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Commission for Communications  
Regulation (ComReg)

Block DEF  
Abbey Court  
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Ireland

For the attention of:  
Mr Kevin O'Brien  
Chairperson of the Commission

Fax: +35318788193

Dear Mr O'Brien,

**Subject: Commission Decision concerning Case IE/2013/1445 — Wholesale market for broadcasting transmission services in Ireland**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC**

## **I. PROCEDURE**

On 12 April 2013, the Commission registered a notification from the Irish national regulatory authority, the Commission for Communications Regulation (ComReg),<sup>1</sup> concerning the wholesale market for broadcasting transmission services<sup>2</sup> in Ireland.

The national consultation<sup>3</sup> ran between 13 July and 19 September 2012.

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<sup>1</sup> Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

<sup>2</sup> Corresponding to market 18 in the previous Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 114, 8.5.2003, p. 45.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

On 19 April 2013, a request for information<sup>4</sup> was sent to ComReg and a response was received on 24 April 2013.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

## **II. DESCRIPTION OF THE DRAFT MEASURE**

### **II.1. Background**

The first review of this market was carried out in 2004.<sup>5</sup> At that time, ComReg excluded the market for broadcasting transmission services on cable and satellite networks from the market analysis (considering that it tended toward effective competition) along with the market for local/regional analogue terrestrial radio broadcasting transmission services (considering that it was characterised by low entry barriers). ComReg proposed to designate RTÉ Transmission Network Limited (RTÉNL)<sup>6</sup> as having significant market power (SMP) in the two wholesale markets for radio and television broadcasting transmission services on national analogue terrestrial networks. ComReg imposed transparency and non-discrimination obligations.

In its comments the Commission invited ComReg to monitor closely the competitive conditions in the provision of cable and satellite transmission services and to revisit if necessary the analysis with regard to satellite and cable transmission.

In November 2004<sup>7</sup> ComReg notified a draft measure concerning the implementation of remedies in the market. ComReg considered supplementing the obligations of transparency and non-discrimination imposed on RTÉNL with a further obligation of accounting separation. In ComReg's reasoning this obligation was necessary to ensure that cost allocations would become transparent and that any excessive profits would be revealed. The Commission issued a no comments letter on this draft measure.

### **II.2. Market definition**

Having regard to the recent move to digital terrestrial television (DTT) broadcasting in Ireland, ComReg has now undertaken a second review of the market.<sup>8</sup>

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<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

<sup>5</sup> Case IE/2004/0042.

<sup>6</sup> RTÉNL is the transmission operating arm of RTÉ, the Irish national public service broadcaster (RTÉNL is a wholly owned subsidiary of RTÉ and operates a network of transmission sites from which terrestrial radio and television services are broadcast).

<sup>7</sup> Case IE/2004/0114.

<sup>8</sup> The switch-off of analogue terrestrial television services took place on 24 October 2012.

With the current notification, ComReg intends to define two separate wholesale markets for the provision of terrestrial broadcasting transmission services in Ireland as follows:

- Market A: the market for wholesale access to national terrestrial broadcast transmission services;<sup>9</sup>
- Market B: the market for wholesale access to DTT multiplexing services.<sup>10</sup>

ComReg concludes that the geographic scope of both Market A and Market B is national.

In terms of television transmission and viewership, ComReg notes that retail broadcasting services are available primarily via terrestrial broadcasting, cable, satellite and internet.

There are currently three terrestrial TV broadcast programme service providers operating in Ireland, namely TV3, TG4 and Raidió Teilifís Éireann (RTÉ). The Irish terrestrial programme services of RTÉ, TG4 and TV3 are required to be broadcast on a national free-to-air (FTA) basis. Consolidated national audience market shares show that Irish terrestrial TV broadcasters together maintain large audience viewing shares.<sup>11</sup> ComReg also stresses the continued importance of Irish terrestrial broadcasters' TV programme services for Irish viewers where, despite the increase in the range of television programme services being available over time across cable and satellite platforms, these Irish FTA programme services have continued to maintain a large share of TV viewership relative to other commercial programme services.<sup>12</sup>

With regard to radio broadcasting, ComReg's view is that end-users would not be expected to switch to other radio broadcast platforms (such as cable, satellite or Internet Protocol) in the timeframe of this review in such a way that it would effectively constrain the terrestrial radio transmission platform.

In terms of radio transmission, content is primarily deployed over terