and the incentive to use its market power to influence competitive conditions in downstream wholesale and/or retail markets, in particular, through its ability to control key Market A inputs which feed into Market B where it competes as RTÉ, the sole provider of DTT Multiplexing Services, and in the Relevant Retail Radio Broadcast Markets as a supplier of National Terrestrial Radio. This could result in the distortion of, or reduction in, competition in these downstream markets, ultimately causing harm to Access Seekers and end users.

Restrictions on, or Denial of, Access

- 6.20 Vertical leveraging can manifest as an outright, or constructive, refusal to supply access to Access Seekers. Refusal to supply is particularly relevant

where an SMP SP is vertically integrated, enabling them to facilitate its downstream arm in gaining a strategic advantage over its rivals.

- 6.21 ComReg's view is that absent regulation, 2rn would be incentivised to refuse access to competitors of RTÉ in downstream markets. However, 2rn would not have the ability to refuse access to all of its Market A Access Seekers as the Minister has the power, under the 2009 Act, to direct 2rn to provide access to its terrestrial BTS network to certain cases.
- 6.22 Pursuant to section 115 of the 2009 Act, the Minister may request the use of any tower, mast, site, or other installation, for the provision of sound broadcasting services. However, absent regulation, 2rn would not have to provide access unless specifically requested to do so by the Minister, allowing it to refuse access, or withdraw access, to existing Access Seekers upon the expiry of existing agreements. Should 2rn choose to withdraw access, it would remove the ability of BMAI to compete with RTÉ in the downstream Relevant Retail Radio Market for the provision of National Terrestrial BTS. For example, if it restricted access by removing access only to specific sites, it could degrade the coverage quality of BMAI's National Terrestrial Radio service, while still allowing them to fulfil their obligations under the 2009 Act but making them appear less attractive to end users due to weakened coverage. Reduced broadcast quality could result in a loss of listenership, and associated advertising revenue for BMAI, thereby impacting competition in retail markets.
- 6.23 If 2rn did restrict BMAI's access to its network, section 115(1) of the 2009 Act sets out the statutory position that BMAI could ask CnaM to request that the Minister require 2rn to "*cooperate*" with BMAI, which would be preceded by consultation with RTÉ. It is ComReg's view that such requirements to cooperate, in and of itself, would not prevent 2rn's ability to engage in constructive refusal of access type behaviours. Additionally, should the Minister ultimately require cooperation from RTÉ, BMAI would have been forced to broadcast at a lower quality than RTÉ for a period of time that may have resulted in RTÉ gaining listenership at BMAI's expense.
- 6.24 Additionally, in the case of a new Multiplex Operator making an application to CnaM for the right to operate a multiplex in Ireland (based on the evidence available we consider this to be unlikely within the review period), it is required to make a proposal as to area coverage. There is no statutory obligation on 2rn to make its network available to any such applicants. Section 131 of the 2009 Act, however, sets out additional functions of CnaM which include the entry into contracts with operators which afford a right and duty to establish multiplexes. Sub-section (5) affords CnaM "*all such powers as are necessary*

for or incidental to the performance of its functions under this part". It is ComReg's view that this should not be considered a statutory right of access. As such, 2rn has the ability to deny access to its network to a potential new commercial DTT Multiplex Operator in Market B which would compete with RTÉ. The threat of denial of access therefore helps dissuade potential entrants from competing with RTÉ's DTT platform.

- 6.25 ComReg's view is that 2rn, as a vertically integrated SMP SP has the ability and incentive to restrict, or deny, access (including constructive denial) to Access Seekers for the purpose of maintaining or strengthening RTÉ's position in downstream markets.

Delaying Tactics

- 6.26 An SMP SP may also engage in delaying tactics where it does not refuse to supply certain inputs to downstream commercial Access Seekers, but they are supplied at a later point in time than its own vertically integrated affiliates. This could come in the form of, for example, lengthy contract negotiations, which would enable 2rn to frustrate entry into downstream markets and enable RTÉ to protect its market share (in terms of viewership and/or listenership), and corresponding advertising revenues, from downstream competitors.
- 6.27 For example, 2rn could engage delaying tactics in regard to any potential new contract negotiations with BMAI, which uses Market A inputs for the broadcast of National Terrestrial Radio and competes directly with RTÉ in the Relevant Retail Radio Broadcast Market. As 2rn is the sole provider of National Terrestrial BTS, and in the absence of leaving the market, BMAI would have no choice but to engage in these lengthy contract negotiations, leading to uncertainty in both the wholesale and retail markets and, ultimately, impacting upon competition.
- 6.28 In the case of Market B, 2rn could, absent regulation, apply similar delaying tactics in the case of potential new commercial DTT Multiplex Operators wishing to enter the market. If this new entrant was dependent upon 2rn National Terrestrial BTS, in the same way as RTÉ, 2rn could apply similar delaying tactics at contract initiation and negotiation stage, which would likely deter market entry, and reinforce a market structure that would not tend towards effective competition.

Quality Discrimination

- 6.29 As a vertically integrated SMP SP, 2rn could engage in discriminatory behaviour on the basis of quality, gaining a strategic advantage for RTÉ in Market B and the downstream Relevant Retail TV Broadcast Market and

Relevant Radio Broadcast Market. It may be difficult for Access Seekers to compare the wholesale products 2rn supplies to RTÉ against those offered to other Access Seekers. A lack of transparency surrounding any differences between those products could facilitate an environment whereby 2rn has both the ability and incentive to engage in quality discrimination.

- 6.30 This could manifest in 2rn accommodating the needs of RTÉ first when rolling out new towers and mast infrastructure, giving preferential treatment to RTÉ when upgrades are implemented, and/or prioritising the repair of RTÉ equipment over other Access Seekers.
- 6.31 Absent regulation in Market A, 2rn also has the ability and incentive to make more cost-efficient Market A products (or associated facilities) available to its own downstream arm, whilst either refusing access (outright or constructively) to, or charging higher prices for, the same products to other Access Seekers. Regardless of whether equivalent products remain available to Access Seekers, this type of discriminatory conduct would still likely create a barrier to entry/expansion to downstream markets, by deterring investment from Access Seekers due to the competitive advantage gained by RTÉ through raising its rivals' costs.

Creating or exploiting information asymmetries and withholding relevant information

- 6.32 A vertically integrated SMP SP could create or exploit information asymmetries to impede competition in downstream markets. If information is not visible to market participants, those firms cannot make informed decisions regarding investment.
- 6.33 Informational asymmetry could manifest as a lack of transparency from 2rn regarding the terms and conditions offered to RTÉ versus other Access Seekers. Absent regulation, competing firms in Market A, or in the downstream Relevant Retail TV Broadcast Market and/or Relevant Radio Broadcast Market, may have little basis on which to conclude that Market A inputs are being provided on a non-discriminatory basis. A lack of certainty around the non-discriminatory provision of Market A inputs could dissuade new firms from entering either Market B or downstream markets, thereby strengthening RTÉ's competitive position.
- 6.34 Information asymmetries may also apply to 2rn's future planning related to its network, specifically tower and mast infrastructural changes at a given location. In the event that either network or procedural changes are made by 2rn, which requires Access Seekers to adapt their own tools and procedures, all their

Access Seekers would need sufficient notice. Absent regulation, RTÉ could be informed at an earlier date than its competitors who also purchase Market A inputs. These differential notice periods could enable RTÉ to gain a strategic advantage in the Relevant Retail Radio Broadcast Market. For example, a decision taken by 2rn to reorganise the equipment on their towers and masts could lead to implications for Market A Access Seekers. Should BMAI be given a shorter notice period than RTÉ, it could lead to greater operational challenges and, potentially, higher costs to be incurred for BMAI to quickly amend internal tools and processes to adapt to 2rn's reorganisation. Increased costs could lower their budget for content creation resulting in lower quality for end-users, thereby impeding its ability to compete with RTÉ in the Relevant Retail Radio Broadcast Market. Additionally, frequent informational asymmetries that manifest as differential notice periods of proposed changes could also impede the ability for BMAI to engage in future planning, leading to lower levels of investment.

- 6.35 Any information asymmetries that exist or are created could be used to the benefit of RTÉ in Market B or the downstream markets in which it competes. This means that, absent regulation, 2rn would have the ability and incentive to exploit information asymmetries or withhold relevant information.

Price-based Vertical Leveraging Behaviour

- 6.36 Vertical leveraging may also be evident in the pricing behaviour of a vertically integrated SMP SP. A rise in the price of National Terrestrial BTS would impact RTÉ and BMAI in downstream markets.
- 6.37 In the Relevant Retail Radio Broadcast Market, in which both firms compete, Terrestrial Radio is provided on an FTA basis to end-users, preventing them from passing on this cost increase in real, monetary terms. However, it could be passed on in terms of its impact on the quality of radio broadcast which end users receive. Given RTÉ is vertically integrated with 2rn, this price increase would equate to an internal transfer within its own organisation, however, BMAI would be forced to absorb this cost in full. These additional costs could lead to BMAI reducing their budget for their programming services, for example, by reducing costs for content creation in order to accommodate this cost increase. This degradation in programming quality may, ultimately, lead to a decline in listenership, and a decrease in advertising revenues, thereby damaging competition in the retail market.
- 6.38 On that basis, ComReg's view is that 2rn, as the SMP SP in Market A, has the ability and incentive, absent regulation, to engage in price-based vertical

leveraging behaviour by increasing prices for National Terrestrial BTS above the competitive level to the detriment of competition in downstream markets.

6.4 Conclusion on Competition Problems in Market A

- 6.39 ComReg is of the view that, absent regulation, 2rn, as the vertically integrated SMP SP in Market A, has the ability and incentive to engage in the categories of exploitative practices and leveraging behaviour identified and outlined above, which is likely to negatively impact on competition and end users in related retail and/or wholesale markets, as well as having the potential to reinforce its SMP position in Market B over time.
- 6.40 On that basis, ComReg considers that it is justified and proportionate to impose appropriate and proportionate obligations on 2rn in Market A relating to access, transparency, non-discrimination, price control, cost accounting, accounting separation.

Q. 6. Do you agree that the competition problems identified are those that could potentially arise in Market A (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

7 Remedies in Market A

7.1 Introduction

- 7.1 Section 5 sets out ComReg's finding that 2rn has SMP in Market A with Section 6 then describing the competition problems which, absent regulation, could arise in Market A and in downstream related markets. For example, 2rn could potentially:
- (a) Refuse to supply access (outright or constructive refusal) to National Terrestrial BTS providers and thus restrict competition for the provision of services in downstream markets;
 - (b) Provide access on less favourable terms compared to those obtained by RTÉ or that which it provides amongst others; and
 - (c) Set excessive wholesale charges for access to National Terrestrial BTS.
- 7.2 Under Regulation 50(1) of the ECC Regulations, where an undertaking is designated as having SMP in a relevant market, ComReg is required to impose at least one obligation by way of remedy addressing the competition problems that have been identified, as set out in Regulations 51-56, 58 and 62 of the ECC Regulations.
- 7.3 Regulation 50(5) of the ECC Regulations requires that obligation(s) must:
- (a) Be based on the nature of the problem identified;
 - (b) Be proportionate and justified in light of the objectives laid down in Section 12 of the Communications Regulation Act 2002-2023 and Regulation 4 of the ECC Regulations;²⁵⁹ and
 - (c) Only be imposed following public consultation.
- 7.4 For the avoidance of doubt, and from this point on, ComReg notes that 'Access Seekers', as referred to in this section, (and referred to in the Market A Decision Instrument set out in Annex 2 as 'Broadcast Operators'), refers only to those

²⁵⁹ Pursuant to Section 12 of the Communications Regulation Act 2002 (as amended), ComReg's relevant objectives in relation to the provision of electronic communications networks and services 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 Community. Regulation 4 of the ECC Regulations further specifies ComReg's objectives and sets out a number of obligations in relation to the pursuit of its objectives.

entities which hold multiplex licences, or sound broadcasting licences, and are permitted to operate in the State.

7.2 Remedies for Market A

- 7.5 In the sections below, ComReg sets out the remedies that it deems necessary to address the competition problems identified in Section 6, bearing in mind the requirement set out in Regulation 50 of the ECC Regulations to act proportionately and in the least intrusive way possible.
- 7.6 As explained in detail below, in light of the competition problems arising, or likely to arise, in Market A and related markets, ComReg imposes on 2rn the full set of remedies (including obligations of access, transparency, non-discrimination, price control and cost accounting, and accounting separation), with these largely mirroring those obligations imposed under the 2021 Decision.

7.2.1 Relevance of the Broadcasting Act 2009

- 7.7 The question arises as to whether, absent SMP based regulation, the requirements under the 2009 Act adequately address any of the competition concerns identified.
- 7.8 Section 108 of the 2009 Act concerns, *inter alia*, the exploitation of commercial opportunities by RTÉ and TG4, and states that such exploitation shall be operated in an efficient manner so as to maximise revenues and be used to subsidise its public service objects. Section 108 also requires that transactions entered into on the basis of public service objects and the exploitation of commercial opportunities are made at arm's length and on commercial terms.
- 7.9 Section 109 of the 2009 Act sets out general accounting procedures for 'a corporation' (defined in the 2009 Act as meaning RTE or TG4, or both), and requires RTÉ and TG4 to maintain financial records and accounts, and sets out consequent auditing, financial transparency and reporting obligations. 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 objectives.
- 7.10 Section 115 of the 2009 Act provides that the Minister may, at the request of CnaM, and after consultation with RTÉ, require RTÉ to co-operate with a holder of a sound broadcasting contract in the use of any mast, tower, site or other

installation or facility needed in connection with the provision of transmission facilities for sound broadcasting services under the sound broadcasting contract. It also states that a sound broadcaster shall make to RTÉ such periodical or other payments in respect of any facilities as the Minister, after consultation with RTÉ and CnaM, directs.

- 7.11 As with the 2021 Decision, ComReg's position remains that the above provisions of 2009 Act do not adequately address the potential competition problems which, absent SMP regulation, could arise in Market A (such as those relating to lack of transparency, potential discrimination on price and non-price terms, constructive denial of access and inefficient pricing issues). Neither would such provisions of the 2009 Act address the identified competition problems in a targeted and proportionate manner such as could be addressed under an *ex ante* SMP regulatory approach that seeks to address SMP related competition concerns having regard to the policy objectives set out in Regulation 4 of the ECC Regulations and section 12 of the Communications Regulation Act 2002 (as amended).
- 7.12 Insofar as price controls are concerned, unlike the non-specific payment related provisions of section 115 of the 2009 Act (which relate to the power of the Minister to direct a sound broadcaster to make certain payments to RTÉ), the imposition of *ex ante* SMP regulatory price controls in accordance with Regulation 56 of the ECC Regulations would seek to ensure that the appropriate cost recovery mechanism is put in place to ensure an undertaking does not charge, for example, excessive prices, and that it does so in a manner which serves to promote efficiency and sustainable competition and maximises consumer benefits.
- 7.13 Unlike the above-referenced provisions of the 2009 Act, *ex ante* SMP regulation has the benefit of specifying well defined obligations tailored to target, in advance, potential competition problems in accordance with the regulatory framework and can, by responding to changes in market circumstances, provide regulatory stability and predictability in a market which is characterised by high and non-transitory entry barriers.
- 7.14 *Ex ante* SMP regulatory measures, unlike the above provisions of the 2009 Act, coupled with enforcement capabilities, also provide the necessary mechanisms to deal with issues concerning regulatory compliance on an ongoing basis (either by investigation on an own-initiative basis or in response to complaints/disputes received from undertakings). *Ex ante* regulation also provides both regulatory certainty and predictability to market participants.

- 7.15 Insofar as the specific provisions of sections 108 and 109 of the 2009 Act relate to Market A, ComReg considers that these are aimed at securing accountability for expenditure of public monies and protecting against any inappropriate use of public funds. These provisions are not designed to address issues associated with the potential anti-competitive exercise of SMP *per se*, and neither of these provisions would result in full transparency of internal pricing across RTÉ and 2rn in the same manner as is envisaged under the ECC Regulations (and in the transparency obligations now set out in this Consultation).
- 7.16 Section 115 of the 2009 Act does not necessarily imply that a cost-oriented (and efficient) price control could be put in place by the Minister and, as such, it is ComReg's position that it would not necessarily resolve potential excessive or other pricing problems.
- 7.17 Furthermore, application of section 109 of the 2009 Act, which sets out the general accounting procedures for RTÉ or TG4 or both, as the case may be, would not necessarily result in transparent internal transfer pricing, in the same manner as would an accounting separation obligation imposed by ComReg under the regulatory framework.
- 7.18 Therefore, in the context of a vertically integrated entity that provides broadcasting transmission facilities to actual or potential competitors, ComReg's position, consistent with the position in the 2021 Decision is that the provisions of the 2009 Act do not remove the need for *ex ante* regulation. *Ex ante* regulation has the benefit of well-defined characteristics under the regulatory framework and can provide stability and assurance to markets characterised by high and persistent entry barriers through using a variety of approaches that are methodical and well understood.
- 7.19 ComReg now considers below the imposition of appropriate and proportionate obligations on 2rn in Market A. In doing so, ComReg begins by briefly outlining the remedies imposed under the 2021 Decision.

7.3 Access Remedies in Market A

7.3.1 Existing Access Remedies

- 7.20 The 2021 Decision required 2rn to meet all reasonable requests from Access Seekers for the provision of access to a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) and Associated Facilities. This includes, but is not limited to, the items below, and requirements to meet

all reasonable requests from Access Seekers for access to such on an unbundled / unmanaged basis;

- (a) The provision of co-location for the transmitter equipment;
- (b) The provision of power and the backup power supply for the transmitter and associated equipment;
- (c) The provision of telemetry services;
- (d) The provision of access to the antenna combiner and feeder to enable the connection of the transmitter equipment to the combiner;
- (e) The provision of access to the microwave distribution system; and
- (f) The provision of support services.

7.3.2 Statutory requirements and criteria

7.21 Regulation 55(1) of the ECC Regulations provides that ComReg may impose on an operator, obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities where ComReg considers that the denial of such access, or the imposition on Access Seekers of unreasonable terms and conditions having a similar effect, would:

- (a) Hinder the emergence of a sustainable competitive retail market;
- (b) Not be in the interest of end users; and
- (c) Otherwise hinder the objectives set out under Regulation 4 of the ECC Regulations.

7.22 According to Regulation 55(6) of the ECC Regulations, when imposing access obligations, ComReg may lay down technical or operational conditions to be met by the provider or the beneficiary of the access, where necessary, to ensure normal operation of the network. Conditions covering fairness, reasonableness and timeliness may also be attached to access obligations under Regulation 55(3) of the ECC Regulations.

7.23 In determining whether access obligations imposed under Regulation 55 of the ECC Regulations are appropriate and proportionate, ComReg must also have regard to the following:

- (a) The technical and economic viability of using or installing competing facilities in light of the rate of market development, and taking into account the nature and type of interconnection and access involved;
- (b) The expected technological evolution affecting network design and management;

- (c) The need to ensure technology neutrality, enabling the parties to design and manage their own networks;
- (d) The feasibility of providing the access proposed, in relation to the capacity available;
- (e) The initial investment by the facility owner, bearing in mind the risks involved in making the investment;
- (f) The need to safeguard competition in the long term, the requirement to give attention not only to economically efficient infrastructure-based competition but also to innovative business models that support sustainable competition, such as those based on co-investment in networks;
- (g) Where appropriate, any relevant intellectual property rights; and
- (h) The provision of pan-European services.

7.24 For the reasons set out below and in respect of each of the specified access remedies, ComReg notes that only an access obligation is capable of addressing the competition problems identified and, in ComReg's view, there is no other less intrusive obligation available which is capable of achieving the same outcome.

7.25 ComReg does not consider that existing or potential competition would effectively constrain 2rn's market power within the next five years. On the contrary, access to National Terrestrial BTS will continue to be necessary as an upstream input to enable Access Seekers to provide DTT Multiplexing Services,²⁶⁰ as well as National Terrestrial Radio to end users in the downstream retail market(s). As a vertically integrated SMP SP, 2rn has the ability and incentive to refuse to supply Market A services to Access Seekers (on an outright, or constructive basis), particularly given the absence of alternative sources of supply. Acting in this manner would distort competition in downstream markets and discourage investment, thereby leaving end users with a reduction in choice and poorer quality services. In this respect, imposing an obligation of access on 2rn in respect of National Terrestrial BTS is necessary to ensure the development of sustainable and effective downstream competition, and to minimise exploitative and/or foreclosure concerns that

²⁶⁰ As discussed in sub-section 8.2.2, ComReg's view is that there is unlikely to be market entry by a new commercial DTT Multiplex Operator throughout the lifetime of this review period.

could arise absent regulation. ComReg's view is that there is no other obligation which would achieve the same outcome.

7.26 Against this background, ComReg maintains (subject to amendments and clarifications as discussed below) 2rn's existing obligations of access to National Terrestrial BTS (under the 2021 Decision), and notes the following as regards the criteria listed in Regulation 55 of the ECC Regulations:

- (a) *Technical and economic viability of using or installing competing facilities:* ComReg has considered the viability of competing alternatives to 2rn National Terrestrial BTS. ComReg notes that land access, for the purpose of building new sites, could prove to be problematic due to potential environmental and planning issues, making it difficult to replicate 2rn's current network and coverage area (98% of the population).
- (b) *Feasibility of providing access in relation to capacity available:* ComReg is not aware of any significant constraints limiting 2rn from providing access to its network for national and quasi-national sound broadcasters or DTT Multiplex Operators.
- (c) *The initial investment of the facility owner:* As per Regulation 56(2) of the ECC Regulations, ComReg's approach to imposing access remedies in the market is based on principles that, among others, allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs.
- (d) *The need to safeguard competition:* Competition in the downstream markets, including the Relevant Retail TV Broadcast Market and the Relevant Retail Radio Broadcast Market depends on effective regulation in the relevant wholesale market(s). ComReg considers that the range of remedies discussed in this Consultation is needed due to 2rn's market power in Market A, in order to contribute to the development of downstream competition to the benefit of end users.
- (e) *Intellectual property rights:* ComReg's view is that intellectual property rights are not a significant concern in this market.

- (f) *Pan-European services*: Regulation of the BTS markets is dependent on national circumstances. While many NRAs have designated SMP or found the 3CT to be met in some BTS sub-markets,²⁶¹ other NRAs have deemed the markets to be effectively competitive and, thus, not warranting *ex ante* regulation. ComReg considers that pan-European considerations are of limited relevance to Market A due to varying national circumstances and differing conditions across broadcasting environments in other EU Member States.

7.27 Accordingly, it is necessary, proportionate and justified to impose on 2rn an access obligation pursuant to Regulation 55 of the ECC Regulations.

7.3.3 Obligation to meet reasonable requests for access

7.28 On the basis that access to 2rn National Terrestrial BTS is necessary to ensure the development of sustainable and effective downstream competition, and to minimise exploitative and/or foreclosure concerns arising from 2rn's position of SMP, ComReg proposes to impose on 2rn an obligation to meet reasonable requests for access to Market A services, and associated facilities, as provided for under Regulation 55 of the ECC Regulations. This includes meeting all reasonable requests from Access Seekers for access on an unbundled/unmanaged basis whereby access to any element of a fully managed Broadcast Transmission Service (including Broadcast Distribution Service discussed below) may be sought by Access Seekers on a disaggregated basis.

7.29 There are a number of conditions associated with the obligation to meet reasonable requests for access, such as:

- (a) Any refusal must be objectively justified;
- (b) Negotiations for access must be conducted in good faith; and
- (c) Access granted ought not to be withdrawn without ComReg's prior approval.

²⁶¹ For example, in its 2017 Market Review, KommAustria identified three different markets, which were all found to be national in scope: 1. The wholesale market for the "transmission of analogue terrestrial (FM) radio broadcasting signals to end users". 2. The wholesale market for the "multiplexing of broadcasting signals via the platforms MUX A and MUX B". 3. The wholesale market for "the transmission of digital terrestrial TV broadcasting signals to end users".

Justification for refusal to grant access is limited to objective criteria

- 7.30 The obligation on 2rn to meet reasonable requests for access means that 2rn may only deny requests that are not reasonable. In practice, ComReg expects that circumstances giving rise to a legitimate denial of access would be exceptional and limited to those situations where the request is denied for objective reasons, such as that it is not technically feasible to meet the request for access, or there are apprehended risks regarding the protection of 2rn's network integrity which are not capable of being mitigated otherwise than through denying access. This is consistent with the Code which states at Recital 191:

"... such requests should be refused only on the basis of objective criteria such as technical feasibility or the need to maintain network integrity"

- 7.31 ComReg notes in this regard that, in considering whether requests for access are reasonable, in addition to ascertaining (where necessary) the technical feasibility of the requests, 2rn may, negotiating in good faith (discussed below), set out those terms and conditions that it proposes to attach to the services, or features required to meet the access request. It may do so having regard to the applicable requirements in respect of fairness, reasonableness and timeliness of access (see paragraphs 7.40 to 7.43).

Requirement to negotiate in good faith

- 7.32 Absent regulation, 2rn has the ability and incentive to expressly, or constructively, refuse to provide access to National Terrestrial BTS and therefore an obligation to negotiate in good faith regarding requests for access (including for improvements, variations or other amendments to an existing service) makes it more difficult for 2rn to do so. The obligation also addresses imbalances between the bargaining powers of the respective parties in the negotiation process by reducing incentives to unnecessarily prolong negotiations. Negotiating in good faith includes, in this regard, 2rn assisting Access Seekers in formulating, for instance, technical aspects and specifications of their requests for access, in light of its knowledge and expertise of its own network and systems.
- 7.33 ComReg notes that the obligation to negotiate in good faith encompasses the way in which 2rn conducts the negotiations as well as the positions that it takes in them. In investigating an allegation of a failure to negotiate in good faith, ComReg might draw inferences from 2rn's behaviour and from the adequacy

of the processes and controls it has put in place to assure compliance with this obligation. For example, ComReg might draw adverse inferences from the following:

- (a) A failure on the part of 2rn to behave in the way that a willing seller would behave when negotiating with a willing buyer;
- (b) A failure by 2rn to respond to proposals made by Access Seekers in a timely and constructive manner;
- (c) A failure by 2rn to deploy participants in the negotiations who have the appropriate knowledge and authority, so that negotiations could proceed in a timely manner;
- (d) The absence of effective controls to assure that decision-making processes within 2rn in relation to the negotiations could not be influenced by concerns about the commercial impact on RTÉ (as 2rn's parent company); and
- (e) The presence of incentives for individuals within 2rn who participated in, or influenced, the negotiations that might lead them to receive greater financial reward, or other benefits, if the negotiations were to be delayed, or to result in an outcome other than that which might have been freely negotiated between a willing buyer and a willing seller.

7.34 The precise nature of any investigation and the degree to which inferences might be drawn from behaviour would need to be assessed in the context of the actual circumstances of any particular case.

7.35 In addition, it is ComReg's position that a requirement to negotiate in good faith also includes, but is not limited to, negotiations in relation to the conclusion of fit-for-purpose and legally binding SLAs (see sub-section 7.3.4).

Requirement not to withdraw access to services already granted

7.36 Access to 2rn National Terrestrial BTS is found to be necessary to address the competition problems arising from 2rn's position of SMP in Market A, therefore, 2rn must seek ComReg's prior approval before any withdrawal of access, which will then be assessed by ComReg on a case-by-case basis. ComReg considers that this remedy will promote regulatory certainty for all parties without unduly restricting investment incentives.

7.37 More specifically, 2rn is required to notify ComReg, in writing, of any proposal to withdraw access to facilities already granted, giving reasons borne out of a detailed analysis of the proposal for access withdrawal, to include the impacts

that the withdrawal of access is likely to have on existing Access Seekers who purchase 2rn's services and associated facilities, as well as end users.

- 7.38 Where 2rn proposes to withdraw access, ComReg may consult with relevant parties, prior to making a decision on whether to grant, or to withhold, its approval to any such request.
- 7.39 Any such withdrawal of access should be flagged sufficiently in advance so as to give Access Seekers adequate notice of the impending change. The purpose of this is to allow time for alternative supply arrangements or alternative services to be put in place so as to minimise potential adverse effects on downstream competition, as well as end users relying on the withdrawn facility.

Conditions to ensure fairness, reasonableness and timeliness of access

- 7.40 Regulation 55(3) of the ECC Regulations permits ComReg to attach conditions covering fairness, reasonableness and timeliness to obligations and requirements for access in order to protect the integrity of the access obligation against more strategic, rather than outright, attempts of access denial e.g. delays in provisioning of access which may discourage potential entry etc.
- 7.41 In Section 6, ComReg identified the potential for 2rn to engage in a constructive refusal to supply e.g. through delaying tactics, discriminatory behaviour, withholding of information, disproportionate entry criteria, as well as unreasonable terms and conditions associated with access. ComReg thus imposes a condition, attached to the access obligation, which obliges 2rn to grant access to National Terrestrial BTS in a fair, reasonable and timely manner.
- 7.42 In order to ensure that 2rn provides access on fair and reasonable terms, ComReg requires that 2rn:
- (a) Seeks approval from ComReg for changes to the rules or technical standards for the deployment of telecommunications equipment in the access network, including changes to its network design, topology etc.;
 - (b) Negotiates in good faith and offer meaningful SLAs, that is, legally binding contracts between 2rn and Access Seekers, committing 2rn to defined service levels, as further described below;
 - (c) May only impose restrictions on access that are intended for the protection of the integrity of the network to the extent that they are justified, reasonable and proportionate; and

- (d) Where an order is declined, provide specific and clear reasoning to the Access Seeker at the closure of the order.

7.43 In order to ensure that access is provided on a timely basis, ComReg requires 2rn to inform ComReg when an access request has been refused/declined, at the same time as such refusal/decline is notified by 2rn to the Access Seeker and provide the objective reasons for refusing/declining that access request.

Service Level Agreements ('SLAs')

- 7.44 SLAs are essential in ensuring Access Seekers' ability to rely on access to 2rn National Terrestrial BTS for the delivery of services in downstream markets, including in ensuring Access Seekers' ability to commit to service levels to their own customers. Both sub-standard SLAs and delays in negotiating and agreeing SLAs may have a significant and detrimental impact on Access Seekers, in particular those who are trying to enter the market or grow market share and win customers from established SPs such as RTÉ.
- 7.45 Sub-standard SLAs, for example, may manifest, *inter alia*, in inadequate repair times, or service credits at a level which do not incentivise 2rn to meet the service levels committed to. Delays in the development and availability of suitable SLAs can have an adverse impact on competition in downstream markets and on end users, as the absence of suitable SLAs ultimately lowers certainty regarding the timeliness and quality of access being provided.
- 7.46 In addition to demanding high-quality services, end users expect efficient and timely provision of services, including a high degree of reliability and effective fault management and repair. As such, Access Seekers are reliant on efficient delivery, service quality and after-sales support from 2rn to be able to compete effectively in downstream markets. In this regard, the expected level of service, both at the point of delivery and in-life, are key selling points which can influence an end user when making a decision to purchase a product or service. This means that the SLAs supporting regulated Market A services are an extremely important component of the wholesale input and are integral to the wholesale offering.
- 7.47 Fit-for-purpose SLAs achieve two main objectives: first, they help in setting agreed service levels between 2rn and Access Seekers, ensuring that access is provided in a manner that is fair, reasonable, and timely, and second, they ensure that Access Seekers are compensated where service levels are not met. The two go hand in hand. SLAs give 2rn actual and adequate incentives to deliver agreed service levels, allowing Access Seekers to commit to, and compete on, guaranteed levels of service in downstream markets, but only if

SLAs provide for the payment by 2rn to Access Seekers of meaningful compensation where agreed service levels are not met.

- 7.48 Furthermore, unreliable or incorrect information can result in poor outcomes for end users in their attempts to obtain a connection to, and coverage of, National Terrestrial Radio and FTA DTT, which can have a negative impact on Access Seekers' reputations. Therefore, to ensure that conditions of access are provided on fair, reasonable terms and in a timely manner, ComReg is attaching conditions to the access obligation to ensure that, upon request, legally binding SLAs are appropriately concluded and implemented.
- 7.49 Accordingly, in order to ensure that the service provided is adequate and that 2rn has appropriate incentives to deliver the service required, 2rn must conclude, maintain and update, as appropriate, legally binding SLAs with Access Seekers including the following parameters and specific service levels for each of the below as well as provide for dispute resolution procedures:
- (a) Fault incidents;
 - (b) Fault management; and
 - (c) Fault response.
- 7.50 2rn is obliged to ensure that negotiations for either the conclusion, or amendment, of an SLA are conducted in a fair, reasonable and timely manner.
- 7.51 As noted in Section 6 of this Consultation, 2rn has the ability and the incentive to engage in anti-competitive practices to restrict or distort competition in downstream markets in order to benefit the broadcasting activities of its parent company, RTÉ. This could include issues related to quality of service, where failure to provide guaranteed quality of service may deter downstream market entry and expansion. Therefore, ComReg is imposing an obligation such that SLAs must be provided to deter such behaviour. ComReg considers that absent regulation, 2rn may not be incentivised to meet any conditions of an agreed SLA, without some level of compensation to wholesale customers, should the SLA be breached.
- 7.52 Therefore, ComReg is imposing a specific obligation to ensure that the SLA should oblige 2rn to compensate failure to meet agreed service levels by way of payments made in a timely and efficient manner which provide 2rn with sufficient and adequate incentives to meet agreed service levels. The process of compensation should not be burdensome, and the methodology used, as well as the calculation of SLA credits, should be clearly explained by 2rn in the SLA, with examples.

- 7.53 Given the potential competition problems identified in this Consultation relating to discrimination, ComReg is of the view that certain quality guarantees are appropriate in respect of 2rn's provisioning of its transmission network services. Such assurances are also commonplace in contractual agreements between suppliers and their customers.

7.3.4 Specified forms of access

- 7.54 In addition to the general obligation to meet reasonable requests for access to Market A services and associated facilities, ComReg imposes access requirements upon 2rn to provide a specific range of Market A services and associated facilities to Access Seekers.
- 7.55 For the avoidance of doubt, the access obligations do not preclude 2rn from developing, or Access Seekers requesting, additional functionality or features in accordance with 2rn's obligation to meet reasonable requests for access, as set out above. In doing so, 2rn must act in a non-discriminatory manner consistent with the obligations set out in sub-section 7.47.64 of this Consultation.
- 7.56 Taking account of Regulation 54 and 55(5) of the ECC Regulations, ComReg imposes the following access requirements on 2rn to provide access to a specific range of Market A services and associated facilities, collectively referred to as 'National Terrestrial BTS'. These include:
- (a) The provision of co-location for the transmitter equipment;
 - (b) The provision of power and the backup power supply for the transmitter and associated equipment;
 - (c) The provision of telemetry services;
 - (d) The provision of access to the antenna combiner and feeder to enable the connection of the transmitter equipment to the combiner;
 - (e) The provision of access to the microwave distribution system; and
 - (f) The provision of support services.
- 7.57 Access, including access to associated facilities, provided as either a fully managed or unmanaged service, or a combination of both at the Access Seeker's request, means (but is not limited to) access to 2rn's sites and buildings, masts and antenna systems as is necessary to enable the provision of broadcasting transmission and distribution services. This would include, where applicable, access to allow for the installation and maintenance of

broadcast transmission and distribution and related equipment, and the connection of such equipment to power and other essential services.

- 7.58 Given this meaning, the provision of the following access services is to cover a fully managed or unmanaged service, or combination of both:
- (a) Access to allow for the installation and maintenance of broadcast transmission and/or distribution and related equipment (including provision of access to permit installation by third parties);
 - (b) Access for the connection of such equipment to power and other essential services;
 - (c) Access to sites for the use or establishment of common or exclusive building accommodation; and,
 - (d) Access to, and use of, shared, or shareable, broadcast equipment comprising combiners, feeders, data lines, antennas, transmitters and self-contained equipment housing.
- 7.59 As national and quasi-national Terrestrial Radio Broadcasters and DTT Multiplex Operators are reliant on 2rn's National Terrestrial BTS for delivery of their services, it is appropriate to ensure that effective access is provided.
- 7.60 ComReg's view is that the imposition or design of an access obligation that increases competition in the short term should be weighed against incentives for competitors to invest in alternative facilities that will secure more competition in the long term in the relevant market. In this case, given the high and non-transitory barriers to entry, ComReg does not believe that investment in alternative infrastructure capable of constraining 2rn is likely within the timeframe of this review. Moreover, given the potential for exclusionary behaviour, ComReg considers that an access remedy is justified and required in this market. Additionally, much of 2rn's investment in its infrastructure is historical, the costs of which are likely to be predominantly sunk. The access obligations in and of themselves should not reduce investment incentives, including where the prices charged for access allow efficient cost recovery.
- 7.61 While there are legislative provisions that may overlap with some elements of *ex ante* regulation, for example, section 115 of the 2009 Act, ComReg does not consider that these provide the necessary conditions for access which are applicable under *ex ante* regulation in light of identified SMP related competition problems. For example, to counter the potential for 2rn to employ a tactical refusal of access, ComReg can impose conditions which support the

provision of timely and efficient access, such as the implementation of SLAs, and fair, reasonable and timely access.

- 7.62 Pursuant to Regulation 55(1) of the ECC Regulations, ComReg is also imposing an obligation on 2rn to provide access to its National Terrestrial BTS including broadcast distribution and associated facilities in a fair, reasonable, timely, and transparent manner, and on non-discriminatory terms and conditions (including charges). This is required in order to facilitate sustainable downstream competition.
- 7.63 This obligation allows for the use of 2rn facilities but does not allow for building and erecting of third-party towers and masts on 2rn sites as ComReg does not consider this reasonable or proportionate. ComReg's position is that the conditions associated with the access obligations in this Consultation are sufficient for Access Seekers' needs and should enable competition to develop in downstream markets.

7.3.5 Overall conclusion on access remedies for Market A

- 7.64 Having regard to the analysis set out above, ComReg is imposing the above access obligations on 2rn.
- 7.65 ComReg's position is that obligations to provide access to National Terrestrial BTS are both proportionate and justified. ComReg has considered whether obligations other than those relating to access would, in themselves, resolve the competition problems identified. ComReg does not consider this to be the case. The imposition of the above access obligations alone would also not resolve issues such as excessive pricing, discrimination (on price or quality grounds) or ensure transparency of terms and conditions of access.

7.4 Non-Discrimination Remedies in Market A

7.4.1 Existing Non-Discrimination Obligations

- 7.66 The 2021 Decision imposed on 2rn a non-discrimination obligation, requiring the application of equivalent conditions in equivalent circumstances to Access Seekers. In this regard, 2rn was required to:
- (a) Apply equivalent conditions in equivalent circumstances to other Access Seekers providing equivalent services;
 - (b) Ensure that all services (including Associated Facilities) and information are provided to other Access Seekers under the same conditions and of the same quality as the services and information that 2rn provides to itself or to its subsidiaries or partners, including RTÉ; and

- (c) Ensure that all services and information are provided to other Access Seekers at the same time as such services and/or information are made available by 2rn to itself or to its subsidiaries or partners, including RTÉ.

7.4.2 Proposed Non-Discrimination Obligations

7.67 Regulation 52 of the ECC Regulations provides that ComReg may impose on an SMP SP obligations of non-discrimination in relation to access or interconnection in order to ensure that the SMP SP concerned:

- (a) Applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services; and
- (b) Provides services and information to others under the same conditions and of the same quality as it provides for its own services or those of its subsidiaries or partners.

7.68 Regulation 52(3) of the ECC Regulations provides further that ComReg:

“...may impose on an SMP operator obligations to supply access products and services to all undertakings, including to itself, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes, in order to ensure equivalence of access.”

7.69 As noted in Recital 184 of the Code, the principle of non-discrimination ensures that SMP SPs do not distort competition, in particular where they are vertically integrated and supply services to SPs with whom they compete on downstream markets. Non-discrimination obligations also play an important role in ensuring the effectiveness of other obligations such as those relating to access, transparency, and price control. In turn, obligations of transparency, for example those relating to KPI metrics and performance metrics, support non-discrimination obligations.

7.70 In light of RTÉ/2rn's vertical integration and 2rn's ability and incentive to discriminate between RTÉ and its other Access Seekers in relation to National Terrestrial BTS pre-ordering, ordering, provisioning, and service assurance, ComReg imposes a non-discrimination obligation on 2rn. This covers discrimination between 2rn's independent wholesale customers, and between those customers and RTÉ. A non-discrimination obligation ensures that 2rn does not favour RTÉ (or that RTÉ through its control of 2rn) or unduly favour any particular Access Seeker in the provision of Market A services and information, such that it might restrict or distort competition in any downstream market, ultimately impacting on retail and/or wholesale competition. Without such an obligation, there could be a reduction in quality of service, and of

choice for end users as radio services provided by SPs other than RTÉ would be adversely affected.

- 7.71 The EC notes in its Non-Discrimination and Cost Methodologies Recommendation²⁶² that one of the main obstacles to the development of a true level playing field for Access Seekers of ECNs is the preferential treatment of the downstream businesses of a vertically integrated SMP SP (for example, discrimination regarding quality of service, access to information, delaying tactics, undue requirements and the strategic design of essential product characteristics). The EC emphasises that:

“...it is particularly difficult to detect and address non-price discriminatory behaviour through the mere application of a general non-discrimination obligation. It is, therefore, important to ensure true equivalence of access by strictly applying non-discrimination obligations and employing effective means to monitor and enforce compliance.”

- 7.72 2rn supplies National Terrestrial BTS to Access Seekers and also, by means of self-supply, to RTÉ. ComReg accordingly maintains 2rn's non-discrimination obligation to provide access and information to all undertakings including itself, its subsidiaries, affiliates or partners, on the same timescales, terms and conditions, including those related to prices and service levels.

7.4.3 Overall conclusion on non-discrimination remedies for Market A

- 7.73 Having regard to the analysis set out above, ComReg is imposing the identified non-discrimination obligations on 2rn.
- 7.74 ComReg considers that the imposition of the above non-discrimination obligations is both proportionate and justified, having regard to the competition problems identified in Section 6.
- 7.75 ComReg has also considered whether non-discrimination obligations alone (or imposed alongside the access obligations above) would be sufficient to address the competition problems identified but does not consider this to be the case. For example, excessive pricing, constructive denial of access

²⁶² Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, OJEU [2013] L251/13. Available at: [Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment \(europa.eu\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0466).

problems or poor service quality issues could still occur in the presence of a non-discrimination obligation.

7.5 Transparency

7.5.1 Existing Transparency Obligations

- 7.76 The 2021 Decision imposed on 2rn a general obligation of transparency in respect of the access that it is required to provide. In respect of this, the 2021 Decision imposed on 2rn a number of publication requirements, including:
- (a) The requirement to publish a Reference Offer;
 - (b) The requirement to publish information about products and services; and
 - (c) The requirement to publish an SLA.

7.5.2 Proposed Transparency Obligations

- 7.77 Regulation 51 of the ECC Regulations provides that ComReg may impose obligations to ensure transparency in relation to access, requiring an SMP SP to make public specific information such as accounting information, technical specifications, network characteristics, prices, and terms and conditions for supply and use, including any permissible conditions limiting access to, or use of, services and applications. Regulation 51 makes it clear that the information that an operator may be required to make public includes network characteristics and expected developments.
- 7.78 Regulation 51(2) of the ECC Regulations provides more particularly that requirements may be imposed in respect of the publication of a Reference Offer that is sufficiently unbundled to ensure that operators are not required to pay for associated facilities which are not necessary for the service requested and which include a description of the relevant offerings broken down into components according to market needs, and a description of the associated terms and conditions including prices. ComReg may also specify the precise information to be made available, the level of detail required and the manner of publication.
- 7.79 Transparency obligations can be standalone but can also support other obligations being imposed and usually relate to requirements to make specified information publicly available. The stability created in a relevant market due to transparency obligations ensures effective competition in downstream markets, thereby enabling end users to have greater choice and quality of service. In this regard, ComReg is of the view that a transparency obligation is necessary in order to monitor and ensure the effectiveness of the obligations

of access, non-discrimination and price control. ComReg also notes that, as set out in Recital 182 of the Code, transparency of terms and conditions for access, including prices, also serve to speed up negotiations between operators, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms. In addition, transparency provides the means for 2rn to demonstrate that access to services and associated facilities in Market A is being provided in a non-discriminatory manner.

- 7.80 For the purpose of meeting transparency obligations, clear and unambiguous wording must be used in all material published or to be provided to Access Seekers. In accordance with general principles governing contracts, vague or ambiguous terms will be construed in the favour of Access Seekers.
- 7.81 In Section 6, ComReg identified that 2rn has the ability and incentive to engage in a range of exploitative and/or exclusionary conducts which may impact downstream competition and consumers. The potential for leveraging of SMP into related markets can occur through information asymmetries, delaying tactics such as protracted negotiations in respect of the provision of access to Market A services or associated facilities, and/or seeking unreasonable terms and conditions to grant access. On that basis, and in order to support the non-discrimination obligations, and to ensure that market participants have adequate visibility of the conditions and quality of the wholesale service offered, ComReg imposes a number of publication requirements.
- 7.82 ComReg's view is that the following transparency obligations should be imposed:
- (a) Requirement to publish a Reference Offer;
 - (b) Requirement to publish information about services; and
 - (c) Requirement to publish an SLA.
- 7.83 Each of these categories is considered in further detail below.

Reference Offer

- 7.84 Section 51(5) of the ECC Regulations provides that where an SP is subject to obligations concerning wholesale access to network infrastructure, ComReg is required to ensure the publication of a Reference Offer takes utmost account of the BEREC guidelines on the minimum criteria for a Reference Offer issued

in accordance with Article 69(4) of the Code. BEREC issued such guidelines²⁶³ on 5 December 2019. The BEREC Guidelines set out four categories of information to be included in a Reference Offer, as follows:

- (a) Terms and conditions for the provision of network access;
- (b) Details of operational processes;
- (c) Service supply and quality conditions; and
- (d) General terms and conditions of the agreement.

- 7.85 ComReg follows the same approach in respect of Market A as has been followed in respect of other markets and requires 2rn to publish a Reference Offer for the services falling within the scope of Market A.
- 7.86 A Reference Offer should continue to be published on 2rn's website which contains at least a description of all relevant offerings broken down into components according to market needs, a description of the technical specifications and network characteristics of the access being offered, the mechanism of pricing for access and approaching 2rn for access, and a description of the associated terms and conditions for supply and use, including prices, to 2rn's network infrastructure. It is important to note that this Reference Offer does not limit the services that 2rn can offer as it would need to evolve having regard to access requests that are made, negotiated, and accepted by 2rn.
- 7.87 As part of this Reference Offer, in order to aid transparency and support the obligations of non-discrimination, ComReg requires 2rn to publish its tariffs.
- 7.88 The obligation to publish a Reference Offer gives potential purchasers of Market A services detail on the supply characteristics and terms and conditions and prices of access. This means that such parties will have an understanding of the type of services and the characteristics and prices of these services on offer.
- 7.89 Its purpose is to provide a sufficient degree of certainty to allow Access Seekers to plan and run their operations efficiently, but does not prevent them, having regard to the proposed access obligations discussed below, from submitting bespoke requests or requesting additional services where circumstances arise.

²⁶³ BEREC Guidelines on the minimum criteria for a reference offer, BoR (19) 238, 5 December 2019.

- 7.90 Any terms not covered by the Reference Offer would, in the first instance, be subject to negotiation, with 2rn obliged to negotiate in good faith and with a right for either party to submit a dispute, regarding any terms which remain an issue following such negotiations, to ComReg for resolution.
- 7.91 ComReg proposes that specific obligations should be placed on 2rn regarding any changes to the Reference Offer. The mechanism should provide for all proposed changes, including changes to prices, and the introduction of new services and facilities to be published or otherwise communicated to Access Seekers in a timely and transparent fashion.
- 7.92 To ensure the effectiveness of this transparency obligation, no amendments should be made to the Reference Offer without prior notification to ComReg and Access Seekers. In particular, in order to ensure sufficient notice, 2rn should publish proposed changes to the Reference Offer and any proposed changes to wholesale prices (including prices for new services and facilities) at least two months before they come into effect and notify ComReg of such proposed changes an additional two month before publication. This would mean that ComReg would be notified at least four months before proposed changes were implemented, to be followed by publication at least two months before implementation. This proposal continues in place advance publication requirements but increases by one month the notification period to ComReg. This is to ensure sufficient time for engagement and review, including of pricing submission, based on experience under the 2021 Decision.
- 7.93 ComReg proposes that there should also be provision for ComReg to vary this period, where appropriate, on a case-by-case basis. For example, in the case of significant changes to products or prices, ComReg reserves the right to extend the publication and notification periods beyond the two-month period if appropriate and necessary on a case-by-case basis.

Requirement to publish information about products and services

- 7.94 As part of the transparency obligation, 2rn is required to publish any reasonable information or data which Access Seekers may require in order to be able to compete effectively using 2rn's Market A inputs. This could include, for example, accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.
- 7.95 The information to be made available in the Reference Offer must also include details on the following:
- (a) The locations of the points of network access;

- (b) Details of traffic and network management;
 - (c) Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
 - (d) Details of quality metrics;
 - (e) Details of measures to ensure compliance with requirements for network integrity; and
 - (f) Rules of allocation between the parties when supply is limited.
- 7.96 The need may also arise where Access Seekers require more granular information than would be available via the Reference Offer discussed above.

Requirement to publish SLAs

- 7.97 2rn is obliged to publish SLAs on its publicly available website. The detail of what is to be included, at a minimum, in the SLAs has been set out above in the discussion on access obligations.
- 7.98 ComReg's view is that publication of SLAs provides more transparency and assurance to ComReg, and industry, in demonstrating equivalence. As ComReg does not believe that SLAs would contain any commercially sensitive information, ComReg believes this is proportionate.

7.5.3 Overall conclusion on transparency obligations for Market A

- 7.99 Having regard to the analysis set out above, ComReg is imposing transparency obligations on 2rn.
- 7.100 ComReg considers that the imposition of the above transparency obligations is both proportionate and justified, having regard to the competition problems identified in Section 6.
- 7.101 ComReg has considered whether transparency obligations alone would be sufficient to address the competition problems identified and does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a transparency obligation.

7.6 Price Control and Cost Accounting Remedies in Market A

7.6.1 Existing Price Control and Cost Accounting Obligations

7.102 Under the 2021 Decision, the provision of access to Market A products, services, and associated facilities is subject to a cost orientation price control obligation based on Historical Cost Accounting ('HCA') and Fully Distributed Cost ('FDC') methodology.²⁶⁴ ComReg also imposed on 2rn an obligation to maintain appropriate cost accounting systems and to publish annually separated accounts for products, services and associated facilities offered in Market A, including an Income Statement setting out the revenues, costs and returns for those products, services and associated facilities ('**Regulated Accounts**').

7.6.2 Proposed Price Control and Cost Accounting Remedies

Regulation 56

7.103 Regulation 56 of the ECC Regulations²⁶⁵ allows ComReg to impose on an SMP SP obligations relating to cost recovery and price controls. These include obligations for both cost orientation of prices and cost accounting systems in situations where a market analysis indicates that a lack of effective competition for the provision of specific types of access or interconnection means that the SMP SP concerned may sustain prices at an excessively high level or apply a price squeeze to the detriment of end users.

7.104 In imposing any such obligations, ComReg is required to:

- (a) Take into account any investment made by the SMP SP which ComReg considers relevant and allow that SMP SP a reasonable rate of return on adequate capital employed, taking into account any risks specific to a new investment network project; and
- (b) Ensure that any cost recovery mechanism or pricing methodology that ComReg imposes serves to promote efficiency and sustainable competition and maximises consumer benefits.

7.105 Accordingly, the purpose of price control and cost accounting obligations is to ensure that prices charged are not excessive (or cause a margin squeeze) and

²⁶⁴ See Annex 3 for definitions of HCA and FDC.

²⁶⁵ [S.I. No. 444/2022 - European Union \(Electronic Communications Code\) Regulations 2022 \(irishstatutebook.ie\)](#).

promote efficiency and sustainable retail competition, while maximising consumer benefits.

- 7.106 ComReg set out at sub-section 7.6.1 above the existing price control and cost accounting obligations imposed on 2rn in Market A under the 2021 Decision.

Requirement for Price Control and Cost Accounting Remedies in Market A

- 7.107 2rn is currently subject to *ex ante* regulatory obligations of price control and cost accounting. Given the persistent risk of price-related competition problems deriving from an SMP position in the market, ComReg considers that the imposition of a price control and cost accounting obligation remains appropriate and proportionate.
- 7.108 For example, RTÉ, given its vertical integration with 2rn, has the ability and incentive to price excessively and/or to deter entry/expansion of potential DTT Multiplex Operators or rival broadcasters. 2rn might also have a limited incentive in keeping network cost to an efficient level, since higher transmission charges would hinder the development of competition (as such costs have to be borne by users of 2rn's network and impact on their cost structures) and this could benefit the broadcasting activity of RTÉ. These competition issues are set out in Section 6.
- 7.109 ComReg considers that it is necessary to reimpose a price control obligation to ensure that the SMP SP sets appropriate wholesale prices such that effective competition is facilitated. This is on the basis that, absent an appropriate price control obligation, 2rn would have the ability and incentive to set excessive prices in the wholesale market which would potentially harm competition from potential DTT Multiplex Operators or increase costs for Retail TV and Radio Broadcasters relying either directly, or indirectly, on 2rn's wholesale services. ComReg therefore considers it appropriate and justified to impose a price control obligation on 2rn to guard against such potential excessive pricing.
- 7.110 Price control obligations imposed in a regulated market may be relatively light, such as an obligation that prices are reasonable, or heavier, such that prices are cost oriented to ensure full justification for prices where competition is not strong enough to prevent excessive pricing. The price control obligation used should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition for end user benefit.
- 7.111 ComReg has set out in Annex 3 the different price control options available to ComReg; these include:

- (a) Retail minus;
- (b) Reasonable costs; and
- (c) Cost orientation.

- 7.112 2rn is currently subject to an obligation of cost-orientation and ComReg considers that cost orientation continues to be the appropriate price control for 2rn in Market A as it addresses the risk of excessive pricing while ensuring 2rn recovers its efficient costs. A cost-orientation price control ensures that 2rn's prices are an actual reflection of efficiently incurred costs while, at the same time, allowing for an appropriate return on investment.
- 7.113 ComReg does not consider that the use of retail minus is appropriate in Market A as there is no separately identifiable retail price point, or points, on which a wholesale price could be based. ComReg considers that an obligation that price reflects reasonable costs is not the appropriate means to determine tariffs for Market A as this price control may not provide sufficient transparency and reassurance to the market that the tariffs being charged are not excessive or discriminatory.
- 7.114 As noted above, when imposing obligations, ComReg is required under Regulation 56(2) of the ECC Regulations to take into account any relevant investments made by the SMP SP and allow a reasonable rate of return on adequate capital employed, taking into account the risks involved.
- 7.115 The burden of proof to demonstrate that charges are derived from costs, including a reasonable rate of return on investment, rests with the SMP SP. Following a direction from ComReg, as per Regulation 56(6) of the ECC Regulations, an SMP SP may be required to provide full justification for its price and may, where appropriate, require prices to be adjusted.

Price control considerations

- 7.116 RTÉ's vertically integrated structure is important when considering the pricing methodologies that should be followed in setting cost-oriented tariffs, and in determining such charges.
- 7.117 As new entry into Market A is highly unlikely during the period of this market review, for the reasons discussed above, the focus of the cost orientation price control should be to ensure that prices are not excessive and allow the recovery of efficient costs, rather than incentivising alternative investment.
- 7.118 The pricing mechanism applied to set tariffs needs to take account of these factors to ensure a level playing field for all Market A customers and not disadvantage end users, including Irish TV viewers and radio listeners.

- 7.119 The tariffs charged by 2rn, both internally to RTÉ and externally to independent Retail Radio Broadcasters, should be cost-oriented, transparent and non-discriminatory taking into account the fact that 2rn's infrastructure is also used by RTÉ for the provision of DTT Multiplexing Services and also for other non-broadcasting services which do not fall within the scope of Market A (e.g., use of masts by mobile operators).
- 7.120 In particular, costs should be allocated fairly across all services provided by 2rn using its infrastructure.

Costing Methodologies

- 7.121 To achieve its regulatory objectives, ComReg has a number of options to choose from in specifying the methodologies to be used by 2rn to in modelling the appropriate cost-oriented prices, taking account of the specific issues relevant to Market A.
- 7.122 The costing methodology options that can be used when modelling costs include the following, as described in further detail in Annex 3:
- (a) Historic costs or current costs;
 - (b) Top-down ('TD') model, bottom-up ('BU') model or hybrid model; and/or
 - (c) Long run incremental costs ('LRIC') or fully distributed costs ('FDC').
- 7.123 Which costing methodology to retain will depend on how best each will be in achieving the following objectives in the circumstances:
- (a) Maximising consumer welfare;
 - (b) Ensuring 2rn recovers its efficiently incurred costs;
 - (c) Avoiding any cost over-recovery by 2rn; and
 - (d) Encouraging efficient investment in infrastructure.
- 7.124 Taking into account the considerations above, ComReg's view is that a cost-oriented price control based on historic costs remains the most appropriate approach for Market A to prevent competition problems such as excessive pricing.
- 7.125 Furthermore, as discussed in Section 5, there is unlikely to be any new entry to Market A over the lifetime of this market review so there is no need to incentivise alternative investment.
- 7.126 Therefore, consistent with previous market reviews, ComReg's conclusion is that the actual costs or **historic costs, adjusted if required for efficiencies,**

continue to be the most appropriate costs on which to base wholesale regulated charges for Market A.

- 7.127 Consumer welfare can be maximised by ensuring that the tariffs charged to Retail Radio Broadcasters and DTT Multiplex Operators are reflective of the efficient costs incurred by 2rn in providing the service.
- 7.128 Setting the tariffs at the level of 2rn's efficiently incurred costs means that DTT Multiplex Operators and Retail Radio Broadcasters will not pay for inappropriate investments or unjustified excess costs.
- 7.129 The avoidance of potential cost over-recoveries by 2rn also ensures that tariffs are not excessive and that ultimately there is not a transfer of resources from Market A customers to 2rn.
- 7.130 Investment in capital intensive industries is often rewarded through a return on capital.
- 7.131 NRAs generally use the Weighted Average Cost of Capital ('**WACC**') as the most appropriate measure of the returns that investors require before they will invest in a business. The WACC determines the normal level of profit that must be earned by a business if it is to continue to attract funds in a market where financial resources have many alternative uses. It represents the rate of return a company should earn on its invested capital in order to provide sufficient returns to the investors who are financing the investment. The calculation of an appropriate WACC is not part of this review. This was assessed by ComReg in ComReg Decision D10/20, Document No. 20/96.²⁶⁶ This Decision remains in force and provides for annual updates to the WACC.²⁶⁷
- 7.132 The use of historical cost is also a practical means of setting tariffs which through the use of 2rn's own data, also minimises the regulatory burden on 2rn. In particular, most of the information that ComReg considers necessary to set tariffs can be found in the accounting records of 2rn, which, if subject to regulatory scrutiny, constitute a robust basis for tariffs.
- 7.133 In relation to the choice of model for calculating wholesale regulated charges for Market A, in the absence of expected entry in the market during the timeframe of this review, the use of a BU model is not appropriate or proportionate.

²⁶⁶ [Review of Weighted Average Cost of Capital | Commission for Communications Regulation \(comreg.ie\)](#).

²⁶⁷ See most recently, [ComReg IN 24/49](#).

- 7.134 In particular, a TD model is more compatible with the use of historic costs as the relevant cost base. A TD model using the HCA accounts as its source means that, allowing for efficiency and modelling adjustments, the resulting Market A tariffs will continue to be reconcilable to 2rn's HCA accounts and will continue to be based on 2rn's TD information - as has been the case under the previous two market analysis decisions.
- 7.135 ComReg's view is accordingly that the **TD data remains the appropriate choice for modelling Market A costs**.
- 7.136 ComReg also remains of the view that **FDC continues to be the most appropriate cost accounting approach to adopt for modelling Market A costs** given that this method is closely aligned with the top-down approach using historic costs.
- 7.137 In summary, for Market A, an FDC approach using a TD costing model using historic costs (subject to appropriate efficiency adjustments, as the case may be), remains the most appropriate method to set the cost-oriented charges.

Implementation of Cost Orientation Obligation by 2rn

- 7.138 Since 2013, 2rn has developed and operated a tariff model that derives applicable tariffs from 2rn's accounting records and budgeted estimates for operational and capital expenditures relevant to Market A. The treatment of these Market A costs in the tariff model depends on their classification as capital expenditure related cost ('**capex related costs**') or other operating costs ('**opex related costs**').

Capex related costs

- 7.139 Insofar as capex related costs are concerned, the 2rn tariff model provides for two separate components:
- (a) A return on the Regulated Asset Base calculated by applying to the regulated assets' Mean Capital Employed ('**MCE**'), the Weighted Average Cost of Capital ('**WACC**') for broadcasting ('**Capital costs**') determined by ComReg each year in accordance with ComReg Decision D10/20²⁶⁸ (currently set at 6.57% for the year commencing 1 July 2024).
 - (b) A yearly depreciation charge, calculated using the following asset useful economic lives:

²⁶⁸ [Review of Weighted Average Cost of Capital | Commission for Communications Regulation](#).

- i. Masts and towers: 15 – 40 years;
- ii. Transmission and distribution equipment: 13.33 years;
- iii. Buildings: 10 – 40 years;
- iv. Leasehold Land: 10 years;
- v. Other equipment: 5 – 8 years.

- 7.140 The majority of the 2rn's assets base's MCE relates to four sites, namely Maghera, Mullaghanish, Truskmore and Mount Leinster. Since the assets at these 4 sites were replaced in or around 2012 there has been no major capital expenditure programmes and therefore 2rn's Regulated Accounts show decreasing MCE over time.
- 7.141 For 2rn's assets a depreciation charge using a straight-line basis is calculated and the capital costs are based on the resultant MCE, with the exception of certain "Long Life Assets" ('LLA'). LLA include large towers and masts, and buildings which have an asset life of 40 years. Their cost represents a significant proportion of the 2rn regulated asset base (approximately [REDACTED] [REDACTED]²⁶⁹ of the asset base). In order to minimise spikes in tariffs at the initial implementation of the tariff model in 2013, depreciation charges and capital costs for LLA have been smoothed over a 20-year period. The tariff model includes a 20-year annuity for all LLAs which were existing or planned in 2013. This annuity calculation incorporates a projection of depreciation and capital costs until 2033 and has been updated to account for changes in the regulated WACC.
- 7.142 Large scale investments in LLA, similar to when 2rn replaced four large towers circa 2013, have not been repeated and are not likely to occur during the lifetime of this review.
- 7.143 2rn records and compares the annuity based LLA capex related costs used in the tariff model, to LLA capex related costs in the Regulated Accounts. This comparison is carried out to confirm if the depreciation and capital costs relating to LLA are on track to be recovered by 2033.
- 7.144 Apart from LLA, as part of its tariff model updates, 2rn also reviews the expected investment in the network over a multi-year period to ensure

²⁶⁹ In the range of 80% to 90%.

foreseeable significant capital expenditure does not result in spikes in annual tariffs while also ensuring that asset lives are appropriate.

Opex related costs

7.145 The main sources of opex related costs are employee and personnel related costs, and electricity consumption. In particular, the 2rn sites consume significant amounts of energy, for cooling equipment housed indoors, broadcasting signals, and also lighting aircraft warning lights on the tops of structures. These opex related costs are estimated annually in 2rns annual budget and compared to the latest available Regulated Accounts.

“T2 adjustment”

7.146 In order that 2rn only recovers incurred costs, the cost-based tariff for any given year reflects any adjustment that is required to address discrepancies between expected opex related costs included in the tariff applicable in the previous year, and the actual outturn as set out in the HCA Regulated Accounts. The tariff for the subsequent year will accordingly address any under or over recovery of these costs.

7.147 For many years, there were minimal fluctuations in 2rn tariffs from one year to the next. With geopolitical events in 2022, 2rn tariffs entered a period of volatility, mainly caused by inflationary pressures on energy and thereby 2rn’s energy costs, which is a significant input into the Market A tariffs.

Allocation

7.148 Tariff charges for Market A Access Seekers reflect costs allocated across all the services offered on the 2rn infrastructure using the following three cost drivers:

- (a) Mast occupancy, ascertained by mast occupancy studies which identify what proportion of the masts and towers are utilised by each service (including non-regulated services). In practical terms, 2rn conducts on an annual basis “climb downs” on its masts to determine what equipment is carried on each mast, where, and the amount of space on the mast it occupies. Taking into account the location on the mast and its wind loading, 2rn determines what cost each piece of equipment drives to the services using that equipment. This exercise is supplemented by a third party engaged by 2rn to review the mast occupancy study, involving attendance at several sites, monitoring of the activities and checking the processes employed by 2rn to ensure the studies are accurate;
- (b) Electricity consumption, metered for each service; and

- (c) Pay related costs, allocated to services depending on time spent on the basis of activity reports which record time spent on various activities against sites and activity codes (e.g., DTT, radio, common infrastructure). The manner in which 2rn compiles activity reports was subject to a review conducted for ComReg in 2023 which did not identify any cause to change the approach used by 2rn.
- 7.149 Mast occupancy is used to allocate mast and tower usage costs, rent and rates, and building usage costs. Activity reports are used to allocate personnel and related costs, including 2rn's staff hours.
- 7.150 An analysis of 2rn's published Regulated Accounts²⁷⁰ shows that between 2013 and 2023, the costs incurred in operating Market A annually have risen from circa €12.3m to circa €13.5m, representing an increase of 9.6% while during the same period cumulative inflation in Ireland was at approximately 22%.²⁷¹ This has had the effect of causing a nominal increase in tariff for all Market A Access Seekers (but a reduction in real terms).
- 7.151 Overall however, it should also be noted that over the period from 2013, when a price control for 2rn was first applied, to December 2023, 2rn has earned, on average, a return on its mean capital employed of 7.16%. Over the same period, the regulated WACC for Market A was on average 7.22%, a difference of 0.06%.

Annual Tariff and Tariff Model Transparency

- 7.152 The pricing volatility experienced since 2022 has highlighted the need for additional transparency and predictability in the determination of the annual tariffs and the timing of adjustments required to address discrepancies between expected and incurred costs, as recorded in the Regulated Accounts. This can be achieved relatively easily by formalising the annual tariff review process conducted to date by 2rn.
- 7.153 In particular, and with the aim of facilitating the annual review of 2rn's tariffs, ComReg proposes that 2rn be required to furnish to ComReg no later than 31 January, a copy of the budget for that calendar year with a commentary on variances from the previous years' budget. At the same time, 2rn should provide the calculation of the T2 adjustment in respect of the previous year, which may form the basis for any adjustment to the tariff. Following these

²⁷⁰ [2rn Published Regulated Accounts 2023 \(2rn.ie\)](#).

²⁷¹ [CPI Inflation Calculator interactive comparison app | CSO Ireland](#) Jan 2013 to Dec 2023.

submissions, ComReg proposes that 2rn be required to notify ComReg annually by 1 April, the tariff that will apply from 1 July, including where no change to the existing tariff is proposed. If a new tariff is to apply from 1 July, it would have to be published on 1 May. Any variation of these timelines would require prior approval from ComReg.

- 7.154 2rn's annual notification should be accompanied by an updated tariff model and a detailed note describing the reason for the proposed tariff and how it remains cost oriented and provides a justification of the proposal.
- 7.155 Confidence on the part of Market A customers (and indirectly Market B customers given that Market A services is the main cost driver in Market B) in the cost-orientation of tariffs can also be helped by providing information that allows them to understand the basis for the tariffs they are being charged. ComReg believes in this regard that 2rn should continue to publish on its website a detailed description of the tariff model and how it operates to derive prices. In order to further address any erosion in confidence in the cost orientation of tariffs as a result of increase in cost volatility, ComReg also proposes that 2rn be required also to publish its tariff model, redacted to the extent required to protect commercially sensitive information of 2rn.
- 7.156 There has been little change to the model structure since it was introduced in 2013. The fact that the financial data in the tariff model is directly comparable to that in the 2rn audited Regulated Accounts gives assurance that the tariff model reflects actual costs and revenues.

7.6.3 Cost Accounting Obligations

- 7.157 To support the effective operation of the price control obligation, it is necessary that 2rn maintain cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, which should be clearly stated and include the principles of cost causality, objectivity, transparency and consistency of treatment. A key part of this process is the stage which identifies those parts of the underlying activities or network components that directly support, or are consumed by, those particular services or products. As these components are frequently used to provide more than one product or service, it is also necessary to determine how much of each component is used for each service or product.
- 7.158 The division of services and products, and the corresponding costs, capital employed, and revenues between the different services and products should be reflected in costing systems, and the coherence and integrity of information

should be assured. Where a cost accounting system is mandated to support price control, a description of the cost accounting system must be made public where, at least, the main categories under which costs are grouped and the rules used for the allocation of costs are provided.

7.159 2rn accordingly should continue to publish on its website Accounting Documentation which includes the following:

- (a) Description of the business of 2rn explaining the main activities and functions performed and RTÉ services offered;
- (b) Definitions of the 2rn functional cost categories;
- (c) Regulatory Accounting systems and underlying principles including the conceptual flow of cost and revenues from the source financial systems;
- (d) Regulatory Accounting Policies including an explanation of the key accounting policies adopted by 2rn and the key cost allocation methodologies employed;
- (e) Inter/Intra transactions – an overview of the basis of calculation of any inter/intra transactions;²⁷² and
- (f) Material period-on-period changes – describing the period-on-period changes to the form and content of the Regulated Accounts and changes to the cost allocation methodologies having a material impact.

7.160 The Primary Accounting Documentation should also include details on the sources of information used in the tariff model (including financial and engineering information), description of the main cost drivers details of assumptions made, and an explanation of any material changes in assumptions/cost drivers in the tariff model from prior years. ComReg may consider refinements, additions or amendments that are required to this documentation to improve transparency.

7.6.4 Overall conclusion for the imposition of the Price Control and Cost Accounting Remedies in Market A.

7.161 Having regard to the analysis set out at sub-section 7.6 above, ComReg continues to impose a cost oriented price control obligation on 2rn in Market A

²⁷² Intra transactions comprises revenue of 2rn derived from RTÉ as Multiplex operator in Market B. Inter transactions comprises revenue of 2rn derived from RTÉ as a national analogue terrestrial radio broadcaster in Market A.

based on a HCA and FDC methodology (with some amendments as outlined above).

- 7.162 ComReg's analysis indicates that 2rn has the ability and incentive to engage in excessive pricing, absent regulation.
- 7.163 By imposing a cost-oriented price control obligation on 2rn, ComReg is ensuring that the prices 2rn charge Market A Access Seekers reflect efficient costs and that any investment in the market is also efficient. Cost orientation will allow 2rn recover its efficient costs and earn a return on capital while, at the same time, ensuring that end users are not subject to excessive charges.
- 7.164 As this is a continuation of the price control obligation that has been in place under the previous two market analysis decisions, there is no change in the impact on stakeholders. 2rn already has a tariff model and associated cost allocation processes in place that reflects the pricing requirements as set out above. For the users of Market A services (and by extension Market B) they can continue to relate the structure of the tariffs to the cost recovery requirements in the price control. Where there are changes to the underlying tariff, these are explained.
- 7.165 ComReg, therefore, considers that the imposition of the price control obligations adheres to its regulatory objectives in this market, does not entail a disproportionate regulatory burden on 2rn, and provides transparency for Market A (and Market B) Access Seekers.

7.7 Accounting Separation Remedies in Market A

7.7.1 Existing Accounting Separation Obligations

- 7.166 The 2021 Decision imposed requirements on 2rn to maintain separated accounts, publish regulated accounts and provide accounting records, upon request, to ComReg.

7.7.2 Proposed Accounting Separation Remedies in Market A

Overview

- 7.167 In accordance with Regulation 53 of the ECC Regulations, ComReg may require an SMP SP, which is vertically-integrated, to make transparent its wholesale prices and its internal transfer prices, to ensure compliance with any non-discrimination obligation imposed or, where necessary, to prevent unfair cross-subsidisation.

- 7.168 An accounting separation obligation can also support cost accounting obligations and assist with monitoring compliance with pricing obligations as it brings additional transparency to the revenue and costs of an SMP SP's services.

Proposed Accounting Separation Remedies for Market A.

- 7.169 In Section 6, ComReg has identified potential competition problems associated with possible price-related leveraging such as excessive pricing which highlights the importance of establishing a transparent and effective mechanism of accounting separation and transfer charges between the various RTÉ's entities so that 2rn costs and its allocation to each customer (RTÉ and competitor broadcasting activities) are efficient and can be transparently identified.
- 7.170 Separated accounts, by making visible 2rn's wholesale and internal transfer prices, facilitates transparency on the allocation of costs across 2rn's different services. It is therefore considered justified to reimpose an obligation on 2rn to maintain separated accounts to support 2rn's obligations around non-discrimination cost oriented price control.
- 7.171 ComReg notes the relevance of sections 108 and 109 of the 2009 Act. Section 108(2) provides that all transactions entered into by a "corporation", defined in the 2009 Act as meaning RTÉ or TG4 or both, as the case may be, as between the activities arising from (a) its public service objectives, and (b) its exploitation of commercial opportunities, shall be made at arm's 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 CnaM.
- 7.172 Section 109 of the 2009 Act sets out the general accounting procedures for a corporation. These accounting procedures include the requirement for a relevant corporation to prepare and submit audited accounts to the Minister. CnaM, at the direction of the Minister and having consulted with the corporation, must 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 2009 Act. In particular, section 109(9)(b) provides that a corporation, 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. The statement must distinguish between monies received or expended on (i) activities in pursuance of its public service objectives, and (ii) activities in pursuance of its exploitation of commercial opportunities objective.

- 7.173 The above provisions of the 2009 Act are concerned with ensuring accountability for expenditure of public monies and protecting against inappropriate use of public funds. They are not designed to address issues of SMP *per se*, and neither provision, in ComReg's view, results in full transparency of internal pricing in the same manner as under the electronic communications regulatory framework.
- 7.174 2rn has been subject to Accounting Separation obligations under the two previous market analysis decisions.

Current reporting requirements of RTÉ (including 2rn)

- 7.175 RTÉ is a vertically integrated operator in that it provides wholesale services as well as offering retail services and therefore competes with other Retail TV and Radio Broadcasters. RTÉ is also a statutory corporation established under legislation while 2rn is an incorporated company with limited liability and is a wholly-owned subsidiary of RTÉ.
- 7.176 2rn annually files statutory financial statements with the Companies Registration Office ('CRO'). Statutory financial statements tend to be used to comply with companies' legal obligations, such as compliance with taxation requirements and CRO filing requirements. While they are also used to report the financial performance at a given point of time, the information contained within statutory financial statements tends not to be sufficiently granular in terms of detail to support regulatory decisions. Statutory financial statements can contain information relating to both regulated and unregulated services and usually does not differentiate between the two.
- 7.177 RTÉ also publishes an annual report which contains audited financial statements of the RTÉ Group. These financial statements include the reporting of internal transfer charges between 2rn and other RTÉ integrated business divisions. These internal charges are removed on consolidation of RTÉ's activities, thereby reflecting the amount RTÉ charges third parties for use of its broadcasting network.
- 7.178 However, the annual report does not differentiate between the broadcasting and non-broadcasting customers using RTÉ's network or between regulated and non-regulated activities. Therefore, the level of detail provided in the RTÉ annual report is insufficient for ComReg when conducting regulatory reviews. Separated accounts provide more granular detail in terms of 2rn's revenue and costs, which is required by ComReg to ensure 2rn is complying with its obligations. ComReg, therefore, considers that reimposing 2rn's Accounting Separation obligation is justified and proportionate.

2rn's Accounting Separation obligations

- 7.179 ComReg proposes that 2rn continues to prepare separated accounts in a format which assists ComReg in discharging its regulatory functions.
- 7.180 The implementation of the obligation of accounting separation is detailed under the following headings:
- (a) Presentation of accounts;
 - (b) Regulatory Accounting Principles and Accounting Policies; and
 - (c) Audit.

Presentation of accounts

- 7.181 ComReg is of the view that the separated accounts should continue to include the following:
- (a) Regulated Accounts;
 - (b) Additional financial data ('AFD'); and
 - (c) Accounting Documentation.

Regulated Accounts

- 7.182 The requirement that 2rn prepare Regulated Accounts is in order that there is available a financial statement identical in form to statutory financial statements showing the financial data relating only to the services offered by 2rn in Market A. In other words, the Regulated Accounts are an income statement showing revenues and costs for Market A services, prepared in a format similar to that used for statutory reporting purposes and a balance sheet prepared on a Mean Capital Employed basis. The Income Statement should include details on the underlying relevant cost categories, which should be discussed first with ComReg.
- 7.183 With the view to monitoring financial performance in Market A, the Regulated Accounts should be accompanied by a separate statement showing the average return on capital on a rolling multi-year basis for assets used for the provision of Market A services.
- 7.184 In order to ensure the reliability of the Regulated Accounts, there should be a reconciliation against the statutory financial statements which include details of the revenues and costs of services provided to non-Market A customers (e.g., local FM Radio Broadcasters or mobile operators). The principles followed for the identification and allocation of costs to specific services when producing the Regulated Accounts ('**Regulatory Accounting Principles**') and

the regulatory accounting policies followed by 2rn in arriving at the Regulated Accounts (**'Accounting Policies'**) should also be identified in order to ensure that the Regulated Accounts can be fully understood and properly reconciled against the statutory financial statements.

- 7.185 It is also essential that Regulated Accounts are comparable year on year. In order to ensure that this is case, where there are changes made that means that this would no longer be the case, as a result of, for example, a material change in an accounting policy, cost attribution methodology or material error, the Regulated Accounts for the preceding financial period must be adjusted, unless ComReg agrees in writing that it would be unreasonable to have to make such an adjustment, so that they are produced on the same basis. Given the impact that any such changes have on the reliability of the Regulated Accounts, no adjustment to an Accounting Policies or cost attribution methodology should be made without it having been discussed in advance with ComReg, and without ComReg's consent.
- 7.186 Finally, in light of the critical role of Regulated Accounts in ensuring the cost-orientation of prices and confidence that this is so, there should also be a signed statement from the directors of 2rn, acknowledging their responsibilities for the preparation of the Regulated Accounts and confirming their compliance with the requirements of the Decision Instrument in this respect.
- 7.187 The Regulated Accounts accordingly should continue to contain the following information:
- (a) A statement or reference to the Regulatory Accounting Principles followed when preparing the Regulated Accounts;
 - (b) Income Statement and Balance Sheet providing details on the underlying relevant cost categories; and
 - (c) Notes to the Regulated Accounts including a reconciliation to the statutory financial statements.
- 7.188 ComReg proposes that the Regulated Accounts continue to be audited annually by an independent auditor and published on 2rn's website within four months of the end of its financial year, unless otherwise agreed by ComReg. Audit requirements are discussed further below.

Additional Financial Data

- 7.189 Additional, more detailed, financial data may be required by ComReg from time to time when monitoring compliance with the requirement of cost-orientation, for instance:

- (a) Income statements for each service, including comparable data, distinguishing between external and inter/intra revenues and costs;
- (b) A schedule comparing the revenues in the Regulated Accounts to the tariffs in the 2rn tariff model; and/or

A copy of the 2rn Fixed Asset Register, as reconciled to the property, plant and equipment note, as well as the intangible assets note (or their equivalents) per the statutory financial statements.

- 7.190 Any such additional financial data would need to be prepared using the same Regulatory Accounting Principles and policies as the Regulated Accounts. Given their level of detail, they likely contain commercially sensitive and confidential information. As such, ComReg's view is that 2rn should not be required to make it public and, instead, this Additional Financial Data ('AFD'), is to be shared only upon request from ComReg, in confidence.
- 7.191 When AFD has been required by ComReg, it should be submitted to ComReg at the same time as the Regulated Accounts are published.

Accounting Documentation

- 7.192 Assessment of the Regulated Accounts and AFD, and their reconciliation to the statutory financial statements requires having a description of the 2rn's accounting systems available setting out underlying principles and the conceptual flow of costs and revenues from source financial systems so that the allocation of costs by 2rn between regulated and non-regulated activities and within regulated activities to RTÉ and third parties can be understood. There should also be clarity and transparency as regards the accounting policies followed by 2rn for the purpose of allocating costs and in terms of the main cost drivers within the cost accounting system. It is essential that this documentation, referred to as '**Primary Accounting Documentation**', which covers the following, is published by 2rn:
- (a) The basis of preparation of the Regulated Accounts (and AFD), including an explanation of the key accounting policies adopted by 2rn. This includes for instance details of the income recognition policy, depreciation policy, capitalisation policy, and the approach to dealing with issues such as cost allocation, prior period adjustments and changes in Accounting Policies;
 - (b) A description of 2rn's business, explaining the main activities and functions performed;
 - (c) A description of Functional Cost Categories;

- (d) An overview of the basis of calculation of any inter/intra transactions;
 - (e) An overview of the key cost allocation methodologies employed; and
 - (f) The details of material period on period changes to the form and content of the Regulated Accounts and changes to cost allocation methodologies having a material impact.
- 7.193 Additional documentation or information may be required by ComReg from 2rn from time to time where it is needed to understand the Regulated Accounts or the AFD.
- 7.194 The Primary Accounting Documentation should be published at the same time as the Regulated Accounts, within four months of the end of 2rn's financial year, or at a time as agreed by ComReg. The obligation to publish the Primary Accounting Documentation has been in place for a number of years and satisfactorily addresses the requirements for reliability and transparency.

Directors' compliance statement for the Separated Accounts

- 7.195 In addition to the directors' compliance statement in the Regulated Accounts, ComReg may require 2rn to submit to ComReg, in confidence, at the same time it publishes its Regulated Accounts, a statement which is signed by its directors acknowledging their responsibilities for the preparation of the Separated Accounts and confirming 2rn's compliance with the requirements of the Decision.

Regulatory Accounting Principles and Policies

- 7.196 In order that the Regulated Accounts and AFD can support the obligation of cost-orientation imposed on 2rn, the accounting policies and accounting methods including cost allocation methodologies should reflect the principles of cost causality, objectivity, transparency and consistency. The application of these principles as regards the allocation of costs and transfer charges is considered in further detail below.

Allocation of costs

- 7.197 For the purpose of the Regulated Accounts and the obligation of cost orientation, the following principles should form the basis for cost allocation:
- (a) Where possible, costs which can be directly assigned to a particular Service are so assigned.
 - (b) Common costs (the costs that cannot be directly assigned to a particular service) are allocated as follows:

- i. Whenever possible, common costs are allocated on the basis of direct analysis of the origin of the costs themselves;
 - ii. When direct analysis is not possible, common cost categories are allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible, the indirect linkage should be based on comparable cost structures;
 - iii. When neither direct nor indirect measures of cost allocation can be found, the cost category should be allocated on the basis of an Equi-Proportionate Mark-up, computed by using the ratio of all relevant expenses directly or indirectly assigned or allocated, to each service.
- (c) Only those activities which cause costs to be incurred, either directly or indirectly, are allocated the costs;
 - (d) Costs are objectively applied, and no party gains a benefit at the expense of another;
 - (e) The way costs are allocated is applied consistently from year to year.

7.198 At a minimum and, where relevant, the hierarchy of costs used by 2rn should enable the following functional cost categories – which should also be the same across the tariff model, the Regulated Accounts and the AFD – to be calculated:

- (a) Employee and personnel related costs;
- (b) Network electricity;
- (c) Maintenance costs;
- (d) Other operating costs;
- (e) Depreciation and amortisation;
- (f) Central shared services costs; and
- (g) Rent and rate.

7.199 Where surveys are used to determine the allocation of costs, the survey techniques used must ensure that the survey data is unbiased and objective, representative of the entire population, and not obscured by seasonal or other factors. Survey data should also be updated annually.

7.200 The Primary Accounting Documentation should be reviewed by the auditor annually, including the processes and procedures used by 2rn to arrive at the Regulated Accounts.

Transfer charging mechanism

7.201 A well-defined, transparent and verifiable transfer charging system is necessary to demonstrate non-discrimination and to calculate internal costs and revenues. In particular the tariffs 2rn charges RTÉ should be prepared on the same basis as the charges to third parties, and any differences should be based on objective and transparent reasons. In this regard, transfer charges should be prepared based on the following transfer charging principles:

- (a) Transfer charges (revenues and costs) are attributed to cost components, for regulated and unregulated services, in accordance with the activities, which cause the revenues to be earned, or costs to be incurred.
- (b) The attribution methods are objective and not intended to benefit any service (regulated or unregulated).
- (c) Transfer charges are treated consistently from period to period.
- (d) The transfer charging methods used are transparent. There should be a clear rationale for the transfer charges used and each charge must be justifiable (and supporting calculations available).
- (e) The charges for inter/intra usage (that is, for usage by an RTÉ radio service or by the RTÉ DTT Multiplexers) are equivalent to charges levied for the equivalent service provided to a third, external, party in order to ensure equal, non-discriminatory treatment. Where no equivalent exists, the charge for the nearest equivalent is used. Where there is no near equivalent, a cost-based charge is used.

7.202 This information will assist in monitoring 2rn's compliance with the relevant non-discrimination obligations with regard to wholesale prices as well as its internal transfer charges. This will also help to detect and prevent any unfair cross subsidisation.

Audit

Auditor appointment

7.203 In light of the importance of the Regulated Accounts in the determination of cost-oriented tariffs, ComReg is of the view that just as statutory financial statements are audited, so should the Regulated Accounts. Given that ComReg will rely on the Regulated Accounts in assessing the cost orientation

of 2rn's tariffs, it is essential that ComReg has full visibility of the audit. This is easiest achieved by requiring 2rn to have the audit conducted on the basis of a tripartite agreement whereby the audit opinion is to be addressed to both ComReg and 2rn and both are owed a "duty of care" from the auditor. Such an arrangement has been in place with 2rn over the timeframe of the previous two market analysis decisions and implemented by way of a Letter of Engagement signed annually by ComReg, 2rn and the auditor or auditors' firm in charge of providing the audit opinion in respect of the Regulated Accounts (**'the Auditor'**).

- 7.204 Given the tri-partite nature of the arrangement there should be consultation between 2rn and ComReg as regards the appointment of the Auditor so that ComReg can obtain assurances that 2rn's preferred auditor has the necessary expertise and the Auditor should not be appointed or reappointed by 2rn without ComReg's consent.
- 7.205 As part of the tri-partite audit arrangement, ComReg considers that it is important to hold pre and post audit meetings with the Auditor. The purpose of the pre audit meeting is for ComReg to indicate what areas it would like the Auditor to focus on and for the Auditor to set out the areas it considers require the most attention. In addition, ComReg may require the auditor to describe how it considers and sets materiality for the purposes of the audit of 2rn's Regulated Accounts, and what this means for any errors identified in the accounts of the regulated services. It is for the Auditor to determine how to implement its audit plan. The post audit meeting is for the Auditor to report back to ComReg (and 2rn) the findings of its audit and the Auditor should provide ComReg, at the same time as it is furnished to 2rn, a copy of any letter/report in respect of the Regulated Accounts so that ComReg has full knowledge of any weaknesses that may have been identified by the Auditor and understands how 2rn will remedy them.

"Fairly presents in accordance with"

- 7.206 The level of audit opinion provided in respect of the Regulated Accounts is determinative of the extent to which ComReg can place reliance of the Accounts. A "*fairly presents in accordance with*" (**'FPIA'**) audit opinion, which is similar to the "*True and Fair*" audit opinion on statutory financial statements, provides an adequate level of review and continues to be the most appropriate.
- 7.207 An FPIA audit opinion will provide ComReg with a reasonable level of assurance that the Regulated Accounts as a whole have been drawn up in accordance with applicable requirements. In particular, in providing an unqualified FPIA audit opinion the Auditor considers, *inter alia*:

- (a) The reasonableness of the apportionment methodologies;
- (b) The objectivity of the selection of those methodologies; and
- (c) The appropriateness and robustness of the data sources supporting the apportionments.

7.208 An FPIA audit opinion will provide reasonable assurance that 2rn's Regulated Accounts, taken as a whole, have been drawn up in accordance with the prescribed Decision Instrument, and in the context of that Decision Instrument, are free from material misstatement. The audit opinion should be published as part of the Regulated Accounts.

Other reviews and audit opinions

7.209 In other instances, in particular in respect of the AFD, where ComReg has required that a review by an independent professional body, the qualification required of the independent body will depend on the nature of the review that is required. Where the review concerns income and expenditure accounts, then in the normal way the audit of the AFD should be carried out by the Auditor. In that case, however, it may be not necessary – or possible – that the opinion is provided on an FPIA basis. Where a FPIA audit opinion is not necessary or obtainable a “properly prepared in accordance with” (**PPIA**) audit opinion can be used.

7.210 Therefore, when applying a PPIA audit opinion, the accounting framework must be articulated by 2rn in sufficient detail to allow the auditor to report, *inter alia*, whether:

- (a) The Regulated Accounts and/or the AFD have been compiled in accordance with that framework; and
- (b) There are no material issues of note regarding services and products; and
- (c) Where it is considered necessary, a change to a PPIA audit opinion can only take place with the prior approval of ComReg.

7.211 In all cases where ComReg requires an audit opinion in respect of AFD or the Primary Accounting Documentation, the Letter of Engagement will clearly specify the basis for the audit opinion and in the case of PPIA.

7.212 For example, ComReg might not require the Auditor to form an opinion on the reasonableness of the apportionment methodologies and instead seek an opinion that the prescribed methodologies have been correctly applied.

- 7.213 ComReg may require a report in respect of Additional Financial Data from a qualified independent body, who may be an auditor, prepared according to agreed upon procedures (**‘Agreed Upon Procedures’**) which have been agreed between ComReg, 2rn and the qualified independent body.
- 7.214 Where more granular information is sought at the AFD level, an audit opinion may not be necessary and instead it may be sufficient to have the review conducted in accordance with Agreed Upon Procedures. This could apply, for example, where ComReg requires assurance over a particular cost driver. For instance, in 2023, 2rn’s Auditor reviewed for ComReg the activity reports used by 2rn used for allocating payroll costs in accordance with “Agreed Upon Procedures”
- 7.215 In other cases, review by an auditor may not be required and it may be more appropriate and cost efficient to obtain an opinion on the basis of Agreed Upon Procedures from a qualified independent body such as a broadcast engineer, or economist. Such an approach may be particularly well suited to the review of 2rn’s other main cost drivers, namely site costs, which are allocated based on a mast occupancy study and electricity consumption of which is metered. In those cases, 2rn will be expected to facilitate ComReg access to, and engagement with, its contractors or other qualified professionals, including by way of tri-partite arrangements including the provision of data and review outputs, for the review of processes used as they relate to the allocation of costs.

7.7.3 Overall conclusion on the Accounting Separation in Market A.

- 7.216 Having regard to the analysis set out above, ComReg proposes to continue impose an accounting separation obligation on 2rn. This includes requirements to maintain separate accounts, publish Regulated Accounts and accounting documentation annually, and provide further accounting data and documentation, as requested by ComReg. ComReg has also set out above the principles that 2rn must apply in the Separated Accounts to ensure non-discrimination in cost allocations.
- 7.217 By imposing an accounting separation obligation on 2rn, ComReg is ensuring that there is full visibility and transparency for Market A Access Seekers in relation to the revenues, costs, cost allocations and returns of 2rn. For revenues, there is transparency over internal and external revenues earned by 2rn from its own internal arms and those of third parties. ComReg has also has a tri-partite arrangement with 2rn and its auditors which allows ComReg to place greater reliance on the Regulated Accounts.

- 7.218 As 2rn's tariff model is substantially based upon an HCA methodology, and most of this data is extracted from its financial records, without significant modification, there is a direct link between the 2rn tariff model and its financial statements.
- 7.219 ComReg has considered the format of the Regulated Accounts and the nature of the audit opinion and has concluded the Regulated Accounts should be on the basis of HCA and the audit opinion FPIA. While the Regulated Accounts and tariff models can vary given that 2rn's tariffs are also based on HCA, there is a strong degree of comparability between the two. Through the use of the tri-partite arrangement, ComReg can place greater reliance on the Regulated Accounts and its underlying information, much of which is used to support the tariff model. This is a continuation of the existing pricing policy that has been in force for many years.
- 7.220 As this is a continuation of the process that has been in place under the previous market analysis decision, there is no change in the impact on stakeholders. 2rn already has accounting processes in place that reflects the accounting separation requirements as set out above. For the users of Market A services (and by extension the users of Market B services) they continue to have published documentation to allow them to understand the basis of their charge and also the revenues, costs and returns of 2rn. This includes the transfer charges between Market A and Market B.
- 7.221 As one of ComReg's duties is to foster efficient investment, the use of accounting separation enables ComReg, and others, to observe the level of investment made by 2rn. ComReg can obtain more granular data in relation to this investment and as noted above, while ComReg does not determine whether or not a capital investment program of 2rn is appropriate, ComReg can determine whether or not it has been efficiently incurred (for regulatory purposes) and make adjustments, if considered necessary.
- 7.222 ComReg, therefore, considers that the imposition of the accounting separation obligation adheres to its regulatory objectives in this market, does not impose a disproportionate or unfair regulatory burden on 2rn, and provides transparency for the users of Market A (and Market B).

7.8 Conclusions on Remedies in Market A

- 7.223 Having regard to the competition problems identified in Section 6 and the discussion above, ComReg imposes a range of access, non-discrimination, transparency, price control, cost accounting and accounting separation obligations on 2rn, with such obligations being imposed in Market A.

Q. 7. Do you agree with ComReg's conclusions on remedies in Market A? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

8 Market B Competition Analysis – 3CT and SMP Assessment

8.1 Overview

- 8.1 As discussed in sub-section 5.1, the 2020 Recommendation does not include BTS on its list of markets deemed susceptible to *ex ante* regulation. Accordingly, at EU level, there is no presumption in favour of continuing to regulate these markets. Prior to any intervention, ComReg must therefore determine whether, at national level, the Relevant BTS Markets are susceptible to *ex ante* regulation, that is, they meet the 3CT as set out in Regulation 49(3) of the ECC Regulations.
- 8.2 If the 3CT is passed, that is to say, all three criteria are cumulatively satisfied, an SMP Assessment is then carried out to determine whether that market is characterised by the presence of any SP(s) having SMP.
- 8.3 If, on the other hand, at least one of the 3CT criteria fails, *ex ante* regulation is not justified and is no longer required. In such instances, the market in question should be deregulated.
- 8.4 ComReg carries out the competition analysis in Market B in line with the MGA.²⁷³ This assumes the presence upstream regulation in Market A, but the absence of SMP regulation in Market B, and in downstream and related markets. ComReg, however, takes account of all other relevant regulation such as operator licensing conditions and/or statutory obligations, pursuant to the 2009 Act.

8.2 3CT for Market B

8.2.1 Criterion 1: High and non-transitory barriers to entry

Introduction

- 8.5 ComReg examines the nature and extent of any barriers to firms entering Market B. Barriers to entry generally comprise any disadvantage that a new entrant faces when entering a market, which the incumbent operator currently

²⁷³ Described in paragraphs 2.16 to 2.17.

does not. High and non-transitory barriers to entry can be either structural and/or legal and regulatory in nature. ²⁷⁴

- (a) **Structural barriers to entry:** examples of high and non-transitory structural barriers to entry in Market B include the overall size of RTÉ, cost advantages, as well as high (and partially sunk) costs, economies of scale etc.;
- (b) **Legal and regulatory barriers to entry:** examples include the impact of the 2009 Act, as well as operator licensing conditions.

Structural barriers to entry

- 8.6 RTÉ is the national public service broadcaster in Ireland.^{275 276} It is a vertically integrated organisation, operating at each level of the TV broadcast supply chain,²⁷⁷ and is the sole supplier of DTT Multiplexing Services in Market B, thus retaining a 100% market share. This has remained the case over time, including since the 2013 Decision.
- 8.7 Assuming SMP regulation is present in Market A (under the MGA scenario) and, therefore, 2rn is required to grant access to prospective DTT Multiplex Operators to its terrestrial BTS network, the costs associated with the establishment of a commercial DTT platform, which could compete with RTÉ, would not be sunk *in its entirety*, but are substantial, and would be a significant cost burden for potential entrants. For example, to provide a national service comparable to RTÉ, a potential commercial DTT operator would need to seek access to, and be broadcast from, at least 67 transmission sites to cover circa 98% of the population.²⁷⁸ This is not a sunk cost but is significant taking account the size of the market and potential revenue/profit opportunities from such entry.
- 8.8 A new entrant would, however, incur significant sunk costs for necessary expenditure on, for example, marketing and advertising. These could be substantial over the lifetime of a commercial DTT multiplex contract but, in

²⁷⁴ Described in paragraph 5.6.

²⁷⁵ As detailed in section 2 of the 2009 Act, RTÉ is the authority originally established under section 3 of the Broadcasting Authority Act 1960. Part of RTÉ's PSB objects include "...to establish, maintain and operate one or more national multiplexes."

²⁷⁶ Discussed in paragraphs 4.76 to 4.78 above.

²⁷⁷ Namely Market A (through 2rn for the supply of National Terrestrial BTS), Market B (for DTT multiplexing services), and the Relevant Retail TV Broadcast Market (for FTA DTT). See Figure 1.

²⁷⁸ See Table 13.

ComReg's view, are likely fundamental in order to effectively compete with RTÉ. RTÉ FTA DTT currently has a household penetration rate of circa 36%.²⁷⁹ RTÉ, TG4 and VMI (for VM1 and VM2 only) are subject to 'must-carry' obligations and, therefore, contingent upon negotiations with the new commercial DTT Multiplex Operator, must make themselves available for carriage on any potential new DTT platform.²⁸⁰ However, to entice other Retail TV Broadcasters to the new commercial DTT platform, it would need a sufficiently high household penetration rate (nearing that of RTÉ's current DTT platform) given the two-sided nature of these markets whereby advertising revenue is linked to TV viewership. By way of illustration, the Boxer consortium²⁸¹ was proposing to spend €20 million on marketing alone over a four-year period. ComReg notes that it is unclear whether such costs would be similar today having regard to any changes in advertising strategies, however, there still would be significant investment required in order to effectively compete with RTÉ.

- 8.9 Finally, ComReg notes that the RTÉ, as the incumbent operator in Market B would benefit, to a higher degree than a new entrant, from economies of scale. DTT multiplexes generally have an equally finite capacity when the same technology is employed. There are currently two PSB multiplexes in operation and the potential for up to four more commercial DTT multiplexes. Approximately 92% of the annual costs of operating Market B are fixed costs and are those stemming from the use of Market A inputs. The remaining c. 8% are Market B specific costs such as support services, management time and help desk functions. ComReg notes that the entry of new Retail TV Broadcasters (e.g., the addition of new channels on DTT multiplexes) reduces the cost per unit of output for the Multiplex Operator, given the majority of costs to operate the multiplexes are fixed and do not vary with the quantity of Retail TV Broadcasters on the platform. While economies of scale in this manner can be enjoyed by both the incumbent, and a potential new entrant to Market B, the number of Access Seekers currently carried on the RTÉ's PSB multiplexes means that its cost per unit of output, and thus, the prices charged to Access Seekers may be lower than those of a potential new commercial Multiplex

²⁷⁹ See Table 1.

²⁸⁰ RTÉ is currently the only operator of DTT platform in the State.

²⁸¹ In 2008, the Boxer consortium was awarded a commercial DTT multiplex licence for the operation of three DTT multiplexes. However, it pulled out of the project in 2009. See: [O'Brien-backed consortium wins digital TV licence | Irish Independent](#), [Boxer consortium withdraws from digital TV deal - Comms | siliconrepublic.com - Ireland's Technology News Service](#).

Operator which would need to recover higher costs due to higher cost per unit of output in its initial stages.

Legal and regulatory barriers to entry

- 8.10 RTÉ's current DTT platform consists of two PSB multiplexes,²⁸² for which it holds a 'multiplex licence' under section 132 of the 2009 Act. Multiplex licences are required from ComReg to provide spectrum rights of use, which entitle the holder to provide DTT Multiplexing Services for the transmission of DTT. ComReg can only issue multiplex licences to RTÉ and CnaM, but CnaM may then choose to enter into commercial DTT multiplex contracts with DTT Multiplex Operators in relation to these additional licences, following a competitive tender process.²⁸³ ComReg's view is that the time it takes for this process to conclude, and for a potential new entrant to commence offering services, likely raises barriers to entry to Market B. Evidence available to ComReg suggests that the last time a tender process was initiated in relation to these commercial DTT multiplex licences was in 2008,²⁸⁴ however, a commercial entrant to Market B failed to materialise. There has been no further interest since that time.
- 8.11 ComReg further considers legal and regulatory barriers to entry to the downstream Relevant Retail TV Broadcast Market and its impact on potential entry to Market B.
- 8.12 A new entrant to Market B would need to secure enough Retail TV Broadcasters to support its entry to the market. It's likely, given the small number of Access Seekers currently purchasing DTT Multiplexing Services, that a new entrant would need to entice some of RTÉ's Market B Access Seekers to switch to its new DTT platform. In principle, a new commercial DTT Multiplex Operator could act as an alternative means of terrestrial transmission for RTÉ's Market B Access Seekers, however, this is not necessarily possible in all cases. As detailed in sub-section 2.4, Retail TV Broadcasters purchasing DTT Multiplexing Services are subject to various licensing conditions and statutory obligations pursuant to the 2009 Act. For example, Tithe an

²⁸² These PSB multiplexes were established, maintained and operated by RTÉ as provided for at sections 114(1)(i) and 130 of the 2009 Act. Further information available at: [Microsoft Word - DTT Channel Line Up LCN Policy v14 \(rte.ie\)](#).

²⁸³ Pursuant to section 131 of the 2009 Act.

²⁸⁴ See: [BAI Statement on Digital Terrestrial Television \("DTT"\) Contracts Awards Process - Broadcasting Authority of Ireland](#).

Oireachtas, TG4 (for TG4, TG4+1, and Cúla4) and VMI (for VM1 and VM2) are subject to statutory obligations or licensing conditions which require them to provide FTA services and be available nationally. Therefore, unless the new commercial DTT Multiplex Operator operates its DTT platform on an FTA basis, and is capable of providing national level coverage, it could only act as a viable alternative to RTÉ DTT Multiplexing Services for a limited number of SPs. A limited market such as this is unlikely to support market entry.

Conclusion on high and non-transitory barriers to entry

- 8.13 ComReg's view is that the combination of the structural, and legal and regulatory barriers identified above raise high and non-transitory barriers which would deter, and impede, new entry to Market B, absent regulation, over the lifetime of this market review.
- 8.14 In response to the 2024 Information Requests,²⁸⁵ RTÉ, VMI and TG4 agreed that barriers to entry to Market B were high and non-transitory, with VMI specifying that the costs associated with entry to the market would be largely sunk.
- 8.15 Having considered the available evidence, ComReg's view is that first 3CT criterion is met.

8.2.2 Criterion 2: The market does not tend towards effective competition within the relevant time horizon

- 8.16 ComReg's view is that Market B could not be expected to tend towards effective competition over time without the entry of a new commercial DTT Multiplex Operator which can compete effectively with existing DTT Multiplexing Services. There has been no entry of commercial DTT Multiplex Operators since, at least, the 2013 Decision and, having regard to the barriers to entry discussed above, ComReg does not consider that future effective commercial DTT Multiplex Operator entry is credible, such that, it is likely to be capable of effectively constraining RTÉ's pricing behaviour in Market B within in the timeframe of this review.
- 8.17 Three of the five stakeholders surveyed (namely VMI, TG4 and RTÉ) as part of the 2024 Information Request, provided views on this matter.²⁸⁶ VMI and TG4 suggested that Market B was unlikely to tend toward effective competition

²⁸⁵ 2rn and BMAI did not provide a response in relation to this issue.

²⁸⁶ *Ibid.*

over the lifetime of this review. RTÉ further suggested that, in the absence of SMP obligations, and having regard to the statutory obligations under which RTÉ operates pursuant to the 2009 Act, it is unclear whether the market would tend towards effective competition over the next five-year period.

- 8.18 Taking all of the available evidence into consideration, ComReg's view is that Market B will not tend towards effective competition, based on observable trends and the lack of potential entry to date. Accordingly, criterion two is met.

8.2.3 Criterion 3: The insufficiency of competition law alone to adequately address the market failure(s) concerned

- 8.19 The third criterion assesses the sufficiency of competition law by itself to deal with any market failures identified in the market analysis, in the absence of *ex ante* regulation. Where competition law is sufficient to address identified competition problems, *ex ante* regulation is not justified. ComReg sets out above,²⁸⁷ the circumstances in which *ex post* competition law, or *ex ante* regulation would be most appropriate to deal with any identified market failures²⁸⁸ in a relevant market.
- 8.20 On that basis, ComReg is of the view that *ex post* competition law, by itself, is insufficient to adequately address any market failures identified Market B, which is structurally prone to competition issues. RTÉ is a vertically integrated SP, operating at multiple levels of the broadcast distribution chain and, therefore, competes with its Market B Access Seekers in the downstream Relevant Retail TV Broadcast Markets. ComReg's view is that in a market such as this (one which is characterised by a single operator, high barriers to entry, and effective competition unlikely to emerge within the relevant time period), RTÉ would have the ability and incentive to act in an anti-competitive manner to strengthen its position in Market B and in downstream markets.
- 8.21 As identified later in Section 9, competition problems likely to occur in this market include refusal to supply and excessive pricing, which ComReg is of the view will not be addressed effectively through competition law. In such circumstances, *ex post* competition law would be ineffective in deterring and preventing anti-competitive conduct and would not give sufficient certainty or predictability to existing or potential market participants.

²⁸⁷ See paragraphs 5.22 to 5.26.

²⁸⁸ In an MGA scenario.

8.22 Three of the five stakeholders surveyed (namely VMI, TG4 and RTÉ) as part of the 2024 Information Request, provided views on this matter.²⁸⁹ Each of these stakeholders agreed that *ex post* competition law would be insufficient in addressing potential issues in Market B.

8.23 On the basis of the above assessment, ComReg's view is that criterion three is met.

8.2.4 Overall Conclusion on 3CT for Market B

8.24 Having regard to the above analysis, ComReg's view is that Market B satisfies the 3CT. ComReg is therefore required to carry out a competition assessment to determine whether any SP, or SPs, hold positions of SMP.

²⁸⁹ 2rn and BMAI did not provide a response in relation to this issue.

8.3 Assessment of SMP in Market B

8.3.1 Framework for assessing SMP in Market B

- 8.25 The framework for assessing SMP set out in sub-section 5.3 applies to the assessment of SMP in Market B.

8.4 Assessment of SMP in Market B

- 8.26 In assessing whether an undertaking has SMP in Market B, ComReg carries out a forward-looking analysis, on the basis of existing and likely future market conditions and considers the range of factors identified in sub-section 5.3 that are of most relevance to Market B. These are as follows:
- (a) Overall size of the SP;
 - (b) Absence of, or low, CBP;
 - (c) Absence of potential competition
 - (d) Economies of scale; and
 - (e) Barriers to entry and expansion.
- 8.27 Given an inherent degree of overlap, ComReg combines its assessment of these factors under the following three broad headings:
- (a) **Existing competition:** factors such as the overall size of the undertaking, market shares, and relative strength of existing competitors;
 - (b) **Potential competition:** factors such as barriers to entry and expansion, including the overall size of the SP, cost advantages, economies of scale and the impact of the 2009 Act and operator licensing conditions; and
 - (c) **Strength of any countervailing buyer power ('CBP'):** an assessment of the impact posed by any strong buyers in the Relevant BTS Markets.
- 8.28 Other factors in addition to those set out at paragraph 5.38 above which could be used to assess the presence of SMP have been considered of less (or no) relevance for the purposes of the SMP assessment in Market B are discussed in Annex 5 of this Consultation.
- 8.29 ComReg notes that the analysis in the following sub-sections relies heavily on the assessment already carried out by ComReg as part of the 3CT for Market B.

8.4.1 Existing Competition in Market B

- 8.30 RTÉ is currently the sole operator in Market B, with 100% market share. Its two PSB multiplexes enable the provision of FTA DTT to circa 98% of the Irish population. Over 50% of the channels on the DTT platform are owned by RTÉ itself,²⁹⁰ and of the remaining 12 independent Access Seekers, six have licensing conditions and other statutory obligations requiring them to operate on an FTA basis, with national level coverage. For that reason, they must be present on the DTT platform, with no credible alternatives.
- 8.31 The last time CnaM entered into negotiations with a potential new entrant to Market B was in 2008,²⁹¹ however, new entry to the market failed to materialise at that time. Evidence available to ComReg suggests that there has been no new interest in commercial entry to Market B and, having regard to the barriers to entry described in sub-section 8.2.1 above, there is unlikely to be throughout this review period.

8.4.2 Potential Competition in Market B

- 8.32 Noting the absence of an effective competitive constraint posed by existing competition in Market B, ComReg assesses the likely effectiveness of any constraints stemming from potential competition in those markets. This assessment considers whether entry (and expansion) in Market B is likely, timely, and credible, to such an extent that it would effectively constrain RTÉ's ability to act independently of its competitors, customers and consumers over the medium term.
- 8.33 In considering constraints posed by potential competition, ComReg considers the presence of barriers to entry and expansion, insofar as they may impact upon the effectiveness of the constraints posed by potential competitors. Having done so, ComReg can determine the strength of such potential competition, having regard to identified barriers to entry and expansion.

Barriers to entry and expansion

- 8.34 The assessment of barriers to entry and expansion in the context of potential competition in Market B is, analytically, the same as the discussion at sub-section 5.2.1 above in respect of Criterion 1 of the 3CT – whether the market is characterised by high and non-transitory barriers to entry. This sub-section

²⁹⁰ Discussed in paragraph 4.79.

²⁹¹ Discussed at paragraph 8.8.

considers barriers to entry to Market B in the context of the overall size of the RTÉ, cost advantages, and the impact of the 2009 Act and operator licensing conditions etc. Accordingly, rather than repeating this analysis, ComReg notes instead that the assessment of Criterion 1 of the 3CT suggests that Market B is characterised by the presence of high and non-transitory barriers to entry which, in the context of the present SMP assessment, are likely to sufficiently inhibit the emergence of effective potential competition within the timeframe of this market review.

8.4.3 Countervailing Buyer Power

Framework for CBP Assessment

- 8.35 The framework for assessing CBP is set out in sub-section 5.4.3 applies to the assessment of SMP in Market B.

CBP Assessment in Market B

- 8.36 RTÉ is the only operator in Market B and for the reasons discussed above, this is unlikely to change within the period of this review. Therefore, to provide terrestrial programming services, Retail TV Broadcasters must seek access to RTÉ's DTT platform, without the availability of any credible alternative supplier.
- 8.37 Access Seekers could seek to exert CBP by threatening to cease purchases of DTT Multiplexing Services altogether, however, in ComReg's view, this is unlikely to suffice given RTÉ's presence in downstream retail markets.
- 8.38 RTÉ is vertically-integrated and competes with Market B Access Seekers in the downstream Relevant Retail TV Broadcast Market, thus, any lost wholesale revenue by RTÉ would likely be recovered through gained advertising in downstream markets. Moreover, the prices set by RTÉ are likely to be far outweighed by the benefits to an Access Seeker of being present on the DTT platform. Therefore, ComReg's view is that CBP could not be credibly, or effectively, exercised by Market B Access Seekers.

8.4.4 Conclusions and Designation of RTÉ in respect of Significant Market Power in Market B

- 8.39 ComReg's view is that Market B is not effectively competitive, and that RTÉ would not be sufficiently constrained by the above factors such that it would prevent it from behaving to an appreciable extent, independently of customers and end users, on that market.
- 8.40 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 49 of the ECC Regulations, that a given market

identified in accordance with Regulation 46 of the ECC Regulations is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 49(8) of the ECC Regulations as having significant market power.

- 8.41 Having regard to the conclusions of the above market analysis, ComReg is of the view that RTÉ should be designated as having SMP in Market B.

Q. 8. Do you agree with ComReg's 3CT and assessment of SMP on Market B? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

9 Market B Competition Problems and Impacts

9.1 Overview

- 9.1 In this Section, ComReg identifies competition problems which, absent regulation,²⁹² could potentially arise in Market B, noting that ComReg designates RTÉ with SMP in Market B, the market for wholesale access to DTT Multiplexing Services. ComReg then considers the imposition of appropriate remedies in Section 10 in order to address the competition problems identified.
- 9.2 ComReg has already set out the legal and regulatory basis for its assessment of competition problems and impacts at sub-section 6.1 above. It further notes that it is necessary neither to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuses in Market B, rather the purpose of *ex ante* regulation is to prevent the possibility of abuses from materialising.
- 9.3 In order to determine what form(s) of *ex ante* regulatory remedies are warranted in Market B, ComReg carries out an assessment of a range of potential competition problems which are likely to arise in the absence of regulation, given the structure and characteristics of Market B.
- 9.4 ComReg has identified two categories of competition problems which are likely to occur, absent regulation in Market B:
- (a) **Exploitative Practices:** where an SMP SP engages in exploitative behaviours, such as excessive pricing or practices leading to inefficiency and/or inertia, to the detriment of both competition and end users; and
 - (b) **Vertical Leveraging:** where a vertically integrated operator with SMP in one market leverages its SMP in order to exert undue influence in other adjacent markets, either at the same level (horizontal), or at a different level (vertical) in the distribution chain.

²⁹² DTT Multiplexing Services have, to date, been provided by RTÉ pursuant to the regulatory obligations imposed under the 2021 Decision. The assessment carried out in this Section applies the MGA to determine what competition problems could potentially arise, assuming that such regulatory (SMP) obligations were not in place in Market A and Market B.

- 9.5 Each of the competition problems set out above are discussed in detail below with regard to the specificities of Market B.

9.2 Exploitative Practices

- 9.6 Economic theory suggests that, where a firm possesses market power, it is in a position to increase prices above, and/or reduce output below, competitive levels, thereby enabling the accumulation of higher-than-normal profits.²⁹³ These higher profits effectively create a wealth transfer from the end user or other market participants to the firm with market power. It is ComReg's view that RTÉ, as an undertaking with SMP in Market B, and, given its presence in a number of adjacent markets, would have the ability and incentive to engage in exploitative practices, such as excessive pricing and some degree of inefficiency or inertia, to the detriment of other downstream firms and customers.

9.2.1 Excessive Pricing

- 9.7 Market B is characterised by a single SMP SP, RTÉ, with 100% market share. The market has an absence of effective existing competition, high and non-transitory barriers to entry, limited scope for potential competition, and insufficient CBP.²⁹⁴ The above factors and the absence of any likely entrant means this market structure will persist over the lifetime of the market review. Thus, RTÉ has the ability to engage in excessive pricing in Market B through its control of infrastructure not easily duplicated and an absence of existing or potential competition.
- 9.8 RTÉ is a vertically integrated operator, providing DTT Multiplexing Services to Market B Access Seekers, with which it then competes in the downstream Relevant Retail TV Broadcast Market. At the retail level, FTA DTT is a zero-priced good, meaning that Market B Access Seekers, in response to an increase in the price of DTT Multiplexing Services, would have no means of passing any increase on to its end users, but would be forced to absorb this cost in full. Excessive pricing by RTÉ could lead to its downstream competitors (VMI, TG4, Sky etc.) needing to reduce their budget for programming services, for example, in terms of content creation. This decline in programming quality could impact viewership and, in turn, reduce a Retail TV Broadcaster's ability

²⁹³ Detailed further at sub-section 6.2.

²⁹⁴ See analysis of 3CT and SMP set out at Section 8 above.

to generate revenue through advertising²⁹⁵ and compete effectively in the Relevant Retail TV Broadcast Market. RTÉ has the incentive to engage in excessive pricing behaviours.

9.2.2 Inefficiency

- 9.9 An SMP SP may, arising from the absence of effective competitive pressure in that market, be insulated from the need to innovate and improve efficiency and quality of service to stay ahead of rivals. This may limit the development of new technology or processes and/or lead to more costly and less efficient methods of supply and, consequently, higher prices for customers than would likely otherwise exist under competitive market conditions.
- 9.10 As the sole, SMP SP in Market B, ComReg is of the view that there may be less effective pressure, absent regulation, on RTÉ to provide an efficient service than may otherwise be the case.
- 9.11 Subject to certain statutory obligations and/or licencing conditions, some Market B Access Seekers must operate on an FTA basis and on a national, or quasi-national, level. Due to these constraints, RTÉ's DTT platform is the only viable distribution platform enabling these Access Seekers to adhere to their broadcasting obligations, meaning that, regardless of RTÉ's level of investment or innovation in Market B, they have no means of switching to an alternative platform.²⁹⁶ The absence of these alternative platforms, and effective competition in Market B, means that RTÉ faces no competitive pressure to maintain the efficiency of its DTT platform as any additional costs associated with this lack of efficiency can be recovered from the aforementioned Access Seekers.

9.3 Leveraging

- 9.12 ComReg has described 'leveraging' at sub-section 6.3 above. Given the close relationship between Market B and the Relevant Retail TV Broadcast Market, absent regulation, there is potential for vertical leveraging to occur.

9.3.1 Vertical Leveraging

- 9.13 ComReg is of the view that vertical leveraging could occur in Market B, given that RTÉ, as the SMP SP providing DTT Multiplex Services, competes with its

²⁹⁵ See sub-section 3.2.4 for more detail on two-sided nature of retail TV broadcast markets.

²⁹⁶ Discussed in sub-section 4.3 above.

Market B Access Seekers in the downstream Relevant Retail TV Broadcast Market.

- 9.14 RTÉ has both the ability and incentive to use its SMP to influence competitive conditions, in particular through its ability to control key inputs for the provision of FTA DTT in the Relevant Retail TV Broadcast Markets. This could result in the distortion of or reduction in competition in these downstream markets, ultimately resulting in harm to Access Seekers or end users, potentially in the form of higher prices, lower output or sales, and reduced quality or consumer choice.

9.3.2 Restrictions on or Denial of Access

- 9.15 Denial of access can manifest as an outright, or constructive, refusal to supply.
- 9.16 RTÉ is the SMP SP in Market B, the sole supplier of DTT Multiplexing Services, and competes with Market B Access Seekers in the downstream Relevant Retail TV Broadcast Markets. Absent regulation, RTÉ would have the incentive to refuse access to its competitors in the downstream Relevant Retail TV Broadcast Market that rely on Market B inputs for the provision of FTA DTT. However, it would only have the ability to engage in certain behaviours.
- 9.17 RTÉ are obliged to provide access to certain channels under section 130(1)(a) of the 2009 Act (for example, TG4, Tithe an Oireachtas etc.). In addition, RTÉ must provide access to the television programme service contractor, where required to do so by the Minister, following consultation with RTÉ, pursuant to section 130(10) of the 2009 Act. This may insulate a television programme service contractor from outright access refusals (but not constructive access refusals). Absent regulation, channels not dealt with in those sections²⁹⁷ would be vulnerable to access denial/restrictions by RTÉ. By denying access to Access Seekers in Market B, with whom RTÉ competes with in the provision of FTA DTT, RTÉ could reduce the level of, and insulate itself from, competition in Relevant Retail TV Broadcast Market. Some of the viewership from those channels would likely be redistributed over the other channels carried on the DTT platform, increasing RTÉ's own viewership and its ability to generate revenue through the associated advertising.
- 9.18 ComReg's view is that this tactic would only be profitable for RTÉ up to the point at which restrictions or denials of access for Access Seekers would

²⁹⁷ This does not include channels for which RTÉ are directed, by the Minister, to provide access to the DTT platform, for example, TG +1, Cúla4 etc.

prompt end-users to cease watching Irish FTA DTT due to the reduced choice and quality of programming on offer. However, the threat of access denial, or restriction, would act as a deterrent to entry, and distort competition, in Market B, as it would create uncertainty amongst Retail TV Broadcasters whose channels are not protected by the 2009 Act or, indeed, the Minister.

9.3.3 Delaying Tactics

- 9.19 RTÉ has the ability and incentive to engage in delaying tactics whereby it does not refuse to supply a certain input to its downstream competitors but supply them a later point in time than it does for itself (through means of self-supply). This may restrict market entry in the Retail TV Broadcast Market and would enable RTÉ to protect its advertising revenues from downstream competitors.
- 9.20 For example, absent regulation, RTÉ could engage in prolonged and lengthy contract negotiations at contract initiation or renewal stage. Prolonged contract negotiations could result in Market B Access Seekers needing to cease broadcasting for a period of time before a new contract is signed, if negotiations have not completed by the time of expiry of their current contract. In the event of temporary disruption, TV viewership would likely be lost to other channels on the DTT platform, many of which are owned by RTÉ itself. These viewers may not return once the disruption ends due to dissatisfaction with service disruptions, particularly if they are repeated.
- 9.21 The threat of delaying tactics could act as a significant deterrent to market entry in the Relevant Retail TV Broadcast Market, thereby harming competition given the uncertainties this can create.
- 9.22 It should be noted that while delaying tactics would be beneficial to RTÉ to an extent, this would only work up to the point that it does not cause end users to cease watching FTA DTT (Saorview) altogether due to a lack of alternative broadcasting channels other than RTÉ, or frequent service disruptions which would degrade the viewer experience.

9.3.4 Quality Discrimination

- 9.23 As discussed in sub-section 6.29, a vertically integrated SMP SP could engage in discriminatory behaviour on the basis of quality. In the case of Market B, RTÉ could use quality discrimination in the provision of its Market B inputs as it competes with its Market B Access Seekers in the downstream Retail TV Broadcast Market. RTÉ has the ability and incentive to provide more cost-efficient, or higher quality, Market B services (or associated facilities) to its own downstream retail broadcast arm whilst either refusing access (whether

outright or constructively) to the same products to other Market B Access Seekers.

- 9.24 For example, RTÉ could refuse to grant access to, or fail to inform Access Seekers of, the availability of capacity for high definition ('HD') channels. This could result in RTÉ having an advantage over its competitors in the Relevant Retail TV Broadcast Market which would be forced to broadcast in standard definition ('SD'). Higher broadcast picture quality could draw viewers from other channels, including in the case of live sporting events (which can attract premium advertising revenues), leading to an increase in RTÉ's viewership and advertising revenue at the expense of its Market B Access Seekers. Given that RTÉ is the sole SMP DTT Multiplex Operator in the State, its Market B Access Seekers, particularly those with broadcasting licence obligations, would have no choice but to accept broadcasting in SD.
- 9.25 Absent regulation in Market B, RTÉ, also has the ability and incentive to charge higher prices to Market B Access Seekers for equivalent products which it self-supplies. This type of discriminatory conduct would still likely create a barrier to entry/expansion to downstream markets, by deterring investment from Access Seekers due to the competitive advantage gained by RTÉ through raising its rivals' costs.
- 9.26 ComReg notes, however, that quality discrimination would be beneficial to RTÉ only until it results in a decrease in FTA DTT household penetration rates at retail level due to quality and consumer choice issues.

9.3.5 Creating or exploiting information asymmetries and withholding relevant information

- 9.27 As noted in paragraph 6.32, a vertically integrated SMP SP could create or exploit information asymmetries to impede competition in downstream markets. If information is not visible to market participants, those firms cannot make informed decisions regarding investment.
- 9.28 An example of information asymmetries could include where Market B Access Seekers require SLAs with regard to service delivery and fault repair to view from a provisioning and service assurance perspective. Failure by RTÉ to meet such requirements could provide the potential for discriminatory behaviour and act as a deterrent to potential market entry.
- 9.29 Information asymmetries may also apply to future planning RTÉ. For example, changes by RTÉ to its wholesale services may have significant implications for Retail TV Broadcasters on the DTT platform. A lack of information and associated uncertainty may further discourage entry to the retail market.

9.3.6 Price-Based Vertical Leveraging Behaviour

- 9.30 As noted in paragraph 6.36, Vertical leveraging may also be evident in the pricing behaviour of vertically integrated SMP SP.
- 9.31 RTÉ, as the SMP SP in Market B, has the ability and incentive to use vertical leveraging to affect the prices paid by its competitors in the downstream Relevant Retail TV Broadcast Market. If RTÉ were to raise the price of Market B inputs, the downstream Retail TV Broadcasters have no ability to pass on price increases to their end-users in real monetary terms. Therefore, Market B Access Seekers would be forced to absorb these costs in full or exit the market.
- 9.32 For Market B Access Seekers who remain in the market, this could require, for example, a reduction in their content creation budget to accommodate the price increase, leading to a reduction in programming service quality and consumer choice. This would enable RTÉ to gain a strategic advantage at retail level by reducing the quality of their competitors broadcasts, and potentially increasing their own viewership and associated advertising revenue.
- 9.33 ComReg's view is that the threat, alone, of RTÉ using vertical leveraging to raise prices for Market B inputs would likely disincentivise market entry in the downstream Relevant Retail TV Broadcast Market.

9.4 Conclusion on Competition Problems in Market B

- 9.34 ComReg is of the view that, absent regulation, RTÉ, as the vertically integrated SMP SP in Market B, has the ability and incentive to engage in the categories of exploitative practices and leveraging behaviour identified and outlined above, which is likely to negatively impact on competition and end users in related retail markets.
- 9.35 On the basis of the foregoing assessment, ComReg considers that it is justified and proportionate to impose appropriate and proportionate obligations on RTÉ in Market B relating to access, transparency, non-discrimination, price control, cost accounting, accounting separation.

Q. 9. Do you agree that the competition problems identified are those that could potentially arise in Market B (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

10 Imposition of Remedies in Market B

10.1 Introduction

- 10.1 Section 8 sets out ComReg's finding that RTÉ has SMP in Market B and Section 9 describes the competition problems that, absent regulation, could arise in Market B and in downstream related markets.
- 10.2 As discussed in sub-section 7.1, under Regulation 50(1) of the ECC Regulations, where an undertaking is designated as having SMP in a relevant market, ComReg is required to impose at least one obligation by way of remedy addressing the competition problems that have been identified, as set out in Regulations 51-56, 58 and 62 of the ECC Regulations.
- 10.3 Regulation 50(5) of the ECC Regulations requires that obligation(s) must:
- (a) Be based on the nature of the problem identified;
 - (b) Be proportionate and justified in light of the objectives laid down in Section 12 of the Communications Regulation Act 2002-2023 and Regulation 4 of the ECC Regulations;²⁹⁸ and
 - (c) Only be imposed following public consultation.

10.2 Imposition of Remedies for Market B

- 10.4 In the sections below, ComReg sets out the remedies that it deems necessary to address the competition problems identified in Section 9, bearing in mind the requirement set out in Regulation 50 of the ECC Regulations to act proportionately and in the least intrusive way possible. ComReg also explains briefly the remedies imposed in the 2021 Decision.
- 10.5 As explained in detail below, in light of the competition problems arising, or likely to arise, in Market B and related markets, ComReg imposes on RTÉ the full set of remedies (including obligations of access, transparency, non-discrimination, price control and cost accounting, and accounting separation) so that obligations imposed in the 2021 Decision are, in practice, maintained.

²⁹⁸ Pursuant to Section 12 of the Communications Regulation Act 2002 (as amended), ComReg's relevant objectives in relation to the provision of electronic communications networks and services 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 Community. Regulation 4 of the ECC Regulations further specifies ComReg's objectives and sets out a number of obligations in relation to the pursuit of its objectives.

10.3 Relevance of the Broadcasting Act 2009

- 10.6 The question arises as to whether the 2009 Act provides a regulatory framework such that any competition concerns that may occur, absent regulation, would be addressed through the provisions of the 2009 Act.
- 10.7 The sections of the 2009 Act that ComReg considers to be of most relevance to the analysis of Market B are:
- (a) Section 108, as described in paragraph 7.8 of this Consultation;
 - (b) Section 109, as described in paragraph 7.9 of this Consultation; and
 - (c) Section 130 is also of relevance to the analysis of Market B and provides that the following TV programme services are carried on RTÉ's PSB DTT multiplex(es):
 - (i) RTÉ One and RTÉ Two;
 - (ii) TG4;
 - (iii) The Houses of the Oireachtas Channel (where required by the Minister);
 - (iv) The Irish Film Channel (where required by the Minister);
 - (v) Other TV services having the character of a public service as may be designated by the Minister (this applies to VM1 and VM2); and
 - (vi) The TV programme service provided under the TV programme service contract by the TV programme service contractor (this applies to VM3).
- 10.8 Insofar as section 130 of the 2009 Act is concerned, this provides that the Minister, after consultation with ComReg, RTÉ and the TV programme services listed above, may also direct that payments be made by the aforementioned TV programme services (other than RTÉ One and RTÉ Two) to RTÉ for the broadcasting of their programme services on the national PSB DTT multiplexes established, maintained and operated by RTÉ.
- 10.9 These TV programme services may request an increase in capacity for the carriage of their programme services if they do not consider that the digital capacity employed by RTÉ on its PSB DTT multiplex(es) is adequate and the Minister may, on request, direct RTÉ to employ a specific amount of digital capacity.
- 10.10 ComReg's view, consistent with ComReg's position in the 2021 Decision, is that the provisions of the 2009 Act, in particular sections 108, 109 and 130, do not adequately address the potential competition problems which, absent SMP regulation, could arise in Market B.

- 10.11 Insofar as sections 108 and 109 of the 2009 Act are concerned, the discussion in sub-section 7.2.1 in this Consultation (in the context of the relevance of sections to Market A) are equally relevant to Market B and hence, ComReg does not repeat this analysis here.
- 10.12 ComReg's views set out in sub-section 7.2.1 of this Consultation, with respect to section 115 of the 2009 Act, equally apply to section 130 insofar as they relate to access and pricing. As such, ComReg's view is that:
- (a) The 2009 Act does not adequately address SMP related competition problems in an effective or efficient manner or would not likely provide sufficient regulatory certainty and predictability to market participants;
 - (b) Section 130 of the 2009 Act does not necessarily imply a cost-oriented (and efficient) price control could be put in place and, as such, would not necessarily resolve potential excessive pricing problems;
 - (c) ComReg also has experience and knowledge of regulating other electronic communications markets to address SMP related competition problems (such as price control decisions and disputes), such that *ex ante* SMP regulation is likely to be more effective and efficient in addressing, in a timely manner, competition concerns (related to pricing for example) than would otherwise be the case under section 130 of the 2009 Act;
 - (d) In terms of access, the provisions of the 2009 Act do not adequately address the identified SMP related competition problems in an effective manner which would provide necessary regulatory certainty or counter potential constructive refusals of access such as granting access in a fair, reasonable and timely manner and to negotiate in good faith for example; and
 - (e) The provisions of the 2009 Act relevant to Market B are more akin to *ex post* intervention and, as such, may not provide sufficient predictability to market participants in a manner which would promote efficiency, sustainable competition and maximise consumer benefits.
- 10.13 As discussed in Section 9 above, irrespective of whether *ex ante* regulatory obligations are applied to upstream Market A, the competitive conditions of Market B are unlikely to evolve towards effective competition in the timeframe of this review. Moreover, ComReg does not consider the provisions of the 2009 Act to be sufficient to address potential SMP related anti-competitive behaviour which RTÉ, as the SMP SP would have the ability and incentive to engage in.

- 10.14 ComReg now considers below the imposition of appropriate and proportionate obligations on RTÉ in Market B.

10.4 Access Remedies for Market B

10.4.1 Existing Access Remedies in Market B

- 10.15 The 2021 Decision imposed on RTÉ an obligation to meet reasonable requests for access to Market B products, services and associated facilities. ComReg attached the following requirements to this obligation:
- (a) A requirement to meet reasonable requests for Access to Market B products, services and associated facilities;
 - (b) Requirements to meet various conditions attached to the access obligations;
 - (c) A requirement not to withdraw access to services and facilities already granted;
 - (d) A requirement to grant access in a fair, reasonable and timely manner;
 - (e) A requirement to provide SLAs; and
 - (f) A requirement to provide objective criteria for any refusal or part refusal of access.

10.4.2 Statutory requirements and criteria

- 10.16 As discussed at sub-section 7.3.1 above, Regulation 55(1) of the ECC Regulations provides that ComReg may impose on an operator, obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities where ComReg considers that the denial of such access, or the imposition on Access Seekers of unreasonable terms and conditions having a similar effect, would:
- (a) Hinder the emergence of a sustainable competitive retail market;
 - (b) Not be in the interests of end users; and
 - (c) Otherwise hinder the objectives set out under Regulation 4 of the ECC Regulations.
- 10.17 According to Regulation 55(6) of the ECC Regulations, when imposing access obligations, ComReg may lay down technical or operational conditions to be met by the provider or the beneficiary of the access where necessary to ensure normal operation of the network. Conditions covering fairness, reasonableness

and timeliness may also be attached to access obligations under Regulation 55(3) of the ECC Regulations.

10.18 In determining whether access obligations imposed under Regulation 55 of the ECC Regulations are appropriate and proportionate, ComReg must also have regard to the following:

- (a) The technical and economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection and access involved; the expected technological evolution affecting network design and management;
- (b) The expected technological evolution affecting network design and management;
- (c) The need to ensure technology neutrality, enabling the parties to design and manage their own networks;
- (d) The feasibility of providing the access proposed, in relation to the capacity available;
- (e) The initial investment by the facility owner, bearing in mind the risks involved in making the investment;
- (f) The need to safeguard competition in the long term, the requirement to give attention not only to economically efficient infrastructure-based competition but also to innovative business models that support sustainable competition, such as those based on co-investment in networks;
- (g) Where appropriate, any relevant intellectual property rights; and
- (h) The provision of pan-European services.

10.19 ComReg notes that only an access obligation is capable of addressing the competition problems identified in the market analysis and, in ComReg's view, there is no other less intrusive obligation available capable of achieving the same outcome. ComReg does not consider that existing or potential competition would effectively constrain RTÉ's SMP within the next five years. On the contrary, access to DTT Multiplexing Services will continue to be necessary as an upstream input to enable Access Seekers to broadcast their terrestrial TV channels, with national level coverage, to retail end users. As a vertically integrated SMP SP, RTÉ, in most cases, has the ability and incentive to refuse to supply DTT Multiplexing Services to Access Seekers (on an outright, or constructive basis), particularly given the absence of alternative sources of supply. In this respect, imposing an obligation of access on RTÉ in

respect of DTT Multiplexing Services is necessary to ensure the development of sustainable and effective downstream competition, and to minimise exploitative foreclosure concerns that could arise absent regulation. In ComReg's view, there is no other obligation which would achieve the same outcome.

10.20 Against this background, ComReg proposes maintaining (subject to amendments and clarifications as discussed below) RTÉ's existing obligations of access to DTT Multiplexing Services, and notes the following as regards the criteria listed in Regulation 55 of the ECC Regulations:

- (a) *Technical and economic viability of using or installing competing facilities:* ComReg has considered the viability of competing alternatives to RTÉ's PSB Multiplexes. ComReg's SMP analysis in Section 8 indicates that, based on the evidence to date, it does not anticipate alternative DTT Multiplex Operators in the timeframe of this review which would be capable of constraining RTÉ's from engaging in anti-competitive behaviour in Market B.
- (b) *Expected technological evolution affecting network design and management:* There are no likely developments in terms of technological evolution likely to significantly impact network design or evolution throughout this review period.
- (c) *Technology neutrality, enabling the parties to design and manage their own networks:* As discussed in sub-section 8.2.1, due to the high and non-transitory barriers to Market B, Access Seekers could not supply reasonably expect to design and manage this own network in order to self-supply DTT Multiplexing Services.
- (d) *Feasibility of providing access in relation to capacity available:* Capacity for the provision of terrestrial services is constrained by the finite amount of spectrum available for a national service in bands allocated to broadcasting. The spectrum used by RTÉ for DTT is licensed by ComReg, which has issued two DTT multiplex licenses to RTÉ in accordance with section 132 of the 2009 Act. Capacity for more television programme services on one of these PSB multiplexes is limited; however, there is currently capacity on the second PSB multiplexes for the carriage of additional programme services.

- (e) *The initial investment of the facility owner:* As per Regulation 56(2) of the ECC Regulations, ComReg's approach to imposing access remedies in the market is based on principles that, among others, allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs.
- (f) *The need to safeguard competition:* Competition in the Relevant Retail TV Broadcast Market depends on effective regulation in the relevant wholesale market(s). ComReg believes that the range of remedies discussed in this Consultation are needed to contribute to the development of competition, which ultimately benefits end users.
- (g) *Intellectual property rights:* ComReg's view is that intellectual property rights are not a significant concern in this market.
- (h) *Provision of pan-European services:* Regulation of broadcasting transmission services is dependent on national circumstances. While many NRAs have designated SMP or found the 3CT to be met in part(s) of their broadcasting transmission market, other NRAs have deemed the market to be effectively competitive and thus not warranting *ex ante* regulation. ComReg is of the view that the principles applied by ComReg in this Consultation adhere to the 2020 Recommendation.

10.21 Accordingly, it is necessary, proportionate and justified to impose on RTÉ an access obligation pursuant to Regulation 55 of the ECC Regulations.

10.4.3 Obligation to meet reasonable requests for access

10.22 On the basis that access to RTÉ DTT Multiplexing Services is necessary to ensure the development of sustainable and effective downstream competition, and to minimise exploitative concerns arising from RTÉ's position of SMP, ComReg proposed to maintain RTÉ's obligation to meet reasonable requests for access to products, services and associated facilities in Market B, as provided for under Regulation 55 of the ECC Regulations.

10.23 In particular, RTÉ is required to provide access to any multiplex operated and maintained by RTÉ for the purposes of DTT, that is, access to multiplexing services, which for the purpose of this Consultation, means access to the electronic system combining programme material and related and other data in digital form and the transmission of that material and data so combined by

means of wireless telegraphy directly or indirectly for reception by the general public.

- 10.24 As discussed in sub-section 10.3 above, while there are legislative provisions under the 2009 Act which may address some elements of *ex ante* regulation in Market B, ComReg does not believe that these are sufficient. In particular, they do not provide the same necessary protections available under *ex ante* regulation such as granting access in a fair, reasonable and timely manner, or negotiating in good faith, for example. If these conditions were not in place, there could be the potential for RTÉ to engage in anti-competitive behaviour which could otherwise result in, for example, an outright, or constructive, refusal to supply through delaying the provision of its wholesale services to broadcasters.
- 10.25 There are a number of requirements attached to this to the obligation to meet reasonable requests for access:
- (a) Open access must be granted to technical interfaces, protocols and other key technologies;
 - (b) Negotiations for access must be conducted in good faith;
 - (c) Any refusal must be objectively justified; and
 - (d) Access granted ought not to be withdrawn.

Requirement to grant open access to technical interfaces, protocols and other key technologies

- 10.26 Given the ability for RTÉ to create or exploit information asymmetries with regards their IT system, ComReg is imposing an obligation on RTÉ to grant open access to technical interfaces, protocols and other key technologies, in line with Regulation 55 of the ECC Regulations.
- 10.27 ComReg notes that where there are any differences in the manner of access provided between Access Seekers and RTÉ to itself (including any downstream retail arms) on the basis of legacy IT development that may have been designed to service a vertically integrated organisation at a time when there may not have been a requirement to facilitate third party access, RTÉ must nonetheless provide access in a manner that is compliant with existing non-discrimination (and other) obligations. That is, RTÉ must provide services and information to Access Seekers under the same conditions and of the same quality as RTÉ provides for its own services.
- 10.28 RTÉ must ensure that any of its future IT developments evolve such that both RTÉ's own downstream arms and Access Seekers have the ability to access

RTÉ's IT systems as may be necessary for the purpose of the broadcast of FTA DTT on RTÉ's multiplexing service in exactly the same manner.

Requirement to negotiate in good faith

- 10.29 Given the potential for constructive refusal to supply outlined in Section 9, ComReg imposes an obligation on RTÉ to negotiate in good faith with broadcasters requesting access to its multiplexing service. ComReg notes that the obligation to negotiate in good faith implies that the responsibility rests with RTÉ to demonstrate that its approach to negotiation with undertakings was done in good faith and that any unmet access requests can be shown to be unreasonable.
- 10.30 ComReg notes that the obligation to negotiate in good faith does not involve a requirement on the part of RTÉ to assist Access Seekers in formulating their access requests. However, the requirement to negotiate in good faith, given that RTÉ has knowledge and expertise of its own network and systems which is not readily available to Access Seekers, means that RTÉ staff ought to provide meaningful guidance to Access Seekers as to how their access requests could be best formulated, having regard to the purpose which the access would be put to. This obligation seeks to address the technical knowledge imbalances between the respective parties by reducing incentives to unnecessarily prolong product development timelines.
- 10.31 The obligation to negotiate in good faith encompasses the way in which RTÉ conducts negotiations, as well as the positions that it takes in them. In investigating an allegation of a failure to negotiate in good faith, ComReg may draw inferences from RTÉ's behaviour and from the adequacy of the processes and controls it has put in place to assure compliance with this obligation. For example, ComReg may draw adverse inferences from:
- (a) A failure on the part of RTÉ to behave in the way that a willing seller would behave when negotiating with a willing buyer;
 - (b) A failure by RTÉ to respond to proposals made by Access Seekers in a timely and constructive manner;
 - (c) A failure by RTÉ to deploy participants in the negotiations who have the appropriate knowledge and authority, so that negotiations can proceed in a timely manner;

- (d) The absence of effective controls to assure that decision-making processes within RTÉ in relation to the negotiations cannot be influenced by concerns about the commercial impact on RTÉ's downstream business; and
 - (e) The presence of incentives for individuals within RTÉ who participated in, or influenced, the negotiations that might lead them to receive greater financial reward, or other benefits, if the negotiations were to be delayed; or to result in an outcome other than that which might have been freely negotiated between a willing buyer and a willing seller.
- 10.32 The precise nature of any investigation and the degree to which inferences might be drawn from behaviour would need to be assessed in the context of the actual circumstances of any particular case.

Justification for refusal to grant of access limited to objective criteria

- 10.33 The obligation on RTÉ to meet reasonable requests for access means that RTÉ may only deny requests that are not reasonable. In practice, ComReg expects that circumstances giving rise to a legitimate denial of access would be exceptional and limited to those situations where the request is denied for objective reasons, such as that it is not technically feasible to meet the request for access because of, for example, there are capacity issues associated with RTÉ's PSB multiplexes.
- 10.34 This is consistent with the Code which states at Recital 191:
- "... such requests should be refused only on the basis of objective criteria such as technical feasibility or the need to maintain network integrity"*
- 10.35 Where a request for access is refused, RTÉ is obliged to provide objective criteria for refusing the request, or only partly meeting the request, to the Access Seeker which has made the request. This is considered proportionate and justified in light of the ability and incentives for the SMP SP to refuse to supply to its competitors and the associated potential competitive and consumer impacts on related markets. ComReg would thus expect that RTÉ's response should be fair, reasonable and timely.

Requirement not to withdraw access to services already granted

- 10.36 Given that access to RTÉ DTT Multiplexing Services is necessary to address the competition problems which, absent regulation, would likely arise from RTÉ's position of SMP, once granted, there ought to be no reason for

withdrawal. However, ComReg does not necessarily consider it proportionate to force RTÉ to maintain access to facilities once granted in all cases and regardless of circumstances. Rather, RTÉ may apply for ComReg's prior approval before any withdrawal of access. ComReg considers that this approach will promote regulatory certainty for all parties without unduly restricting investment incentives.

- 10.37 Where ComReg decides to approve a request for withdrawal, it may impose terms and conditions including for the purpose of protecting users of the service being withdrawn, such as requiring that sufficient notice is provided.
- 10.38 In arriving at the decision to approve or refuse RTÉ's request, RTÉ is required to notify ComReg, in writing, of any proposal to withdraw access to facilities already granted, giving reasons borne out of a detailed analysis of the proposed access withdrawal, including the impact that the withdrawal of access is likely to have on existing customers and end-users. ComReg will provide a predicted decision date to RTÉ as its request advances through the withdrawal request process.

Conditions to ensure fairness, reasonableness and timeliness of access

- 10.39 In assessing potential competition problems which could arise, absent regulation, in Market B, ComReg identified the potential for RTÉ, as the SMP SP in Market B to engage in constructive refusal to supply e.g. through disproportionate entry and unreasonable terms and conditions associated with access, and in some cases, an outright refusal to supply. ComReg thus imposes a condition attached to the access obligations which would oblige RTÉ to grant access to its DTT Multiplexing Services in a fair, reasonable and timely manner.
- 10.40 In order to ensure that RTÉ provides access on fair and reasonable terms, ComReg requires that RTÉ:
- (a) Negotiate in good faith and offer meaningful SLAs, that is, legally binding contracts between RTÉ and Access Seekers, committing RTÉ to defined service levels, as further described below;
 - (b) May only impose restrictions on access that are intended for the protection of the integrity of the network to the extent that they are justified, reasonable and proportionate; and

- (c) Where a request for access is refused, provide specific and clear reasoning for such to the Access Seeker at the time the request is declined.
- (d) In order to ensure that access is provided on a timely basis, ComReg requires RTÉ to:
- (e) Adhere to specified processes and timelines as regards the development of new services or amendments to existing services;
- (f) Adhere to specific processes and timelines as regards the negotiation of SLAs in respect of new services or amendments to existing services; and
- (g) Inform ComReg when any access request has been refused/declined, at the same time as such refusal/denial is notified by RTÉ to the Access Seeker, together with the objective reasons for refusing/declining that access request.

SLAs

- 10.41 To ensure that conditions of access are provided on fair, reasonable terms and in a timely manner, ComReg is attaching conditions to the access obligation to ensure that legally binding SLAs are appropriately concluded and implemented by RTÉ.
- 10.42 For the purpose of clarity and to provide certainty to industry, RTÉ must conclude, maintain and update, as appropriate, legally binding SLAs with Access Seekers that shall include, but shall not be limited to, the maintenance of the SLA requirements. The SLA parameters set forth are the minimum requirements needed to ensure that the SLAs provided are adequate and support the functioning of the access remedies. They include, for example, fault management and response, business continuity management, traffic and network management, maintenance objectives and quality metrics.
- 10.43 ComReg is also imposing a specific provision that RTÉ should be obliged to negotiate in good faith with Access Seekers in relation to the conclusion of legally binding and fit-for-purpose SLAs.
- 10.44 As has been noted in Section 9 of this Consultation, RTÉ has the ability and incentive engage in anti-competitive practices to discourage downstream market entry in order to benefit its broadcasting activities. This could include issues related to quality of service, where failure to provide guaranteed quality of service may deter market entry and expansion. Therefore, it is ComReg's view that SLAs should be provided by RTÉ in this market to deter such behaviour. ComReg's view is that absent regulation, RTÉ may not be

incentivised to meet any conditions of an agreed SLA without some level of compensation to wholesale customers should the SLA be breached.

- 10.45 Therefore, ComReg is imposing a specific obligation to ensure that the SLA should specify a level of compensation (service credits) that adequately compensate the customer for a breach of the SLA. For example, this may occur where there is a failure to deliver or repair a service appropriately within a prescribed time as described in the SLA. This measure would provide RTÉ with an incentive to deliver and maintain its DTT Multiplexing Services to a pre-defined and pre-agreed level of performance or otherwise compensate its customer accordingly. The process of compensation should not be burdensome, and the methodology used, and calculation of SLA credits should be clearly explained by RTÉ in the SLA, with examples. Service credits will be a matter of negotiation between RTÉ and Access Seekers, and recovery of service credits will in the first instance be a matter for the Access Seekers and RTÉ. To ensure the effectiveness of this obligation, it is ComReg's view that the payment of any service credits should be made in a timely and efficient manner.
- 10.46 Given the competition problems identified in this Consultation relating to discrimination, ComReg is of the view that certain quality guarantees are appropriate in respect of RTÉ's provisioning of its DTT Multiplexing Services. Such assurances are also commonplace in contractual agreements between suppliers and their customers.

10.4.4 Overall Conclusion on Access Remedies for Market B

- 10.47 Having regard to the analysis set out above, ComReg imposes the above access obligations on RTÉ.
- 10.48 ComReg's position is that the obligation to provide access to DTT Multiplexing Services is both proportionate and justified. ComReg has considered whether obligations other than those relating to access would, in themselves, resolve the competition problems identified. ComReg does not consider this to be the case. The imposition of the above access obligations alone would also not resolve issues such as excessive pricing, discrimination (on price or quality grounds) or ensure transparency of terms and conditions of access.

10.5 Non-Discrimination Remedies for Market B

10.5.1 Existing Non-Discrimination Remedies in Market B

- 10.49 The 2021 Decision imposed on RTÉ a non-discrimination obligation and, in this respect, RTÉ was required to:
- (a) Apply equivalent conditions in equivalent circumstances to other Access Seekers providing equivalent services;
 - (b) Ensure that all services (including associated services and associated facilities) and information are provided to other Access Seekers under the same conditions and of the same quality as the services and information that RTÉ provides to itself or to its subsidiaries or partners; and
 - (c) Ensure that all such services and information shall be provided to other Access Seekers at the same time as the service(s) and/or information are made available by RTÉ to itself or its subsidiaries or partners.

10.5.2 Proposed Non-Discrimination Remedies for Market B

- 10.50 Regulation 52 of the ECC Regulations provides that ComReg may impose on an SMP SP obligations of non-discrimination in relation to access or interconnection in order to ensure that the SMP SP concerned:
- (a) Applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services; and
 - (b) Provides services and information to others under the same conditions and of the same quality as it provides for its own services or those of its subsidiaries or partners.
- 10.51 As noted in Recital 184 of the Code, the principle of non-discrimination ensures that SPs with SMP do not distort competition, in particular, where they are vertically integrated and supply services to SPs with whom they compete on downstream markets. Non-discrimination obligations also play an important role in ensuring the effectiveness of other obligations such as those relating to access, transparency, and price control. In turn, obligations of transparency, for example those relating to KPI metrics and performance metrics, support non-discrimination obligations.
- 10.52 ComReg's position is that a non-discrimination obligation is a necessary support to the provision of access to DTT Multiplexing Services by RTÉ in Market B. The aim of a non-discrimination obligation is to ensure that RTÉ does not discriminate between Access Seekers, as well between RTÉ itself and other Access Seekers. If RTÉ were only required to provide access, it could

potentially discriminate in favour of RTÉ, for example, by providing services to Access Seekers which were not of the same quality or pricing as those supplied to RTÉ. The non-discrimination obligation therefore supports the objective of promoting the development of sustainable competition which should be to the benefit of end users.

- 10.53 ComReg is, therefore, reimposing the following non-discrimination obligations on RTÉ. In this regard RTÉ is required to:
- (a) Apply equivalent conditions in equivalent circumstances to other Access Seekers providing equivalent services;
 - (b) Ensure that all services (including associated facilities) and information are provided to other Access Seekers under the same conditions and of the same quality as the services and information that RTÉ provides to itself or to its subsidiaries, affiliates or partners; and
 - (c) Ensure that all services and information are provided to other Access Seekers at the same time as such services and/or information are made available by RTÉ to itself or to its subsidiaries, affiliates or partners.
- 10.54 This obligation could be imposed by itself but usually supports other regulatory obligations such as access, transparency and price control. Given the potential to discriminate between RTÉ and other Access Seekers on the terms and conditions of access, quality of service, and price, the obligation of non-discrimination is required to ensure competition problems do not arise.
- 10.55 ComReg recognises there may be commercial sensitivity surrounding the provision of information and services by RTÉ to Access Seekers and therefore concludes that it is reasonable to restrict the obligation regarding non-discrimination to the provision of services and information to an Access Seeker who has already agreed a Reference Offer with RTÉ. ComReg does not consider it proportionate or justified to expect RTÉ to make available commercially sensitive information to all market players, irrespective of whether or not they rely on RTÉ supplied wholesale inputs to compete.
- 10.56 ComReg suggests that this obligation is a proportionate and reasonable approach, taking into account potential commercial sensitivities surrounding the provision of information and services to other Access Seekers and DTT Multiplex Operators.
- 10.57 To ensure that Access Seekers are in the same position as RTÉ, with respect to the provision of information and services, such information and services should be provided to them at the same time as RTÉ provides to itself.

- 10.58 ComReg further requires RTÉ should also ensure that it offers SLAs to broadcasters in accordance with its obligations relating to non-discrimination.

10.5.3 Overall Conclusion on Non-Discrimination Remedies for Market B

- 10.59 Having regard to the analysis set out above, ComReg proposes reimposing the identified non-discrimination obligations on RTÉ.
- 10.60 ComReg considers that the imposition of the above non-discrimination obligations is both proportionate and justified, having regard to the competition problems identified in Section 9.
- 10.61 ComReg has also considered whether non-discrimination obligations alone (or with the access obligations above) would be sufficient to address the competition problems identified but does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a non-discrimination obligation.

10.6 Transparency Remedies for Market B

10.6.1 Existing Transparency Obligations in Market B

- 10.62 The 2021 Decision imposed on RTÉ an obligation of transparency in respect of the access that it is required to provide. In this respect, the 2021 Decision imposed on RTÉ a number of publication requirements, including:
- (a) The requirement to publish a Reference Offer;
 - (b) The requirement to publish information about products and services; and
 - (c) The requirement to publish an SLA.

10.6.2 Proposed Transparency Remedies for Market B

- 10.63 Regulation 51 of the ECC Regulations provide that ComReg may impose obligations to ensure transparency in relation to access requiring an SMP SP to make public specific information such as accounting information, technical specifications, network characteristics, prices, and terms and conditions for supply and use, including any permissible conditions limiting access to, or use of, services and applications.
- 10.64 Transparency supports the monitoring of the non-discrimination obligation. As set out in Recital 182 of the Code, transparency of terms and conditions for access and interconnection, including prices, serves to speed up negotiations

between operators, avoid disputes and give confidence to market players that a service is not provided on discriminatory terms.

- 10.65 Transparency obligations ensure that forms of anti-competitive behaviour are prevented that would be difficult, or not possible, for Access Seekers to be aware of in its absence. Transparency allows Access Seekers to know that services are being provided on a non-discriminatory basis. For example, without a transparency obligation, RTÉ, without the knowledge of Access Seekers, could:
- (a) Provide less favourable terms and conditions of access to downstream competitors than to itself;
 - (b) Provide levels of service to Access Seekers that are inferior to that provide to itself; and
 - (c) Engage in delaying tactics by providing services on a self-supply basis earlier than is provided to Access Seekers.
- 10.66 The behaviour outlined above could allow RTÉ to exploit information availability/asymmetries, causing uncertainty that could discourage the use of Market B services. This could foreclose competition in Market B while distorting downstream markets.
- 10.67 A transparency obligation is also required to monitor and ensure the effectiveness of any price control obligations, and to support any accounting separation obligations. Transparency would allow the calculation of costs and prices (i.e. internal price transfers) to be rendered visible. This would allow ComReg and industry to monitor the compliance of RTÉ's pricing behaviour with any non-discrimination obligations, address potential competition problems relating to excessive pricing and price discrimination and generate certainty that RTÉ is operating at an efficient level for prices charged.
- 10.68 As set out in Regulation 51(1) of the ECC Regulations, transparency obligations may be used in relation to:
- “...access or interconnection requiring such undertaking to make public specific information such as accounting information, prices, technical specifications, network characteristics and expected developments thereof, as well as terms and conditions for supply and use, including any conditions altering access to or use of services and applications, in particular with regard to migration from legacy infrastructure, where such conditions are permitted by law.”*

- 10.69 Transparency can be applied on its own, but it usually supports other obligations. Transparency serves the purpose of ensuring that access and pricing behaviour are observable.
- 10.70 ComReg is of the opinion that transparency obligations are necessary, both to allow monitoring and visibility of how RTE is meeting its obligations, and to provide information which Access Seekers may use to make a decision to enter the retail market. The specific detail of this obligation is discussed below.
- 10.71 To support the access, non-discrimination and price control obligations and to ensure that market participants have adequate visibility of the conditions and quality of the wholesale service offered, ComReg imposes a number of publication requirements:
- (a) Requirement to publish a Reference Offer;
 - (b) Requirement to publish information about products, services and associated facilities; and
 - (c) Requirement to publish an SLA.
- 10.72 Each of these categories is considered in further detail below.

Reference Offer

- 10.73 Section 51(5) of the ECC Regulations provides that where an operator is subject to obligations concerning wholesale access to network infrastructure, ComReg is required to ensure the publication of a Reference Offer takes utmost account of the BEREC guidelines on the minimum criteria for a Reference Offer issued in accordance with Article 69(4) of the Code. BEREC issued such guidelines²⁹⁹ on 5 December 2019. The BEREC Guidelines set out four categories of information to be included in a Reference Offer, as follows:
- (a) Terms and conditions for the provision of network access;
 - (b) Details of operational processes;
 - (c) Service supply and quality conditions; and
 - (d) General terms and conditions of the agreement.

²⁹⁹ BEREC Guidelines on the minimum criteria for a Reference Offer, BoR (19) 238, 5 December 2019.

- 10.74 ComReg follows the same approach in respect of Market B as has been followed in respect of other markets and requires RTÉ to publish a Reference Offer dedicated to Market B.
- 10.75 ComReg is imposing an obligation requiring that RTÉ make its Reference Offer publicly available on its website, containing at least a description of all relevant offerings broken down into components according to market needs, a description of the technical specifications and network characteristics of the access being offered, the mechanism for approaching RTÉ for access, and a description of the associated terms and conditions for supply and use, including prices, to RTÉ's DTT Multiplexing Service. It is important to note that this Reference Offer does not represent an exhaustive list of the services which might be the subject of a reasonable request. RTÉ is obliged to keep the Reference Offer up to date.
- 10.76 The obligation requiring the publication of a Reference Offer gives existing and potential Access Seekers more detail on the supply characteristics and terms and conditions and prices of access before they approach RTÉ. This means that parties will have an understanding of the type of services and the characteristics and prices of services on offer before engaging with RTÉ thereby facilitating more timely and effective access to RTÉ's Market B services which otherwise may be constructively denied or delayed due to a lack of information.
- 10.77 Its purpose is also to provide a sufficient degree of certainty to allow Access Seekers to plan and run their operations efficiently but does not prevent them from submitting bespoke requests or requesting additional services where circumstances suggest it.
- 10.78 Any terms not covered by the Reference Offer would, in the first instance, be subject to negotiation with a right for either party to bring a dispute about such terms to ComReg for resolution.
- 10.79 ComReg also proposes to impose an obligation on RTÉ regarding any changes to the Reference Offer. The mechanism provides for all proposed changes, including changes to prices, and the introduction of new services and facilities to be published or otherwise communicated to Access Seekers in a timely and transparent fashion.
- 10.80 To ensure the effectiveness of this transparency obligation, any proposed changes to the Reference Offer should not be implemented without prior notification to ComReg and advance notice given to Access Seekers. At present, RTÉ is required to publish proposed changes to the Reference Offer

and any proposed changes to wholesale prices (including prices for new services and facilities) at least two months before they come into effect, and to notify ComReg of such proposed changes an additional one month before this. This means that ComReg is notified at least three months before proposed changes were implemented, to be followed by publication at least two months in advance of implementation.

- 10.81 While the two-month advance publication to industry appears to have worked well, ComReg proposed to extend the period of prior notification to ComReg to two months, in order to ensure that there is sufficient time for engagement in advance of publication, and ensure full review of the documentation notified by RTÉ. Notifications should include the full set of documents proposed for publication, identifying the changes proposed and justifying same in full.
- 10.82 ComReg may extend or reduce the notification or advance notice periods where appropriate on a case-by-case basis. For example, in the case of significant changes to products or prices, ComReg reserves the right to extend the publication and notification periods beyond the two-month period if appropriate and necessary on a case-by-case basis.

Requirement to publish information about services

- 10.83 ComReg proposes that, as part of the transparency obligation, RTÉ should be required to publish any reasonable information or data which Access Seekers may require in order to be able to compete effectively using RTÉ's Market B inputs. This could include, for example, accounting information, technical specifications, terms and conditions for supply and use, and prices.
- 10.84 The need for this may arise where Access Seekers require more granular information than would be available via the Reference Offer discussed above.

Requirement to publish SLAs

- 10.85 RTÉ should be obliged to publish SLAs on its publicly available website. Detail of the obligation to have SLA in place is set out in sub-section 10.4.3.
- 10.86 Publication of SLAs provides more transparency and assurance to ComReg and industry in demonstrating equivalence. As ComReg does not believe that SLAs would contain any commercially sensitive information, ComReg believes this is proportionate.

10.6.3 Overall Conclusion on Transparency Remedies in Market B

- 10.87 Having regard to the analysis set out above, ComReg proposes reimposing transparency obligations on RTÉ.

- 10.88 ComReg considers that the imposition of the above transparency obligations is both proportionate and justified, having regard to the competition problems identified in Section 9.
- 10.89 ComReg has considered whether transparency obligations alone would be sufficient to address the competition problems identified and does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a transparency obligation.

10.7 Price Control and Cost Accounting Remedies in Market B

10.7.1 Requirement for a Price Control

- 10.90 Under the 2021 Decision, the provision of access to Market B products, services, and associated facilities was subject to a cost orientation obligation based on HCA and FDC methodology³⁰⁰ and also an obligation for RTÉ to maintain appropriate cost accounting systems. ComReg proposes to maintain this obligation.
- 10.91 Regulation 56 of the ECC Regulations provides that ComReg may impose on an SMP SP obligations relating to cost recovery and price controls. These include obligations for both cost orientation of prices and cost accounting systems, in situations where a market analysis indicates that a lack of effective competition for the provision of specific types of access or interconnection means that the operator concerned may sustain prices at an excessively high level or apply a price squeeze to the detriment of end users.
- 10.92 In imposing any such obligations, ComReg is required to:
- (a) Take into account any investment made by the SMP SP which ComReg considers relevant and allow that SP a reasonable rate of return on adequate capital employed, taking into account any risks specific to a new investment network project; and
 - (b) Ensure that any cost recovery mechanism or pricing methodology that ComReg imposes serves to promote efficiency and sustainable competition and maximises consumer benefits.

³⁰⁰ See Annex 3 for definitions of HCA and FDC.

- 10.93 RTÉ's costs in Market B include the costs of the transmission and distribution services purchased in Market A to which are added the costs of carriage on the two DTT multiplexers, with distribution, transmission and multiplexing being combined in Market B in a managed digital multiplexing service enabling the broadcasting of digital terrestrial signals to end-users. In practice, 2rn maintains and operates the multiplexing process for RTÉ, and issues RTÉ with invoices for the cost of operating and maintaining the DTT multiplexes.³⁰¹
- 10.94 Approximately **90% to 95% of the costs in Market B relate to the transmission and distribution managed service procured on Market A.** Other costs include central costs and management time associated with running the PSB multiplexes and the licence fees. The Market B asset base is almost fully depreciated and therefore the return on capital earned by RTÉ is not significant.
- 10.95 In light of this, and given the vertical integration of 2rn and RTÉ, there is a significant risk of excessive prices in Market B which requires a price control obligation. While the obligation of non-discrimination means that any excessive prices would apply also to RTÉ as a Broadcast Operator in Market B, they would constitute revenues for 2rn and remain in the RTÉ group placing other Broadcast Operators competing on the retail market at a disadvantage to RTÉ, in circumstances where they have little or no choice but to use RTÉ's DTT platform. In the absence of a price control RTÉ has a limited incentive in keeping costs to an efficient level, since higher charges would have to be borne by rival broadcasters and impact on their cost structures.

10.7.2 Obligation of cost-orientation

Price control options

- 10.96 It is a requirement under the ECC Regulations that the price control is appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and end user benefit. As set out in Annex 3, price control options include:
- (a) Retail minus;
 - (b) Reasonable costs; and
 - (c) Cost orientation.

³⁰¹ This is visible as a cost line in the RTÉ Regulated Accounts.

- 10.97 RTÉ is currently subject to an obligation of cost-orientation and ComReg considers that **cost orientation continues to be the appropriate price control in Market B** as it addresses the risk of excessive pricing, while ensuring RTÉ recovers its efficient costs. A cost-oriented price control on RTÉ ensures that prices are an actual reflection of efficiently incurred costs while, at the same time, allowing for an appropriate return on investment.
- 10.98 In particular, retail minus does not lend itself as a price control in Market B as there is no separately identifiable retail price point, or points, on which a wholesale price could be based. A reasonable costs-based option will not provide sufficient transparency and assurance that tariffs are not excessive as it does not address the issue arising from vertical integration of Market A and Market B within the RTÉ group. In contrast an obligation of cost orientation offers an objective basis for assessing tariffs in Market B and ensuring that competitors of RTÉ in the retail market are not at a disadvantage. It also ensures that RTÉ recovers the efficient costs incurred in making its DTT platform available to other Broadcast Operators.

Costing Methodologies

- 10.99 In the absence of expected entry in Market B, ComReg also proposes to maintain the requirement that tariffs reflect costs calculated on a Historical Cost Accounts (HCA) Top-Down basis using the Net Book Value of the relevant assets and actual operating costs, on a fully distributed basis (FDC). ComReg notes that this ensures also consistency between the respective price control for Market A and Market B bearing in mind that Market A prices are the most significant source of costs for Market B.

Implementation by RTÉ to date

- 10.100 In setting the Market B price control, ComReg seeks to ensure RTÉ recovers its efficiently incurred costs while, at the same time, provides certainty on the tariffs that purchasers of wholesale services will be charged by minimising fluctuations in the tariffs. When proposing tariffs, RTÉ forecasts supply and demand factors such as new users or possible exits from the market by Access Seekers using the infrastructure. RTÉ also forecasts capital expenditure and operating costs, including wholesale inputs from Market A.
- 10.101 Since 2013, when the obligation of cost-orientation of tariffs on the basis of HCA-FDC was introduced by ComReg Decision D11/13 for Market B, RTÉ has used a tariff model to allocate costs among Saorview users on the basis of capacity actually used, as a percentage of the relevant total cost base. This means that the actual tariff paid by a Broadcast Operator will depend not only

on the capacity that it uses but also on the number of channels being broadcast on Saorview.

10.102 More particularly, as set out in Appendix B of the RTÉ SAORVIEW's Reference Offer (version 12 March 2024), the tariff is calculated so that the RTÉ's **full costs** in providing the DTT multiplexing, distribution and transmission broadcast service are recovered from all users of the DTT platform on the basis of the following:

- (a) The relevant user's **relative consumption of the multiplexes' bitrate** as compared to the total consumption from all users;
- (b) A cost per kbps, derived from actual and estimated number and type of channels using Saorview during a five year term; and
- (c) The smoothing of the tariff over a five year period taking into account the number of new or enhanced channels that RTÉ reasonably believes will be contracted for during that period.

10.103 In other words, although there is some scope on the PSB multiplexes for additional channels, RTÉ recovers the total cost of operating the PSB multiplexes across all existing broadcasters. The total cost of operating the PSB multiplexes is divided by the estimated total number of kilobits that will be consumed to derive a cost per kilobit. Each individual broadcaster is then invoiced the cost per kilobit multiplied by the kilobits consumed by that broadcaster. In setting charges, RTÉ sets a flat rate per amount of data transmitted (kbps) for all broadcasters. This means that HD broadcasters pay more in total than SD broadcasters as the former have higher capacity consumption requirements. In addition, for the purpose of calculating the tariff, RTÉ assumes for the purpose of its current tariffs, that all TV and radio channels on the platform on 1 January 2023, or contemplated, will remain on Saorview at similar average bit rate usage for the remainder of the five year term and that the total of the estimated input costs are aligned with actual costs incurred over the smoothing period.³⁰² These assumptions on channels or input costs are reviewed at least annually and where they are not met, the tariff may be adjusted.

10.104 Since the 2021 Decision and before, RTÉ's tariff model has allowed RTÉ to set smoothed tariffs at a level that ensured that Saorview's costs were recovered in full at a time that the number of channels broadcast on the platform

³⁰² Appendix B of RTÉ Saorview's Reference Offer (version 12 March 2024).

increased steadily and spare capacity filled up, to the benefit of end-users. However, ComReg is concerned that RTÉ's approach to implementing its obligation of cost-orientation may no longer be appropriate in a changing environment and may no longer be consistent with the objectives pursued by the obligation of cost-orientation in the first place.

- 10.105 ComReg notes in this regard that at this time, no new additional channels are expected to join the platform; rather RTÉ expects usage of Saorview to decrease. RTÉ's decision to increase capacity on the DTT platform in 2023 was followed in November 2023 by publication of its Strategy Statement for 2025-2029 entitled "*A New Direction*", which indicates RTÉ's intention to close four digital radio services in 2024 (RTÉ Radio 1 Extra, RTÉ 2XM, RTÉ Pulse and RTÉjr radio) and by end of 2029, to "*close the 'time shift' channels RTÉ One +1 and RTÉ2 +1... allow[ing RTÉ] to reduce the cost of traditional broadcast distribution*". However, the costs of running the platform do not vary depending on the number of channels using the platform: withdrawing those services from Saorview will not reduce the costs of maintaining and operating Saorview. Rather, it could reduce the costs only for RTÉ, because, under the approach followed to date, some of the costs would be reallocated on to other Broadcast Operators on Saorview as a consequence of how the per kbps weightings are applied.
- 10.106 ComReg is concerned that in this new environment, the approach followed to date by RTÉ may have detrimental effects which are not consistent with the competitive market outcome that the set of remedies seeks to achieve. Allowing RTÉ, the owner and operator of the DTT platform, to pass onto other users of the platform, some of the costs that used to be borne by a user that exits the platform (including its own channels), reduces any incentive on the part of RTÉ to ensure that the multiplexers' capacity (newly increased) is fully utilised; meanwhile RTÉ's incentives as a vertically-integrated broadcaster offering transmission services to its competitors are further distorted as exits from the platform increases its retail's competitors' costs. This means that not only improvements in efficiencies may not translate into reduced tariff for Broadcast Operators, but also that a commercial decision of a Broadcast Operator to no longer use Saorview will result in an increase in the tariffs paid by other Broadcast Operators. This is particularly troublesome in light of RTÉ's SMP status and the statutory requirement applying to a number of channels to be broadcast on Saorview so that those Broadcast Operators may not leave Saorview.

10.107 While ComReg does not propose to change the price control, which should remain an obligation of cost-orientation of tariffs calculated on an HCA-FDC basis, ComReg believes that the matter of its implementation needs to be considered against this background. In this regard, and with the view to increasing certainty for RTÉ and users of the Saorview platform, ComReg proposes that the price control is more closely defined and specific requirements to be complied with by RTÉ when setting tariffs, set out in the Decision. ComReg's proposal is set out below.

Further Specification

10.108 By way of further specification, ComReg proposes to require RTÉ to move away from the current position where tariffs may vary depending on the number of channels on the platform at any point in time. Noting that the main factor influencing a Broadcast Operator's bitrate consumption is the type of channel being broadcast, namely television or radio, and for television, Standard Definition or High Definition, as opposed to the exact content broadcast by individual Broadcast Operator, ComReg proposes to require that annual tariffs are calculated by RTÉ as follows:

- (a) There should be a single tariff per service type (e.g., SD, HD, Digital Radio) based on average bitrate consumption for the service type concerned and which does not vary per Broadcast Operator. This would make the tariff clearer and more consistent over time.
- (b) Given that additional channels are not expected to join Saorview, the existing number of channels at 1 April 2024 – commencing a new five year period³⁰³ – should be treated as the efficient minimum number of channels at each service type which RTÉ can take into account in calculating the tariff per service type for that five year period.
- (c) Applicable tariffs may be amended on an annual basis to reflect changes in costs.

10.109 Accordingly, the tariff would vary over time only to the extent input costs change but would not vary as a consequence of a change in the number of channels using the platform or any changes in service type.

10.110 This should protect Broadcast Operators from tariff increases as a result of commercial decisions from their competitors (including RTÉ) where there has

³⁰³ Current tariffs have been calculated over a "smoothing" five year period running from 1 April 2019 to 31 March 2024, see Appendix B of the RTÉ SAORVIEW's Reference Offer (version 12 March 2024).

been no change in the service that they procure from RTÉ; it incentivises RTÉ to ensure capacity on the multiplexers is utilised to the maximum extent as a decrease in the number of channels or levels of service (SD v HD) means that additional costs will need to be absorbed by RTÉ, while an increase in the number of channels or levels of service will bring RTÉ further revenues.

- 10.111 ComReg proposes also that the tariff model used by RTÉ is published on its website so that there is full transparency as regards the calculation underpinning the tariffs. ComReg does not believe that there should be any need for redactions to protect confidential information but will consider any submissions that RTÉ would wish to make in this regard.

Tariff notification and publication

- 10.112 In terms of annual amendments to reflect changes in input costs, given that the vast majority of costs are costs from Market A, ComReg proposes that amendments to Market B tariffs take into account the published Market A tariffs for the year. In practical terms, as it is proposed that 2rn publishes on 1 May the tariffs to apply from 1 July that year, ComReg proposes that RTÉ be required to publish on 1 November tariffs to apply from 1 January, having notified ComReg two months in advance on 1 September. Fixing the date for tariff changes will bring certainty to Broadcast Operators as to whether or not there will be a tariff change, while allowing RTÉ to amend the tariff to reflect increases costs is consistent with the principle that the tariff charged by RTÉ must allow it to recover the efficient costs in providing the service.
- 10.113 A requirement to notify ComReg on 1 September for publication on 1 November represents an increase of one month in the notification period which ComReg believes is necessary to ensure full review of the pricing submission, in circumstances where the timeline for publication is fixed. Notification should be accompanied by full justification of the amendments proposed by reference to costs including copy of the updated tariff calculation and related assumptions, and copy of the proposed publication of the amended Tariffs.

10.7.3 Cost Accounting

- 10.114 The obligation to maintain appropriate cost accounting systems generally supports the obligations of price control and accounting separation and can assist ComReg in monitoring the obligation of non-discrimination. ComReg requires RTÉ to continue to maintain appropriate cost accounting systems in respect of wholesale products, services or facilities in Market B.
- 10.115 To support the effective operation of a price control obligation, it is necessary for RTÉ to maintain cost accounting systems that capture, identify, value and

attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. A key part of this process is the stage which identifies those parts of the underlying activities or network components that directly support, or are consumed by, those particular services or products. As these components are frequently used to provide more than one product or service, it is also necessary to determine how much of each component is used for each service or product.

- 10.116 The division of services and products, and the corresponding costs, capital employed and revenues between the different services and products should be reflected in costing systems, and coherence and integrity of information should be assured.
- 10.117 Approximately 90% to 95% of the cost inputs into Market B are charged directly from Market A. This is visible as a revenue line in the 2nd Regulated Accounts and a cost line on the RTÉ Regulated Accounts. The remaining costs tend to consist of Market B specific costs, such as central costs or management time associated with running the PSB multiplexes and licence fees, which are issued by ComReg.

10.7.4 Conclusions on the proposed price control and cost accounting remedies for Market B

- 10.118 Having regard to the analysis set out above, ComReg proposes to reimpose a price control on RTÉ in Market B in the form of an obligation of cost-orientation based on an HCA and FDC methodology.
- 10.119 Continuation of the obligation of cost orientation is necessary to ensure that Access Seekers (Broadcast Operators other than RTÉ) are not subject to excessive charges.
- 10.120 Although this is a continuation of the price control obligation that has been in place under the 2021 Decision, the proposed further specification of the price control means that the price control's impact on stakeholders will differ from the impact from the 2021 Decision.
- 10.121 Insofar as RTÉ is concerned, it will be able to rely on the cost allocation processes already in place but would need to amend its tariff model. However ComReg does not believe the amendments required will add any complexity to the exercise. However, the proposed further specification can be seen as introducing a degree of market risk for RTÉ, which unless it ensures an efficient use of the DTT platform, will absorb a greater share of the costs that it has to date. ComReg believes that this is entirely consistent with the principle that not all costs, but only efficient costs, ought to be recovered.

- 10.122 Insofar as Access Seekers are concerned, the proposed further specification ensures that the tariff that they pay does not depend on commercial decisions of other Broadcast Operators including RTÉ, but on the service that they choose to avail based on transparent pricing. It also ensures that they bear a fair objectively determined share of the costs of making available and operating the DTT platform.
- 10.123 ComReg, therefore, considers that the reimposition of the price control obligations adheres to its regulatory objectives in this market, does not impose a disproportionate regulatory burden on RTÉ and provides transparency for the users of Market B.

10.8 Accounting Separation Remedies in Market B

10.8.1 Existing Accounting Separation Obligations

- 10.124 The 2021 Decision imposed requirements on RTÉ to maintain separated accounts, to publish regulated accounts showing the income and revenues statements for products and services offered in Market B and provide accounting records, upon request, to ComReg.

10.8.2 Continued requirement for an Accounting Separation Remedy in Market B

- 10.125 As discussed in sub-section 7.7 in respect of Market A, under Regulation 53 of the ECC Regulations, ComReg may require an SMP operator which is vertically-integrated to make transparent its wholesale prices and its internal transfer prices, to ensure compliance with any non-discrimination obligation or, where necessary, to prevent unfair cross-subsidisation. An accounting separation obligation can also support cost accounting obligations and assist with monitoring compliance with pricing obligations as it brings additional transparency to the revenue and costs.
- 10.126 Separated accounts, by making visible RTÉ's Market B costs and revenues, facilitates transparency on the allocation of these costs across its customers. It is therefore considered justified to reimpose an obligation on RTÉ to maintain separated accounts to support RTÉ's obligations around non-discrimination cost oriented price control.
- 10.127 As noted in the context of Market A, sections 108 and 109 of the 2009 Act are concerned with ensuring accountability for expenditure of public monies and protecting against inappropriate use of public funds. They are not designed to address issues of SMP *per se*, and neither provision, in ComReg's view, results

in full transparency of internal pricing in the same manner as under the electronic communications regulatory framework.

- 10.128 Similarly, the level of detail provided in the financial statements for RTÉ is insufficient to examine how Market B costs are allocated to broadcasters who are using capacity on RTÉ's DTT multiplexes. Separated accounts provide more granular detail in terms of RTÉ's revenue and costs, which is required by ComReg to ensure RTÉ is complying with its obligations. RTÉ has been subject to Accounting Separation obligations under the two previous market analysis decisions and ComReg considers that reimposing RTÉ's Accounting Separation obligation is justified and proportionate.

10.8.3 RTÉ's Accounting Separation obligations

- 10.129 ComReg proposes that the same requirements apply to RTÉ as apply to 2rn, as set out in sub-section 7.7 above. This means that RTÉ should continue to be required to prepare separated accounts on an annual basis, comprising a set of Regulated Accounts, the Primary Accounting Documentation setting out the accounting policies followed by RTÉ in preparing the Regulated Accounts and Additional Financial Data as ComReg may require from time to time. ComReg proposes further that the same requirements apply in terms of Regulatory Accounting Principles to be followed by RTÉ in preparing its Separated Accounts.
- 10.130 RTÉ should also be subject to the same requirements regarding auditing of the Separated Accounts and publication including timelines as set out in sub-section 7.7. in respect of the services offered in Market B.
- 10.131 When applying the requirements set out in sub-section 7.7.2 to RTÉ, ComReg notes as follows:
- (a) The RTÉ **Regulated Accounts** should continue to include an income statement for Market B including an analysis of costs by functional cost category and distinguishing between External and Inter/Intra revenues; a balance sheet for Market B prepared on a Mean Capital Employed basis and Notes to the accounts, as required.
 - (b) Relevant **Additional Financial Data** for Market B may include a schedule of charges by individual Broadcasters, reconciled to the income per the Income Statement in the Regulated Accounts; a copy of the Fixed Asset Register of assets relevant to Services in respect of Market B; and a breakdown of Market B specific costs.

- (c) The **Primary Accounting Documentation** setting out the Accounting Principles and Policies followed in preparing the Regulated Accounts and AFD should make it clear how costs are allocated to the multiplexes' users.

10.8.4 Overall Conclusions on the proposed Accounting Separation remedies in Market B

- 10.132 The accounting separation obligation on RTÉ allows ComReg ensuring that there is visibility and transparency for the users of Market B in relation to the revenues, costs, cost allocations and returns of RTÉ. This includes transparency as regards the internal and external revenues earned by RTÉ from its own internal arms and those of third parties.
- 10.133 As this is a continuation of the process that has been in place under the previous market analysis decisions there is no change in the impact on stakeholders. RTÉ already has accounting processes in place that reflects the accounting separation requirements as set out above. For the users of Market B services, they can continue to have published documentation to allow them to understand the revenues, costs and returns of RTÉ. This includes the transfer charges between Market A and Market B (as a cost input into Market B).
- 10.134 As one of ComReg's duties is to foster efficient investment the use of accounting separation enables ComReg and others to observe the level of investment made by RTÉ. ComReg can obtain more granular data in relation to this investment and as noted above while ComReg does not determine whether or not a capital investment program of RTÉ is appropriate ComReg can determine whether or not it has been efficiently incurred (for regulatory purposes) and make adjustments if considered necessary.
- 10.135 ComReg therefore considers that the imposition of the accounting separation obligation adheres to its regulatory objectives in this market, does not impose a regulatory burden on RTÉ and provides transparency for the users of Market B.

10.9 Conclusion on Remedies in Market B

- 10.136 Having regard to the competition problems identified in Section 9 and the discussion in Section 10 above, ComReg imposes a range of access, non-discrimination, transparency, price control, cost accounting, accounting separation on RTÉ, with such obligations being imposed in Market B.

Q. 10. Do you agree with ComReg's proposals in respect of remedies in Market B? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Annex 1 Decision Instrument: Market A

1 STATUTORY POWERS GIVING RISE TO THIS DECISION

1.1 This Decision Instrument ("**Decision Instrument**") is made by the Commission for Communications Regulation ("**ComReg**"):

- (i) Pursuant to and having regard to sections 10 and 12 of the Communications Regulations Act 2002;
- (ii) Pursuant to and having regard to Regulations 4 and 42(1) of the ECC Regulations;
- (iii) Having had regard to, where appropriate, the Broadcasting Act 2009;
- (iv) Having, pursuant to section 13 of the Communications Regulation Act 2002, where applicable, complied with Ministerial Policy Directions;
- (v) Having taken the utmost account of the European Commission's 2020 Recommendation and the Explanatory Note and the European Commission's SMP Guidelines;
- (vi) Having had regard to the market analysis and reasons set out in ComReg Document 25/08 [*this Consultation Document*];
- (vii) Having, in accordance with Regulation 101(3) of the ECC Regulations, published the text of the proposed measure in ComReg document 25/08 [*this Consultation Document*] and given reasons for it, including information as to which of ComReg's statutory powers gives rise to the measure;
- (viii) Having, in accordance with Regulation 101(5) of the ECC Regulations, considered the submissions received in response to ComReg Document 25/08, [*this Consultation Document*];
- (ix) Having consulted with the Competition and Consumer Protection Commission and considered its comments in discharge of the requirement to collaborate pursuant to Regulation 49 of the ECC Regulations;
- (x) Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 17 of the ECC Regulations and having taken the utmost account, pursuant to Regulation 17(7) of the ECC Regulations, of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State;

- (xi) Pursuant to Regulations 45, 46 and 49 of the ECC Regulations;
 - (xii) Pursuant to Regulation 50 of the ECC Regulations;
 - (xiii) Pursuant to Regulations 51, 52, 53, 54, 55, and 56 of the ECC Regulations;
 - (xiv) Pursuant to Regulation 99 and Regulation 104 of the ECC Regulations;
 - (xv) Having regard to the analysis and reasons set out in ComReg Decision DYY/NN [*the Decision and Response to Consultation Document*].
- 1.2 This Decision Instrument shall, as and where required, be construed consistently with and in light of the Response to Consultation and Final Decision, ComReg Decision DYY/NN.
- 1.3 To the extent that there is any conflict between a decision instrument dated prior to the Effective Date and this Decision Instrument, this Decision Instrument shall prevail.

PART I - GENERAL PROVISIONS

2 DEFINITIONS AND INTERPRETATION

2.1 In this Decision Instrument:

“2rn” means RTÉ Transmission Network Designated Activity Company;

“Access” shall have the same meaning as under Regulation 2 of the ECC Regulations;

“Associated facilities” shall have the same meaning as under Regulation 2 of the ECC Regulations, and for the avoidance of doubt shall include handover with a Multiplex Contractor, where “handover” means adequate connectivity to a Multiplex;

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No. 1211/2009;

“Broadcast Distribution Service(s)” means the delivery of a Broadcast Service from where it is compiled to a network of broadcast transmission sites;

“Broadcast Operator” means, for the purposes of this Decision Instrument, a Multiplex Contractor, a national Sound Broadcasting Contractor and RTÉ;

“Broadcasting Act” means the Broadcasting Act 2009 (No. 18 of 2009), as amended;

“Broadcasting Service” shall have the same meaning as under section 2 of the Broadcasting Act;

“Broadcast Transmission Service(s)” means the delivery of a Broadcasting Service to the general public via a terrestrial network;

“Combiner” means radio frequency equipment that is used to combine radio frequencies from a number of different broadcast transmission sources into one output;

“CnaM” means Coimisiún na Meán, as established in accordance with Part 2 of the Broadcasting Act.

“Communications Regulation Act” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended;

“ComReg” means the Commission for Communications Regulation, as established under section 6 of the Communications Regulation Act;

“ComReg Decision D10/20” means ComReg Document 20/96, “Review of Weighted Average Cost of Capital: Mobile Telecommunications, Fixed Line Telecommunications, Broadcasting Transmission”, Response to Consultation and Final Decision, ComReg Decision D10/20, dated 14 October 2020;

“ComReg Decision D02/21” means ComReg’s Response to Consultation and Decision, Market Review – Broadcasting Transmission Services in Ireland, of 26 February 2021, ComReg Document 21/14;

“ComReg Decision DYY/NN” means [*the Response to Consultation and Final Decision Document*];

“ComReg Document 25/08” means ComReg Document No. 25/08 entitled “Market Review: Broadcasting Transmission Services in Ireland, dated 14/02/2025 [*this Consultation Document*];

“Co-location” means a form of Associated Facilities sharing which facilitates, for example, space for transmitter equipment required to provide a Broadcasting Service;

“Competition and Consumer Protection Commission” means the body established under section 9 of the Competition and Consumer Protection Act 2014;

“ECC Regulations” means the European Union (Electronic Communications Code) Regulations 2022, Statutory Instrument No. 444 of 2022;

“Effective Date” means the date set out in Section 19.1 of this Decision Instrument;

“External” means the supply of Services to parties other than entities within the RTÉ group;

“Feeder(s)” means equipment used to connect the output of an apparatus for wireless telegraphy or combiner to an antenna;

“Inter” means the supply of national sound broadcasting Services between 2rn and RTÉ;

“Intra” means the supply of Broadcasting Multiplex Services between 2rn and RTÉ;

“Market A” means the market defined in section 4 of this Decision Instrument;

“Ministerial Policy Directions” for the purposes of this Decision Instrument means the policy directions made by Dermot Ahern TD, then Minister for Communications, Marine and Natural Resources dated 21 February 2003 and 26 March 2004;

“Multiplex” has the same meaning as set out in section 129 of the Broadcasting Act.

“Multiplex Contractor” has the same meaning as under section 2 of the Broadcasting Act and for the avoidance of doubt includes a Sound Broadcasting Multiplex Contractor;

“Regulated Accounts” means the financial statements provided for in section 11.

“Relevant Market” means the market defined in section 4.1 of this Decision Instrument;

“RTÉ” means Raidió Teilifís Éireann, the body corporate established under the Broadcasting Authority Act 1960 and continued in being by section 113 of the Broadcasting Act;

“RTÉ group” means RTÉ and all legal entities under its control including in particular 2rn;

“Service” for the purposes of this Decision Instrument means any and all products, services and associated facilities provided by 2rn using its broadcasting transmission and distribution infrastructure;

“SMP” means Significant Market Power;

“(the) SMP Guidelines” means the European Commission guidelines of 7 May 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01) (OJ C 159, 7.5.2018, p.1);

“Sound Broadcasting Contractor” means persons have entered into a sound broadcasting contract with CnaM under section 63 of the Broadcasting Act, where the area specified in the sound broadcasting contract is national or quasi-national;

“Sound Broadcasting Multiplex Contractor” means a person having entered into a contract with CnaM in accordance with section 131 of the 2009 Broadcasting Act for the purposes of establishing, maintaining and operating a multiplex in which programme material is predominately sound;

“Statutory Accounts” means the accounts of 2rn, and its successors, which 2rn is required to prepare pursuant to the Companies Act 2014 (No. 38 of 2014);

“(the) 2020 Recommendation” means the European Commission Recommendation of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (C (2020) 8750).

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument is concerned with the provision of broadcasting transmission and distribution services in Ireland by 2rn.
- 3.2 This Decision Instrument is binding upon 2rn and its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns and including, for the avoidance of doubt, RTE, and all shall comply with it in all respects.

PART II – RELEVANT MARKET AND SMP DESIGNATION

4 MARKET DEFINITION

- 4.1 Upon its analysis of the provision of wholesale access to national terrestrial Broadcast Transmission Services and Broadcast Distribution Services in Ireland, ComReg hereby defines the relevant market as the wholesale market for the provision of access to national terrestrial broadcasting transmission and distribution services in Ireland (**“Market A”**) consisting in the provision of terrestrial broadcast transmission and broadcast distribution services via towers and masts on a managed and unmanaged basis and relevant associated broadcast transmission and broadcast distribution equipment and associated facilities to Broadcast Operators enabling the delivery of Broadcasting Services to the general public.

5 COMPETITION ASSESSMENT AND SMP DESIGNATION

- 5.1 ComReg hereby finds that the three criteria test set out in Regulation 49(3) of the ECC Regulations is met in respect of Market A and accordingly that Market A, as defined in section 4.1, is a market that is susceptible to ex ante regulation.
- 5.2 ComReg hereby determines that on a forward-looking basis, Market A is not effectively competitive and designates 2rn as having SMP in that market.

PART III – SMP OBLIGATIONS

6 REQUIREMENT FOR SMP OBLIGATIONS

- 6.1 In light of the competition issues arising in connection with 2rn's SMP in Market A, ComReg finds that it is necessary to impose on 2rn in respect of the Market, obligations of access, non-discrimination, transparency, accounting separation, and price control and cost accounting, as set out in, and detailed further in sections 7 to 13 below.

7 ACCESS

Reasonable requests for Access

- 7.1 2rn shall meet all reasonable requests from Broadcast Operators for access to its national broadcasting transmission and broadcast distribution infrastructure including Associated facilities.

Conditions for Access

- 7.2 2rn shall at all times grant access in a fair, reasonable, timely, transparent and non-discriminatory manner, as may be further specified by ComReg from time to time.

Specified forms of Access

- 7.3 Without prejudice to the generality of section 7.1, 2rn shall provide and grant Broadcast Operators access to a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) and Associated Facilities, to include without limitation:
- (i) The provision of co-location for the transmitter equipment;
 - (ii) The provision of power and the backup power supply for the transmitter and associated equipment;
 - (iii) The provision of telemetry services;

- (iv) The provision of access to the antenna Combiner and Feeder to enable the connection of the transmitter equipment to the Combiner;
 - (v) The provision of access to the microwave distribution system; and
 - (vi) The provision of support services.
- 7.4 Without prejudice to the generality of section 7.1, 2rn shall meet all reasonable requests from Broadcast Operators for access on an unbundled/unmanaged basis whereby access to any element of a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) that may be sought by Broadcast Operators on a disaggregated basis.
- 7.5 Without prejudice to the generality of sections 7.1 to 7.4:
- (i) 2rn shall negotiate in good faith with Broadcast Operators requesting access;
 - (ii) 2rn may not withdraw, without the prior approval of ComReg, access to services and facilities already granted and any such approval shall be sought giving full reasons and in good time so as to allow adequate consideration by ComReg and adequate notice to Broadcast Operators where approval is granted;
 - (iii) 2rn shall grant open access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services.
- 7.6 For the purposes of section 7.1, a request by a Broadcast Operator for the provision of access, or a request by a Broadcast Operator for the provision of information may only be rejected, refused or otherwise denied by 2rn for objective reasons and 2rn shall provide the reasons for refusing/declining or otherwise rejecting the access request to the Broadcast Operator who made it, in a fair, reasonable and timely manner, and at the same time, shall provide those reasons to ComReg.

Service Level Agreements

- 7.7 Without prejudice to the generality of, and for the purpose of further specifying the requirements of the obligation at section 7.2, 2rn shall ensure that a legally binding, fit-for-purpose, Service Level Agreement (“**SLA**”) encouraging an efficient level of performance on the part of 2rn, is attached to each service and Associated Facility made available in accordance with this Decision Instrument from the time that the service and Associated Facility is available and subsequently kept up to date and fit for purpose.
- 7.8 In meeting its obligation under section 7.7, 2rn shall:

- (a) Ensure that SLAs are sufficiently detailed and include, without limitation, an obligation on 2rn to compensate failure to meet agreed service levels by way of adequate and timely payments, and provide for an effective dispute resolution procedure;
- (b) Ensure that the SLA includes the following parameters and specifies service levels for each of them:
 - I. Fault incidents;
 - II. Fault management;
 - III. Fault response;
 - IV. Business Continuity.

7.9 2rn shall ensure that negotiations for the conclusion or amendment of an SLA as the case may be, are conducted in a fair, reasonable and timely manner.

8 OBLIGATION OF NON-DISCRIMINATION

8.1 2rn shall, as regards the provision of access required in section 7 of this Decision Instrument, ensure that it does not discriminate between Broadcast Operators, and between Broadcast Operators and itself, the RTÉ group and affiliates and partners, and to that effect shall more particularly:

- (i) Apply equivalent conditions in equivalent circumstances to Broadcast Operators requesting, or being provided with access (or requesting or being provided with information in relation to such access);
- (ii) Provide access and information in relation to such access to all Broadcast Operators under the same conditions (including at the same time) and of the same quality as the access and information that 2rn provides to itself or to any entity within the RTÉ group, as further specified in section 8.2.

8.2 For the purposes of section 8.1(ii), 2rn shall provide access and information to all Broadcast Operators, including itself and any entity within the RTÉ group, on the same timescales, terms and conditions, including those related to prices and service levels.

9 OBLIGATION OF TRANSPARENCY

9.1 2rn shall ensure transparency in its provision of access under this Decision Instrument.

Reference Offer and other information to be published

9.2 Without prejudice to the generality of section 9.1, 2rn shall continue to publish, and keep available on its publicly available website, a Reference Offer setting out its services allowing access to its national broadcasting transmission and broadcast distribution infrastructure. The Reference Offer shall be sufficiently detailed to ensure that Broadcast Operators availing of services and facilities are not required to pay for services or facilities which are not necessary for the service or facility requested and shall include at least the following:

- (a) A description of the offer of contract for access broken down into components according to market needs including without limitation, relevant charges, terms of payment and billing procedures;
- (b) A description of the technical specifications and network characteristics of the access being offered including but not limited to;
 - I. The locations of the points of network access;
 - II. Details of traffic and network management;
 - III. Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
 - IV. Details of quality metrics;
 - V. Details of measures to ensure compliance with requirements for network integrity;
 - VI. Rules of allocation between the parties when supply is limited; and
 - VII. The conditions for access to ancillary and supplementary services.
- (c) A description of any associated contractual or other terms and conditions for supply of access and use, including applicable prices for each of the services and associated facilities provided further to section 7;
- (d) The list of applicable tariffs;
- (e) A detailed description of the tariff model and how it operates to derive the applicable tariffs;
- (f) The tariff model used to derive the applicable tariffs, redacted as is reasonably necessary to protect confidential information;

(g) SLAs.

- 9.3 2rn shall ensure that invoices for services offered in Market A are sufficiently disaggregated, detailed and clearly presented such that a Broadcast Operator availing of access can reconcile invoices to the list of tariffs published as part of the Reference Offer.

Amendments, Notifications, and publication timelines

- 9.4 Subject to section 9.6, 2rn shall keep the Reference Offer up to date on its publicly available website.
- 9.5 2rn shall ensure that the following, in searchable format, is available on its publicly available website;
- (i) A current, unmarked, version of the Reference Offer;
 - (ii) A marked version of the Reference Offer tracking changes as against the previous version such that all changes are readily identifiable;
 - (iii) A Reference Offer Change Matrix listing all of the amendments made to the Reference Offer over time, including dates at which amendments were made;
 - (iv) A copy of historic versions of its Reference Offer and Reference Offer Change Matrix.
- 9.6 Save as otherwise agreed in writing with or directed by ComReg, 2rn shall not introduce new services or make amendments to existing services without first amending accordingly the documents that it is required to publish under this Decision Instrument including without limitation, the Reference Offer and publishing at least two (2) months in advance of coming into effect, any proposed amendments or changes, having notified ComReg in writing with the information to be published at least one (1) month in advance of any such publication taking place, or, in respect of amendments to tariffs, having complied with the requirements set out in section 10.
- 9.7 For the avoidance of doubt, 2rn shall not make any amendments to the Reference Offer available on the day prior to the Effective Date without first having complied with the requirements set out in section 9.6.

- 9.8 2rn shall make available on a publicly available website additional information such as accounting information, technical specifications and network characteristics in respect of the services and facilities referred to in section 7, as may be reasonably required by or for Broadcast Operators, or directed by ComReg, from time to time.

10 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING

- 10.1 2rn shall maintain appropriate cost accounting systems in respect of the provision of the services referred to in section 7 in accordance with any applicable requirements as set by ComReg from time to time.
- 10.2 2rn shall be subject to an obligation of cost-orientation and shall ensure that its charges in respect of the provision of access under section 7 are no more than the Fully Distributed Costs using the Historical Cost Accounting methodology, allowing for a reasonable rate of return not exceeding the applicable Weighted Average Cost of Capital determined by ComReg in accordance with Decision D10/20 as may be amended or otherwise replaced from time to time.
- 10.3 For the purpose of section 10.2, 2rn shall review the applicable tariff for the services referred to in section 7 on an annual basis in order to ensure its cost-orientation and no later than 1 April each year notify ComReg of the proposed tariff applicable three (3) months thence from 1 July, with full justification for the tariff by reference to costs, including where no changes to the existing tariff are proposed. Where a new tariff is to apply from 1 July, 2rn shall publish same on its publicly available website two months in advance on 1 May or any earlier date where agreed to by ComReg.
- 10.4 With the view to facilitating justification of the cost-orientation of its tariffs, 2rn shall each year, no later than 31 January, furnish to ComReg the following:
- (a) a copy of its budget for that calendar year together with a description and an explanation of any variances as against the previous year's budget,
 - (b) the calculation for any adjustment that may be required in the tariff to apply from 1 July to address discrepancies between the expected costs included in the tariff applicable the previous year and the actual outturn as set out in the latest available Regulated Accounts.
- 10.5 2rn may only amend applicable tariffs other than in accordance with the timelines set out in section 10.3 in exceptional circumstances, having obtained ComReg's prior consent and in accordance with any directions that ComReg may give as regards notification and advance publication requirements.

PART IV – SMP OBLIGATIONS: ACCOUNTING SEPARATION

11 SEPARATED ACCOUNTS

- 11.1 On an annual basis, 2rn shall prepare Separated Accounts, consisting of Regulated Accounts, Primary Accounting Documentation and as the case may be, Additional Financial Data as further described in this section 11, presenting the revenues and costs for the products, services and associated facilities supplied in Market A and distinguishing as the case may be between revenues earned from the sale of products, services and associated facilities in Market A within the RTE group and the sale of products, services and associated facilities to a non-RTE group entity.
- 11.2 In any relevant year, the annual Separated Accounts shall be comparable to the Separated Accounts prepared for the year immediately preceding the relevant year. In particular, where there are material changes made from one year to the next in the preparation of the Separated Accounts including without limitation change in Accounting Policy, cost attribution methodology or correction of a material error, the Regulated Accounts for the preceding financial period shall be adjusted to reflect such changes save where ComReg has agreed in advance and in writing that it would be unreasonable to make such an adjustment.
- 11.3 2rn may only make material changes to the basis for the preparation of the Separated Accounts including the principles and policies underpinning the Primary Accounting Documentation with ComReg's consent.
- 11.4 At ComReg's request, 2rn shall provide in respect of the Separated Accounts, a statement signed by the directors of 2rn acknowledging their responsibilities for the preparation of the Separated Accounts and confirming that the Separated Accounts meet the requirements of this Decision Instrument.

Regulated Accounts

- 11.5 The Regulated Accounts required further to section 11.1 shall consist of the following:
- (a) an Income Statement and a Statement of Mean Capital Employed prepared on a Historical Cost Accounts ("**HCA**") basis;
 - (b) a reconciliation to the Statutory Accounts together with (where relevant) a description of adjustments made between the Statutory Accounts and the Regulated Accounts; and
 - (c) the Auditor's report obtained in accordance with the requirements set out in section 13.

- 11.6 Regulated Accounts shall be prepared in accordance with the Regulatory Accounting Principles described in section 12 and implemented in Accounting Policies that reflect the principles of cost causality, objectivity, transparency and consistency of treatment.
- 11.7 The annual Regulated Accounts shall include a statement signed by the directors of 2rn acknowledging their responsibilities for the preparation of the Regulated Accounts and confirming that the Regulated Accounts meet the requirements of this Decision Instrument.

Additional Financial Data

- 11.8 2rn shall prepare, and submit to ComReg, such Additional Financial Data as required by ComReg from time to time, following the same Regulatory Accounting Principles as applied in the preparation of the Regulated Accounts and in the format and level of detail as ComReg may specify from time to time, which may include without limitation:
- (i) HCA Income Statements for each Service provided in Relevant Markets for the most recent financial period and on a comparable basis, the preceding financial period;
 - (ii) Schedule of charges for Services provided in Relevant Markets for the most recent financial period and on a comparable basis, the preceding financial period;
 - (iii) A copy of 2rn's Fixed Asset Register reconciled to the property, plant and equipment note and the intangible assets note (or their equivalents) in the Statutory Accounts.

Primary Accounting documentation

- 11.9 The Primary Accounting Documentation shall set out the regulatory principles used and the methodologies applied, for the purpose of preparing the Regulated Accounts and the Additional Financial Data.
- 11.10 The Primary Accounting Documentation shall consist of:
- (i) An explanation of the basis of preparation of the Separated Accounts, including an explanation of the key Accounting Policies applied in the preparation of the Separated Accounts including without limitation details of income recognition policy, depreciation policy, capitalisation policy, cost allocation, prior period adjustments and changes in Accounting Policies;
 - (ii) A description of the Relevant Market business, and main activities and functions performed, and the Functional Cost Categories;

- (iii) An overview of the regulatory accounting systems, including underlying principles used and conceptual flow of costs and revenues from source financial systems;
- (iv) An overview of the methodology used to identify and distinguish between transactions within the RTÉ group and transactions with non-RTÉ group entities;
- (v) An overview of the key cost allocation methodologies employed;
- (vi) Additional documentation or information as may be required by ComReg from time to time.

12 REGULATORY ACCOUNTING PRINCIPLES

- 12.1 The Separated Accounts shall be prepared using the Regulatory Accounting Principles set out in this section 12 for the allocation and apportionment of costs and the transfer of charges within the RTÉ group.
- 12.2 Costs shall be allocated to each Service on a fully distributed cost basis, in the following manner:
 - (i) Costs that can be directly assigned to a particular Service shall be so assigned.
 - (ii) Common costs shall be allocated on the basis of a direct analysis of the origin of the costs themselves. Common costs which cannot be allocated on that basis shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible or where this is not possible, on the basis of an Equi-Proportionate Mark-Up, computed by using the ratio of all relevant expenses directly or indirectly assigned or allocated, to each Service.
- 12.3 Costs shall be apportioned based on factors/drivers reflecting their impact on each item on the Functional Cost Categories and the hierarchy of costs applied shall enable the cost of the following Functional Cost Categories, as may be amended by ComReg from time to time, to be calculated:
 - (i) Employee and personnel related costs;
 - (ii) Network electricity;
 - (iii) Maintenance costs;
 - (iv) Other operating costs;
 - (v) Depreciation and amortisation;

- (vi) Central shared services costs;
- (vii) Rent and rates.

Transfer charges for RTÉ group transactions

- 12.4 Transfer charges (revenues and costs) shall be attributed to Cost Components, for regulated and unregulated Services, in accordance with the activities, which cause the revenues to be earned, or costs to be incurred, using a methodology that is transparent, objective and designed not to benefit any specific Service.
- 12.5 The charge for Inter/Intra usage shall be equivalent to the charge that is levied if the Service(s) were an External transaction rather than an Inter/Intra transaction. Where no equivalent charge exists, the Nearest Equivalent Charge shall be charged and fully justified to ComReg by 2rn, pursuant to section 10.3 of this Decision Instrument. Where no Nearest Equivalent Charge exists for the Inter/Intra transaction, a cost-based charge shall be transferred and fully justified to ComReg by 2rn, pursuant to section 10.3 of this Decision Instrument.
- 12.6 There shall be a clear rationale for the transfer charges used and each charge shall be justifiable, and 2rn shall make supporting calculations available to ComReg on request.

Survey techniques

- 12.7 Where surveys are used to determine the allocation of costs, 2rn shall ensure that the techniques and data used produce a fair and objective allocation of revenue (including transfer charges), costs (including transfer charges), assets and liabilities.

13 AUDIT AND OTHER REVIEWS

- 13.1 2rn shall prior to their publication in accordance with section 14.1, have the Regulated Accounts audited by an auditor or firm of auditors authorised to conduct the audit of financial statements of companies registered in Ireland (“**Auditor**”) retained by 2rn with ComReg’s consent, and obtained from the Auditor a report and an audit opinion at the standard of “*Fairly presents in accordance with...*” basis. 2rn shall ensure that ComReg has copy of any communications from the Auditor provided to 2rn in respect of matters in connection with the audit of the Regulated Accounts and the audit opinion.
- 13.2 The audit shall be governed by a tri-partite agreement between 2rn, ComReg and the Auditor which provides for the performance of the audit in accordance with International Standards on Auditing (UK and Ireland) and the principles and guidance set out by bodies representative of the Irish accountancy professions

from time to time. 2rn shall ensure that suitable arrangements are in place to facilitate meetings between ComReg and the Auditor in advance of, and following, the audit.

13.3 Where so required by ComReg, 2rn shall have the Additional Financial Data or parts thereof:-

(a) Audited by the Auditor and the subject of an audit opinion, the standard of which has been agreed in advance with ComReg; or

(b) Assessed by a suitably qualified independent body in accordance with methodologies and following procedures agreed upon with ComReg;

in which case 2rn shall submit to ComReg any such opinion or report at the time specified by ComReg.

13.4 2rn shall ensure that its Accounting Documentation and the processes and procedures it uses for the purpose of arriving at the Regulated Accounts and a cost-oriented tariff are subject to review by a qualified independent body annually.

14 SEPARATED ACCOUNTS' NOTIFICATION AND PUBLICATION TIMELINES

14.1 2rn shall publish on its publicly available website, and submit to ComReg, the Regulated Accounts and Primary Accounting Documentation no later than four months after the end of the financial period.

PART V – OPERATION AND EFFECTIVE DATE

15 STATUTORY POWERS NOT AFFECTED

15.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument).

16 MAINTENANCE OF OBLIGATIONS

16.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg, applying to 2rn, and in force immediately prior to the Effective Date of this Decision Instrument, continue in force and 2rn shall comply with the same.

16.2 For the avoidance of doubt, to the extent that there is any conflict between a Decision Instrument dated prior to the Effective Date and 2rn's obligations set out herein, it is the latter which shall prevail.

- 16.3 If any section(s), clause(s) or provision(s) or portion(s) thereof contained in this Decision Instrument is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) section(s), clause(s) or provision(s) or portion(s) thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion(s) thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

17 WITHDRAWAL

- 17.1 The Decision Instrument contained in Annex 4 of ComReg Document No. 21/14, ComReg Decision D02/21 is hereby withdrawn at the Effective Date.

18 PUBLICATION AND NOTIFICATION

- 18.1 This Decision Instrument shall be published on ComReg's website, www.comreg.ie and notified to 2rn.

19 EFFECTIVE DATE

- 19.1 The effective date of this Decision Instrument shall be the date of its notification to 2rn and it shall remain in force until further notice by ComReg.

[...]

Chairperson

The Commission for Communications Regulation

THE XX DAY OF MM YYYY

Annex 2 Decision Instrument: Market B

1 STATUTORY POWERS GIVING RISE TO THIS DECISION

1.1 This Decision Instrument ("**Decision Instrument**") is made by the Commission for Communications Regulation ("**ComReg**"):

- (i) Pursuant to and having regard to sections 10 and 12 of the Communications Regulations Act 2002;
- (ii) Pursuant to and having had regard to Regulations 4 and 42(1) of the EECC Regulations;
- (iii) Having had regard to, where appropriate, the Broadcasting Act 2009;
- (iv) Having, pursuant to section 13 of the Communications Regulation Act 2002, where applicable, complied with Ministerial Policy Directions;
- (v) Having taken the utmost account of the European Commission's 2020 Recommendation, and the Explanatory Note, and the European Commission's SMP Guidelines;
- (vi) Having had regard to the market analysis and reasons set out in (ComReg Document 25/08) [*this Consultation Document*];
- (vii) Having, in accordance with Regulation 101(3) of the ECC Regulations, published the text of the proposed measure in ComReg Document 25/08 [*this Consultation Document*] and given reasons for it, including information as to which of ComReg's statutory powers gives rise to the measure;
- (viii) Having, in accordance with Regulation 101(5) of the EECC Regulations, considered the submissions received in response to ComReg Document 25/08 [*this Consultation Document*];
- (ix) Having consulted with the Competition and Consumer Protection Commission and considered its comments in discharge of the requirement to collaborate pursuant to Regulation 49 of the EECC Regulations;
- (x) Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 17 of the EECC Regulations and having taken the utmost account, pursuant to Regulation 17(7) of the EECC Regulations, of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State;

- (xi) Pursuant to Regulations 45, 46 and 49 of the EECC Regulations;
 - (xii) Pursuant to Regulations 50 of the EECC Regulations;
 - (xiii) Pursuant to Regulation 51, 52, 53, 54, 55 and 56 of the EECC Regulations;
 - (xiv) Having regard to the analysis and reasoning set out in ComReg Decision DYY/NN [*the Decision and Response to Consultation Document*]
- 1.2 This Decision Instrument shall, as and where required, be construed consistently with and in light of the Response to Consultation and Final Decision, ComReg Decision DYY/NN.
- 1.3 To the extent that there is any conflict between a decision instrument dated prior to the Effective Date and this Decision Instrument, this Decision Instrument shall prevail.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)

2 DEFINITIONS AND INTERPRETATION

2.1 In this Decision Instrument:

“2rn” means RTÉ Transmission Network Designated Activity Company;

“Access” shall have the same meaning as under Regulation 2 of the EECC Regulations;

“Associated Facilities” shall have the same meaning as under Regulation 2 of the EECC Regulations;

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No. 1211/2009;

“Broadcaster” shall have the same meaning as under section 2 of the Broadcasting Act;

“Broadcasting Act” means the Broadcasting Act 2009 (No. 18 of 2009), as amended;

“Broadcasting Service” has the same meaning as under section 2 of the Broadcasting Act and means a service which comprises a compilation of programme material of any description and which is transmitted, relayed or distributed by means of an electronic communications network, directly or indirectly for simultaneous or near-simultaneous reception by the general public,

whether that material is actually received or not, and where the programmes are provided in a pre-scheduled and linear order;

“CnaM” means “Coimisiún na Meán” as established in accordance with Part 2 of the Broadcasting Act.

“Communications Regulation Act” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended;

“ComReg” means the Commission for Communications Regulation, as established under section 6 of the Communications Regulation Act;

“ComReg Decision D10/20” means ComReg Document 20/96, “Review of Weighted Average Cost of Capital: Mobile Telecommunications, Fixed Line Telecommunications, Broadcasting Transmission”, Response to Consultation and Final Decision, ComReg Decision D10/20, dated 14 October 2020;

“ComReg Decision D02/21” means ComReg’s Response to Consultation and Decision, Market Review - Broadcasting Transmission Services in Ireland, of 26 February 2021, ComReg Document 21/14;

“ComReg Decision DYY/NN” means ComReg Document No. YY/NN, [*the Decision and Response to Consultation Document*];

“ComReg Document 25/08” means ComReg Document No. 25/08, entitled “Market Review: Broadcasting Transmission Services in Ireland, dated 14/02/2025 [*this Consultation Document*];

“Competition and Consumer Protection Commission” means the body established under section 9 of the Competition and Consumer Protection Act 2014;

“DTT” means Digital Terrestrial Television;

“EECC Regulations” means the European Union (Electronic Communications Code) Regulation 2022, Statutory Instrument No. 444 of 2022;

“Effective Date” means the date set out in section 19.1 of this Decision Instrument;

“External” means the supply of Services to parties other than entities within the RTÉ group;

“Inter” means the supply of national sound broadcasting transmission and distribution services between 2rn and RTÉ;

“Intra” means the supply of Broadcasting Multiplex Services between 2rn and RTÉ;

“Market A” means the market for wholesale access to national terrestrial broadcast transmission and distribution services as defined in section 4 of the

Decision Instrument at Appendix 1 of ComReg Decision YY/NN [*the Decision and Response to Consultation Document*] ;

“Market B” means the market defined in section 4 of this Decision Instrument;

“Ministerial Policy Directions” for the purposes of this Decision Instrument means the policy directions made by Dermot Ahern TD, the Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004;

“Multiplex” has the same meaning as set out in section 129 of the Broadcasting Act and the term **“Multiplexing Services”** means the provision of any and all services associated with a Multiplex;

“Programme material” shall have the same meaning as under section 2 of the Broadcasting Act;

“Relevant Market” means the market defined in section 4.1 of this Decision Instrument;

“RTÉ” means Raidió Teilifís Éireann, the body corporate established under the Broadcasting Authority Act 1960 and continued in being by section 113 of the Broadcasting Act;

“RTÉ group” means RTÉ and all legal entities under its control including in particular 2rn;

“Service” for the purposes of this Decision Instrument means any and all products, services and associated facilities provided by RTÉ in connection with any Multiplex established, maintained and operated by RTÉ;

“Service types” for the purposes of this Decision Instrument means the categories of Multiplexing Services available for Broadcasting Services distinguished according to content (audio-radio and video) and definition (Standard Definition and High Definition) and any other criteria relevant to distinguishing according to content and quality;

“SLA” stands for Service Level Agreement;

“SMP” means Significant Market Power;

“(the) SMP Guidelines” means the European Commission guidelines of 7 May 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01) (OJ C 159, 7.5.2018, p.1);

“(the) **2020 Recommendation**” means the European Commission Recommendation of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (C (2020) 8750).

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument is concerned with the provision of DTT Multiplexing Services in Ireland by RTÉ to Broadcasters.
- 3.2 This Decision Instrument is binding upon RTÉ and its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns, and including for the avoidance of doubt, 2rn, and all shall comply with it in all respects.

PART II – RELEVANT MARKET AND SMP DESIGNATION

4 MARKET DEFINITION

- 4.1 Upon its analysis of the provision of wholesale access to DTT Multiplexing Services in Ireland, including wholesale access to any Multiplex operated and maintained by RTÉ for the purposes of DTT, ComReg hereby defines the relevant market as the market for the provision of access to DTT Multiplexing Services in Ireland incorporating distribution and transmission services to Broadcasters (“**Market B**”).

5 COMPETITION ASSESSMENT AND SMP DESIGNATION

- 5.1 ComReg hereby finds that the three criteria test set out in Regulation 49(3) of the ECC Regulations is met in respect of Market B and accordingly that Market B as defined in section 4.1 is a market that is susceptible to ex ante regulation.
- 5.2 ComReg hereby determines that on a forward-looking basis, Market B is not effectively competitive and hereby designates RTÉ as having SMP in that market.

PART III – SMP OBLIGATIONS

6 REQUIREMENT FOR SMP OBLIGATIONS

- 6.1 In light of the competition issues arising in connection with RTÉ’s SMP in Market B, ComReg finds that it is necessary to impose on RTÉ, obligations of access,

non-discrimination, transparency, accounting separation, and price control and cost accounting, as set out in, and detailed further in sections 7 to 14 below.

7 ACCESS

Reasonable requests for Access

- 7.1 Without prejudice to the requirements under section 130(1)(e) of the Broadcasting Act, RTE shall meet all reasonable requests from Broadcasters for the provision of access to a Multiplexing service, including associated facilities and associated services.

Conditions for Access

- 7.2 RTE shall, in relation to the obligations set out under section 7 above, grant access in a fair, reasonable, timely, transparent and non-discriminatory manner, as may be further specified by ComReg from time to time.

Specified forms of Access

- 7.3 Without prejudice to the generality of section 7.1:
- (i) RTE shall negotiate in good faith with Broadcasters requesting access;
 - (ii) RTE may not withdraw, without the prior approval of ComReg, access to services and facilities already granted;
 - (iii) RTE shall grant open access to technical interfaces, protocols and other key technologies that are required to access the Multiplexing services.
- 7.4 For the purposes of section 7.1, a request by a Broadcaster for the provision of Access, or a request by a Broadcaster for the provision of information may only be rejected, refused or otherwise denied by RTE for objective reasons and RTE shall provide the reasons for refusing/denying or otherwise rejecting the access request to the Broadcaster who made it, in a fair, reasonable and timely manner, and at the same time, shall provide those reasons to ComReg.

Service Level Agreements

- 7.5 Without prejudice to the generality of, and for the purpose of further specifying the requirements of the obligation at section 7.2, RTE shall ensure that a legally binding, fit-for-purpose, Service Level Agreement (“SLA”) encouraging an efficient level of performance on the part of RTE, is attached to each service and associated facility made available in accordance with this Decision Instrument

from the time that the service and associated facility is available and subsequently kept up to date and fit for purpose.

7.6 In meeting its obligation under section 7.5, RTÉ shall:

- (a) Ensure that SLAs are sufficiently detailed and include, without limitation, an obligation on RTE to compensate failure to meet agreed service levels by way of adequate and timely payments, and provide for an effective dispute resolution procedure;
- (b) Ensure that the SLA includes the following parameters and specifies service levels for each of them:
 - I. Fault incidents;
 - II. Fault management;
 - III. Fault response;
 - IV. Business Continuity.

7.7 RTÉ shall ensure that negotiations for the conclusion or amendment of an SLA as the case may be, are conducted in a fair, reasonable and timely manner.

8 OBLIGATION OF NON-DISCRIMINATION

8.1 RTÉ shall, as regards the provision of Access required in section 7 of this Decision Instrument, ensure that it does not discriminate between Broadcasters, and between Broadcasters and itself, the RTÉ group and affiliates or partners, and to that effect shall more particularly:

- (i) Apply equivalent conditions in equivalent circumstances to Broadcasters requesting, or being provided with access (or requesting or being provided with information in relation to such access);
- (ii) Provide access and information in relation to such Access to all Broadcasters under the same conditions and of the same quality as the access and information that RTÉ provides to itself or to any entity within the RTÉ group, as further specified in section 8.2.

8.2 For the purposes of section 8.1(ii), RTÉ shall provide access and information to all Broadcasters, including itself, and any entity within the RTÉ group, on the same timescales, terms and conditions, including those related to prices and service levels.

9 OBLIGATION OF TRANSPARENCY

9.1 RTÉ shall ensure transparency in its provision of Access under this Decision Instrument.

Reference Offer and other information to be published

9.2 Without prejudice to the generality of section 9.1, RTÉ shall continue to publish and keep available on its publicly available website, a Reference Offer for access in the DTT Multiplexing Services Market. The Reference Offer shall be sufficiently detailed to ensure that Broadcasters availing of services and facilities are not required to pay for services or facilities which are not necessary for the service or facility requested and shall include at least the following:

- (i) A description of the offer of contract for access broken down into components according to market needs including without limitation, relevant charges, terms of payment and billing procedures;
- (ii) A description of the technical specifications and network characteristics of the access being offered;
- (iii) A description of any associated contractual or other terms and conditions for supply of access and use, including applicable prices for each of the services and associated facilities provided further to section 7;
- (iv) A list of applicable tariffs;
- (v) A detailed description of the tariff model and how it operates to derive the applicable tariffs;
- (vi) The tariff model subject to any redaction as necessary to protect the confidentiality of information; and
- (vii) SLAs.

9.3 RTÉ shall ensure that invoices for services offered in Market B are sufficiently disaggregated, detailed and clearly presented such that a Broadcaster availing of access can reconcile invoices to the list of tariffs published as part of the Reference Offer.

Amendments, Notifications, and publication timelines

9.4 Subject to section 9.6, RTÉ shall keep the Reference Offer up to date on its publicly available website.

- 9.5 RTÉ shall ensure that the following, in searchable format, is available on its publicly available website;
- (i) A current, unmarked, version of the Reference Offer;
 - (ii) A marked version of the Reference Offer tracking changes as against the previous version such that all changes are readily identifiable;
 - (iii) A Reference Offer Change Matrix listing all of the amendments made to the Reference Offer over time, including dates at which amendments were made;
 - (iv) A copy of historic versions of its Reference Offer and Reference Offer Change Matrix.
- 9.6 Save as otherwise agreed in writing with or directed by ComReg, RTÉ shall not introduce new services or make amendments to existing services without first amending accordingly, the documents that it is required to publish under this Decision Instrument including without limitation, the Reference Offer and publishing at least two (2) months in advance of coming into effect, any proposed amendments or changes, having notified ComReg in writing with the information to be published at least two (2) months in advance of any such publication taking place or, in respect of amendments to tariffs, having complied with the requirements set out in section 10.
- 9.7 For the avoidance of doubt, RTÉ shall not make any amendments to the Reference Offer available on the day prior to the Effective Date without first having complied with the requirements set out in section 9.6.
- 9.8 RTÉ shall make available on a publicly available website, information such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 7, as may be reasonably required by or for Broadcasters, or directed by ComReg, and in the manner specified by ComReg from time to time.

10 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING

- 10.1 RTÉ shall maintain appropriate cost accounting systems in respect of the provision of the services referred to in section 7 in accordance with any applicable requirements as set by ComReg from time to time.

- 10.2 RTÉ shall be subject to an obligation of cost-orientation and shall ensure that its charges in respect of the provision of access under section 7, are no more than the Fully Distributed Costs using the Historical Cost Accounting methodology, allowing for a reasonable rate of return not exceeding the applicable Weighted Average Cost of Capital determined by ComReg in accordance with Decision D10/20 as may be amended or otherwise replaced from time to time.
- 10.3 By way of further specification of the requirement of cost-orientation of tariff under section 10.2, RTÉ shall apply a single, standard, tariff per service type based on the average bitrate consumption for the relevant service type whereby costs are allocated on the basis of the number of Broadcasting Services broadcast using RTÉ's Multiplexing Services at 1 April 2024.
- 10.4 RTÉ shall review the applicable tariffs for the services referred to in section 7 on an annual basis in order to ensure their cost-orientation and no later than 1 September each year notify ComReg of the proposed tariffs applicable four months thence from 1 January, with full justification for the tariffs by reference to costs, including where no changes to the existing tariffs are proposed. Where new tariffs are to apply from 1 January, RTÉ shall publish same on its publicly available website two months in advance on 1 November or any earlier date as agreed to by ComReg.
- 10.5 RTÉ may only amend applicable tariffs other than in accordance with the timelines set out in section 10.4 in exceptional circumstances, having obtained ComReg's prior consent and in accordance with any directions that ComReg may give as regards notification and advance publication requirements.

PART IV – SMP OBLIGATIONS: ACCOUNTING SEPARATION

11 SEPARATED ACCOUNTS

- 11.1 On an annual basis, RTÉ shall prepare Separated Accounts, consisting of Regulated Accounts, Primary Accounting Documentation and as the case may be, Additional Financial Data as further described in this section 11, presenting the revenues and costs for the services and associated facilities supplied in Market B and distinguishing as the case may be between revenues earned from the sale of services and associated facilities in Market B within the RTÉ group and the sale of products, services and associated facilities to a non-RTÉ group entity.
- 11.2 In any relevant year, the annual Separated Accounts shall be comparable to the Separated Accounts prepared for the year immediately preceding the relevant

year. In particular, where there are material changes made from one year to the next in the preparation of the Separated Accounts including without limitation change in Accounting Policy, cost attribution methodology or correction of a material error, the Regulated Accounts for the preceding financial period shall be adjusted to reflect such changes save where ComReg has agreed in advance and in writing that it would be unreasonable to make such an adjustment.

- 11.3 RTÉ may only make material changes to the basis for the preparation of the Separated Accounts including the principles and policies underpinning the Primary Accounting Documentation with ComReg's consent.
- 11.4 At ComReg's request, RTÉ shall provide in respect of the Separated Accounts, a statement signed on behalf of the board of RTÉ acknowledging the board's responsibility for the preparation of the Separated Accounts and confirming that the Separated Accounts meet the requirements of this Decision Instrument.

Regulated Accounts

- 11.5 The Regulated Accounts required further to section 11.1 shall consist of the following:
 - (a) an Income Statement and a Statement of Mean Capital Employed prepared on a Historical Cost Accounts ("**HCA**") basis;
 - (b) a reconciliation to the Statutory Accounts together with (where relevant) a description of adjustments made between the Statutory Accounts and the Regulated Accounts; and
 - (c) the Auditor's report obtained in accordance with the requirements set out in section 13.
- 11.6 The Regulated Accounts shall be prepared in accordance with the Regulatory Accounting Principles described in section 12 and implemented in Accounting Policies that reflect the principles of cost causality, objectivity, transparency and consistency of treatment.
- 11.7 The annual Regulated Accounts shall include a statement made on behalf of the board of RTÉ acknowledging the board's responsibilities for the preparation of the Regulated Accounts and confirming that the Regulated Accounts meet the requirements of this Decision Instrument.

Additional Financial Data

- 11.8 RTÉ shall prepare such Additional Financial Data as required by ComReg from time to time, which shall follow the same Regulatory Accounting Principles as

applied in the preparation of the Regulated Accounts, and in the format and level of detail as ComReg may specify from time to time, including without limitation:

- (i) Schedule of charges by individual broadcasters. This shall also be reconciled to the income per the Income Statement in the Regulated Accounts;
- (ii) A copy of RTE's Fixed Asset Register;
- (iii) A breakdown of Market B specific costs.

Accounting documentation

11.9 The Accounting Documentation shall set out the regulatory principles used and the methodologies applied, for the purpose of preparing the Regulated Accounts and the Additional Financial Data.

11.10 The Primary Accounting Documentation shall consist of:

- (i) Information on the sources of financial data;
- (ii) Details of the cost drivers used to allocate costs;
- (iii) Details of the Services offered and the associated capacity required on the Multiplex;
- (iv) An explanation of the basis of preparation of the Separated Accounts, including an explanation of the key Accounting Policies applied in the preparation of the Separated Accounts including without limitation details of income recognition policy, depreciation policy, capitalisation policy, cost allocation, prior period adjustments and changes in Accounting Policies;
- (v) A description of the Relevant Market business, and main activities and functions performed, and the Functional Cost Categories;
- (vi) An overview of the regulatory accounting systems, including underlying principles used and conceptual flow of costs and revenues from source financial systems;
- (vii) An overview of the methodology used to identify and distinguish between transactions within the RTE group and transactions with non-RTE group entities;
- (viii) An overview of the key cost allocation methodologies employed.
- (ix) Additional documentation or information as may be required by ComReg from time to time.

12 REGULATORY ACCOUNTING PRINCIPLES

- 12.1 The Separated Accounts shall be prepared using the Regulatory Accounting Principles set out in this section 12 for the allocation and apportionment of costs and the transfer of charges within the RTÉ group.
- 12.2 Costs shall be allocated to each Service on a fully distributed cost basis, in the following manner:
- (i) Costs that can be directly assigned to a particular Service shall be so assigned;
 - (ii) Common costs shall be allocated on the basis of a direct analysis of the origin of the costs themselves;
 - (iii) When direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible, the indirect linkage shall be based on comparable costs structures; and
 - (iv) Where neither direct nor indirect measures of cost allocation are possible, the cost category shall be allocated on the basis of an Equi-Proportionate Mark-Up, computed by using the ratio of all relevant expenses directly or indirectly assigned or allocated, to each Service.

Transfer charges for Inter/intra- RTÉ group transactions

- 12.3 Transfer charges (revenues and costs) shall be attributed to Broadcasters in accordance with the activities, which cause the revenues to be earned, or costs to be incurred, using a methodology that is transparent, objective and designed not to benefit any specific Broadcaster or Service.
- 12.4 RTÉ's treatment of transfer charges from period to period shall be consistent.
- 12.5 The charge for Inter/Intra usage shall be equivalent to the charge that is levied if the Service(s) were an External transaction rather than an Inter/Intra transaction. Where no equivalent charge exists, the Nearest Equivalent Charge shall be charged and fully justified to ComReg by RTÉ, pursuant to section 10.3 of this Decision Instrument. Where no Nearest Equivalent Charge exists for the Inter/Intra transaction, a cost-based charge shall be transferred and fully justified to ComReg by RTÉ, pursuant to section 10.3 of this Decision Instrument.
- 12.6 There shall be a clear rationale for the transfer charges used and each charge shall be justifiable, and RTÉ shall make supporting calculations available to ComReg on request.

13 AUDIT AND OTHER REVIEWS

- 13.1 RTÉ shall prior to their publication in accordance with section 14.1, have the Regulated Accounts audited by an auditor or firm of auditors authorised to conduct the audit of financial statements of companies registered in Ireland (“**Auditor**”) retained by RTÉ with ComReg’s consent, and obtained from the Auditor a report and an audit opinion at the standard of “*Fairly presents in accordance with...*” basis.
- 13.2 The audit shall be governed by a tri-partite agreement between RTÉ, ComReg and the Auditor which provides for the performance of the audit in accordance with International Standards on Auditing (UK and Ireland) and the principles and guidance set out by bodies representative of the Irish accountancy professions from time to time. RTÉ shall ensure that suitable arrangements are in place to facilitate meetings between ComReg and the Auditor in advance of, and following, the audit.
- 13.3 Where so required by ComReg, RTÉ shall have the Additional Financial Data or parts thereof:-
- (i) Audited by the Auditor and the subject of an audit opinion, the standard of which has been agreed in advance with ComReg; or
 - (ii) Assessed by a suitably qualified independent body in accordance with methodologies and following procedures agreed upon with ComReg.

14 SEPARATED ACCOUNTS’ NOTIFICATION AND PUBLICATION TIMELINES

- 14.1 RTÉ shall publish on its publicly available website, and submit to ComReg, the Regulated Accounts and Primary Accounting Documentation no later than four months after the end of the financial period.

PART V – OPERATION AND EFFECTIVE DATE

15 STATUTORY POWERS NOT AFFECTED

- 15.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument).

16 MAINTENANCE OF OBLIGATIONS

- 16.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg, applying to RTÉ, and in force immediately prior to the Effective Date of this Decision Instrument, continue in force and RTÉ shall comply with the same.
- 16.2 For the avoidance of doubt, to the extent that there is any conflict between a Decision Instrument dated prior to the Effective Date and RTÉ's obligations set out herein, it is the latter which shall prevail.
- 16.3 If any section(s), clause(s) or provision(s) or portion(s) thereof contained in this Decision Instrument is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) section(s), clause(s) or provision(s) or portion(s) thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion(s) thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

17 WITHDRAWAL OF SMP OBLIGATIONS

- 17.1 The Decision Instrument contained in Annex 5 of ComReg Document No. 21/14, ComReg Decision D02/21 is hereby withdrawn at the Effective Date.

18 PUBLICATION AND NOTIFICATION

- 18.1 This Decision Instrument shall be published on ComReg's website, www.comreg.ie and notified to RTÉ.

19 EFFECTIVE DATE

- 19.1 The effective date of this Decision Instrument shall be the date of its notification to RTÉ, and it shall remain in force until further notice by ComReg.

Chairperson

The Commission for Communications Regulation

THE XX DAY OF MM YYYY

Annex 3 Price Control and Pricing Methodology Options

A 3.1 This annex sets out the different options available to ComReg in specifying price controls applicable in regulated markets and how regulated prices are calculated. The analysis and rationale on which ComReg's views on the options applicable to Market A and Market B are based, is set out in this Annex 3.

Price Control Options

A 3.2 There are a number of different options for Price Controls. These include:

- (a) Retail minus;
- (b) Reasonable costs; and,
- (c) Cost orientation.

A 3.3 **Retail minus** is an approach where the regulated wholesale price is set by reference to a retail price (or offer) from which a margin is subtracted usually calculated by reference to the downstream costs that an operator purchasing the wholesale product would need to incur to provide an equivalent or similar service.

A 3.4 Retail minus is generally used where either there is regulation of a retail market or where there is effective competition in the retail market providing sufficient constraint on the potential to price excessively at the retail level. This mechanism has tended to be used for utility type regulation of wholesale prices where the retail service is identifiable with a single, or few, price points, allowing for easy implementation.

A 3.5 **Reasonable costs** involve assessing the costs proposed by the SMP SP and determining whether or not they could be considered to be reasonable in the normal course of business. These would include both capital costs and operating costs. In assessing whether costs are reasonable, comparison with other countries and international best practice is often undertaken. Incurred costs which are clearly unnecessary, excessive, or avoidable may not be deemed reasonable.

- A 3.6 However, determining reasonable costs requires a significant analysis of financial information, detailed discussion with the SMP SP and a level of judgment. Comparisons with other countries can also prove problematic where markets, products or services do not align with those in Ireland.
- A 3.7 **Cost orientation** is an approach where the regulated price is set to reflect no more than the efficient costs of providing the relevant service including a reasonable rate of return.
- A 3.8 Cost orientation tends to be the most widely used means of determining the appropriate wholesale tariffs to be charged. Cost orientation allows the SMP SP to recover its efficiently incurred costs and a regulated rate of return on the appropriate capital base. ComReg uses cost orientation to regulate many wholesale tariffs in other regulated industries. It is also commonly used by other regulators for the same purpose.
- A 3.9 The use of an appropriate cost base requires an assessment of the costs of the SMP SP. This includes both capital costs and operating costs. Adjustments to these costs can be made to reflect efficiencies and to remove potential legacy issues.

Costing Methodology Options

- A 3.10 There are a number of options available to ComReg in terms of the costing methodologies used to determine the appropriate regulated wholesale prices under the cost orientation principle.

Table 17: Costing methodologies for setting charges

	Top-down		Bottom-up	
	Historic costs	Current costs	Historic costs	Current costs
FL- LRAIC		TD LRAIC		BU LRAIC
FDC	HCA	CCA		

- A 3.11 When choosing the appropriate costing methodology, ComReg needs to consider the relevant regulatory objectives for the market in question and also take into account the current demand and supply situation in the relevant market, technological advancements, and the data available for calculating costs.
- A 3.12 Costing methodology options that can be used calculate cost-oriented prices include the following:
- (a) Historic costs or current costs;
 - (b) Top-down ('**TD**') model, bottom-up ('**BU**') model or hybrid model; and
 - (c) Long run incremental costs ('**LRIC**') or fully distributed costs ('**FDC**').
- A 3.13 A key regulatory decision to consider in determining wholesale regulated charges is the cost base to adopt i.e. historic costs or their current cost equivalents.
- A 3.14 **Historic costs** is an approach that uses the actual costs recorded in the operator's accounting system as the input into the cost model. The operator recovers the costs actually incurred in providing the products, services or associated facilities, plus an allowed rate of return on the investment. Under this approach the cost inputs used for calculating prices are sourced from the Historical Cost Accounts ('**HCA**s') which should be directly reconcilable with the statutory financial statements of the operator.
- A 3.15 **Current costs** is an approach whereby asset values are set at the current market value and which can be implemented either based on the operator's accounting system ('**Current Cost Accounting**' or '**CCA**') or on a BU model basis. Current costs tend to be used by regulators when incentivising investment.
- A 3.16 Another key regulatory decision to consider in determining wholesale regulated charges is the most appropriate modelling approach to use. This choice is interlinked with the choice of the cost valuation base (TD or BU) and the cost accounting methodology (FDC or LRIC), and in turn depends on the regulatory objectives for the relevant market.
- A 3.17 Traditionally the choice of cost models has been between a TD and BU approach.

- A 3.18 **TD models** rely on the operator's actual network and operational information to derive the relevant costs and to calculate the per unit cost for a service. TD models can be constructed on a HCA or CCA basis. For a TD model based on HCA, the net book values ('**NBV**') or Mean Capital Employed ('**MCE**') of the relevant assets are derived from the operator's fixed asset register ('**FAR**') and depreciated over their remaining useful life of the assets. Operating costs should reflect the ongoing costs of operating and maintaining the network.
- A 3.19 While TD models might provide the SMP SP with incentives to over-invest, since incurred costs are generally allowed to be recovered adjustments can be made to correct inefficiencies or adjust for legacy issues identified. Operating costs can also be assessed to ensure that only the relevant and reasonable costs of operating and maintaining the network are included.
- A 3.20 Some of the advantages of using a TD approach include:
- (a) All incurred costs are accounted for (critics of BU models argue that certain cost categories are erroneously ignored); and
 - (b) TD models manage to avoid disincentives for the SMP SP to invest, since incurred costs are generally allowed to be recovered.
- A 3.21 **BU models** reflect the choices of a hypothetical, forward-looking efficient operator from both a technical and an operational point of view and calculate the level of network costs on the basis of the quantity of equipment and infrastructure that an operator using efficient engineering rules would deploy to support an assumed level of demand. BU models are often used to model the costs of a potential new entrant into the market.
- A 3.22 ComReg is of the view that a TD model is more compatible with the use of historic costs as the relevant cost base. A TD model using the HCA accounts as its source means that allowing for efficiency and modelling adjustments its results will be reconcilable.
- A 3.23 Another key regulatory decision to consider in determining wholesale regulated charges is the cost accounting approach to adopt. ComReg considers that LRIC cost accounting methodology and FDC methodology (also known as fully allocated costs ('**FAC**')) are relevant in this regard.

- A 3.24 Under the **FDC methodology** all of the costs efficiently incurred by the SMP SP, including sunk costs, are typically allocated to products on the basis of direct or indirect causality of costs with products. This approach includes all fixed costs, joint (or shared) network costs and common corporate costs. The FDC or FAC concept is usually applied to an existing operator and allocates all the SMP SP's historic costs so runs the risk of including legacy inefficiencies, although adjustments can be made for this.
- A 3.25 Another option is the use of various forms of **LRIC accounting**. This cost accounting methodology includes all of the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned, plus an apportionment of joint and common costs. These include:
- (a) Long Run Incremental Cost ('**LRIC**')
 - (b) Long Run Average Incremental Cost ('**LRAIC**'); and,
 - (c) Long Run Average Incremental Cost plus ('**LRAIC plus**')
- A 3.26 **LRIC** refers to the costs that can be avoided in the long run if a given service or increment is not produced. LRIC includes the direct fixed and variable costs relevant to the increment of providing the service over the long-run (or often referred to as 'Pure LRIC'). A Pure LRIC approach does not include recovery of joint (or shared) network costs or common corporate costs, from other divisions of the operator's business. Under this approach it is assumed that the service only pays for its incremental costs as other tariffs are already covering the other costs (including common costs) of the network and helps NRAs in setting prices that neither encourage efficient investment nor discourage efficient investment.
- A 3.27 **LRAIC** is the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned over the long-run. The main difference between LRAIC and LRIC, is that the increment that is considered under LRAIC tends to cover a wider range of services compared to the LRIC approach, e.g. LRAIC could consider all voice services while LRIC would focus on a sub-set of voice services such as wholesale call termination. LRAIC also includes an attribution of joint (or shared) network costs but excludes common corporate costs.

A 3.28 **LRAIC plus** is calculated in the same way as LRAIC, with an additional mark-up to allow for the recovery of common corporate costs typically using an equi-proportionate mark-up (EPMU). Hence, LRAIC+ includes all of the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned over the long-run, plus a mark-up for common corporate costs and is the calculus faced by any operator when deciding to invest.

Annex 4 Assessing Potential Substitutes

Approach to Assessing Potential Substitutes for Market Definition purposes

A 4.1 When assessing whether or not potential substitute products fall within a particular relevant product market, ComReg typically takes account of the following:

- (a) Demand-side substitution;
- (b) Supply-side substitution; and
- (c) In respect of wholesale product markets only, the indirect retail constraint generated by self-supply of vertically-integrated SPs.

A 4.2 These analytical concepts are briefly described below.

Demand-Side Substitution

A 4.3 Demand-side substitution measures the extent to which a purchaser of services would, in response to the levying by a HM of a SSNIP³⁰⁴ of the relevant focal product above the competitive level, switch to an alternative product such that it would render the price increase unprofitable. If the level of switching away from the HM to the alternative product is sufficient to render the focal product price increase unprofitable (for instance, due to the resulting loss of sales), then the alternative product will be included in the relevant product market.

A 4.4 As noted in paragraph 25 of the Notice on Market Definition, demand-side substitution constitutes the most immediate and effective disciplinary force on the suppliers of a product. If the relevant focal product is priced above the competitive level, a switch to an alternative product may render the price increase unprofitable. If the level of switching away from the HM to the alternative product is sufficient to render the focal product price increase unprofitable, then the alternative product will be included in the relevant product market.

³⁰⁴ Typically, a long-term 'non-transitory' price increase in the range of 5% to 10%.

- A 4.5 For products to be considered effective demand-side substitutes and included in the relevant market, it is necessary that a sufficient number of customers are not only capable of switching between such products, but that they would be likely to actually do so in the short term (usually one year), in response to a price change.
- A 4.6 In this regard, the SMP Guidelines state³⁰⁵ that demand-side substitution must effectively restrain the pricing of the parties' products in the short term. Furthermore, in order for two products to be considered to fall within the same relevant market, demand must be sufficiently responsive to small changes in relative prices above the competitive level.
- A 4.7 For the purposes of market definition, the Notice on Market Definition suggests that constraints imposed by actual competitors in the form of demand substitution are among the most relevant elements to be assessed:

“Demand substitution constitutes the most effective and immediate disciplinary force on the suppliers of a given product. An undertaking’s influence over prevailing conditions of sale – such as prices, the level of innovation or the quality offered – depends on the extent to which its customers can easily switch to available products that the customers consider as substitutes. Demand substitution is therefore the main consideration when defining the relevant product market...”

³⁰⁶

Supply-Side Substitution

- A 4.8 ComReg also considers the impact of supply-side substitution, that is, the extent to which a producer not currently active in supplying the candidate products within the market would, in response to a HM's SSNIP above the competitive level, switch production in the immediate to short term without incurring significant costs, and start supplying potential substitute products of equivalent characteristics and/or prices and, as a consequence of such provision, render the HM's price increase unprofitable.³⁰⁷

³⁰⁵ SMP Guidelines, paragraph 33.

³⁰⁶ Notice on Market Definition, paragraph 23(a).

³⁰⁷ See paragraph 41 of the SMP Guidelines.

A 4.9 Such an alternative potential substitute product could be included within the overall product market as a supply-side substitute if the production facilities (or network) would provide a sufficient competitive constraint to prevent a profitable price increase by the HM supplier of the candidate product(s), say because of the resulting loss of sales through switching to the alternative producer's product.

A 4.10 In such circumstances, the Notice on Market Definition indicates that supply-side substitutes can be included within the product market:³⁰⁸

"...namely when it is as effective and immediate as demand substitution and when it leads to similar competitive conditions across the products concerned..." ³⁰⁹

A 4.11 The Notice on Market Definition also notes that:³¹⁰

"...where supply substitution would entail the need to significantly adjust existing tangible and intangible assets outside the regular course of business; to incur more than insignificant additional investments, sunk costs or risks; to take strategic decisions of a lasting nature, or to incur time delays, the Commission does not widen the relevant market based on supply substitution...in such cases, the Commission examines the effects of such switching in the competitive assessment as a constraint exerted by potential competition..."

A 4.12 Therefore, any potential relevant supply-side substitutes should be sufficiently imminent in terms of their presence in the market in order to be capable of constraining a SSNIP.

A 4.13 The SMP Guidelines also suggest that, when defining a relevant market, mere hypothetical supply-side substitution is not sufficient.³¹¹

"NRAs will need to ascertain whether a given supplier would actually use or switch its productive assets to produce the relevant product or offer the relevant service (for instance, whether their capacity is committed under long-term supply agreements, etc.)."

³⁰⁸ Notice on Market Definition, paragraph 20.

³⁰⁹ Notice on Market Definition, paragraph 23(b)

³¹⁰ See paragraph 37 of the Notice on Market Definition.

³¹¹ See paragraph 41 of the SMP Guidelines.

Self-Supply of vertically-integrated Service Providers

A 4.14 The indirect retail constraint generated by means of self-supply of wholesale/retail inputs on electronic communications networks by vertically-integrated SPs may also fall within the relevant market, if such self-supply exerts an effective competitive constraint on the market being considered. Having regard to the SMP Guidelines, the 2020 Explanatory Note and the Notice on Market Definition, the following criteria are typically considered by ComReg in determining whether self-supply on a given network falls within the relevant product market:

- (a) Whether sufficient demand-side substitution would be likely to arise if the self-supplied product was made available to third parties in the merchant market;
- (b) Whether the network offers the coverage expected by Access Seekers;
- (c) Whether provision of the self-supplied product to third parties is technically feasible;
- (d) Whether the SP whose self-supply is under consideration has sufficient capacity to provide the self-supplied product to third parties; and
- (e) Whether the SP whose self-supply is under consideration would provide the self-supplied product to third parties in the short term without incurring significant additional costs or risks, and would be likely to do so in response to small and permanent changes in relative prices.

A 4.15 Where these criteria are met, it is likely that the self-supplied service could act as an effective competitive constraint on the focal product. On that basis, the inclusion of self-supplied services in the product market is warranted.

Annex 5 Other Criteria for SMP Assessment

A 5.1 ComReg has considered other factors that could be used to indicate the potential market power of an SP but which, for the reasons set out below, are considered of little or no relevance for the purposes of the SMP assessment in Market A and Market B respectively.

Technological advantages or superiority

A 5.2 Technological advantages or superiority: any advance made by a provider in Market B would (from a technological point of view) likely be adopted by potential new entrants. It is unlikely that technology itself could be used as a sustainable advantage in this market.

Control of infrastructure not easily duplicated

A 5.3 Control of infrastructure is considered as part of the SMP assessment in Market A, but in ComReg's view, is less relevant in the SMP assessment for Market B. While 2rn is a wholly owned subsidiary of RTÉ and thus, RTÉ, effectively controls Market A infrastructure (and the associated provision of National Terrestrial BTS), the SMP assessment in Market B is carried out under an MGA scenario whereby SMP regulation is assumed to be present in Market A, meaning that any new potential new entrant to Market B would have regulated access to Market A infrastructure.

Easy or privileged access to capital markets/financial resources

A 5.4 Easy or privileged access to capital markets/financial resources: Easy or privileged access to capital markets may act as a barrier to entry in markets where small, private companies compete with a large incumbent in Market B and are not able to leverage sufficient finance to invest in alternative infrastructure and use it to compete effectively with the incumbent. There are however no competitors to RTÉ in this market. And in this respect this factor does not appear to be a relevant consideration.

A highly developed distribution and sales network

A 5.5 The need to establish distribution systems might delay short term market entry or expansion, given the costs involved and could act as a barrier to entry. However, entry into Market A and/or Market B is unlikely to involve establishing extensive distribution and sales networks, since there are only a small number of potential wholesale customers.

Product/services diversification (e.g. bundled products or services)

A 5.6 This is of relatively less importance in Market A and Market B as bundled offerings do not feature at the wholesale level. Furthermore, National Terrestrial BTS and DTT Multiplexing Services are relatively homogenous non-differentiated products.

Vertical Integration

A 5.7 While vertical integration is of significant importance in Market A and is discussed in sub-section 5.2.1, ComReg's view is that is of relatively less importance in Market B.

A 5.8 ComReg's applies the MGA when carrying out its SMP assessment, which assumes the presence of upstream SMP regulation in Market A, when assessing Market B. For this reason, RTÉ's position as a vertically integrated firm with 2rn is unlikely to raise barriers to entry in Market B given a new potential commercial DTT operator would benefit from regulated access to 2rn infrastructure.

A 5.9 ComReg also considers whether RTÉ could raise barriers to entry in Market B due to its activities in the Relevant Retail TV Broadcast Market, where it competes with its Market B Access Seekers. ComReg concludes, however, that its vertically integrated position in these markets is unlikely to raise barriers to entry due to RTÉ's "must-carry" obligations under the 2009 Act. While not yet enforced, ComReg is required to take a forward-looking view in its analysis and concludes that, within the timeframe of this review, RTÉ will likely to be subject to obligations, requiring them to make their channels available to any new market entrant.

Annex 6 Consultation Questions

Question 1:

Do you agree with ComReg's proposed definition of the Relevant Retail TV Broadcast Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 2:

Do you agree with ComReg's proposed definition of the Relevant Retail Radio Broadcast Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 3:

Do you agree with ComReg's product and geographic market assessment for Market A? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 4:

Do you agree with ComReg's product and geographic market assessment for Market B? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 5:

Do you agree with ComReg's 3CT and assessment of SMP on Market A? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 6:

Do you agree that the competition problems identified are those that could potentially arise in Market A (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 7:

Do you agree with ComReg's conclusions on remedies in Market A? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 8:

Do you agree with ComReg's 3CT and assessment of SMP on Market B? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 9:

Do you agree that the competition problems identified are those that could potentially arise in Market B (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 10:

Do you agree with ComReg's proposals in respect of remedies in Market B? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Annex 7 List of Acronyms

Acronym	Explanation
AFD	Additional Financial Data
BAI	Broadcasting Authority of Ireland
BEREC	Body of European Regulators for Electronic Communications
BMAI	Bauer Media Audio Ireland
BTS	Broadcasting Transmission Services
BU	Bottom-up
CATV	Cable Television Network
CBP	Countervailing Buyer Power
CCA	Current Cost Accounting
CCPC	Competition and Consumer Protection Commission
CnaM	Coimisiún na Meán
CRO	Companies Registration Office
DAB	Digital Audio Broadcast
DTH	Direct to Home
DTT	Digital Terrestrial Television
EC	European Commission
EECC	European Electronic Communications Code Directive
FAC	Fully Allocated Costs
FAR	Fixed Asset Register
FDC	Fully Distributed Cost
FPIA	Fairly presents in accordance with
FTA	Free to Air
FTA DTT	Free to Air Digital Terrestrial Television
FTTP	Fibre to the Premises

HCA	Historical Cost Accounting
HD	High Definition
HM	Hypothetical Monopolist
IPTV	Internet Protocol Television
JNLR	Joint National Listenership Research
LLA	Long Life Assets
LRAIC	Long Run Average Incremental Cost
LRIC	Long Run Incremental Costs
LW	Long Wave
MCE	Mean Capital Employed
MGA	Modified Greenfield Approach
NBV	Net Book Value
NCA	National Competition Authority
NG	Next Generation
NRA	National Regulatory Authority
OECD	Organisation for Economic Co-operation and Development
OTT	Over-the-top
PPIA	Properly prepared in accordance with
PSB	Public Service Broadcasting
QKDR	Irish Communications Market Quarterly Key Data Report
RIA	Regulatory Impact Assessment
RnaG	RTÉ Raidió na Gaeltachta
RTÉ	Raidió Teilifís Éireann
SD	Standard Definition
SLA	Service Level Agreements
SMP	Significant Market Power
SMP SP	Service Provider with Significant Market Power

SP	Service Provider
SSNDQ	Small but Significant Non-Transitory Decrease of Quality
SSNIP	Significant Non-Transitory Increase in Price
SVOD	Subscription-based Video-on-Demand
TAM	Television Audience Measurement Ireland Ltd.
TD	Top-down
TFEU	Treaty on the Functioning of the European Union
TV	Television
UHF	Ultra-High Frequency Band
VM1	Virgin Media One
VM2	Virgin Media Two
VM3	Virgin Media Three
VM4	Virgin Media Four
VMI	Virgin Media Ireland
VOD	Video-on-Demand
WACC	Weighted Average Cost of Capital
2rn	RTÉ Transmission Network
3CT	Three Criteria Test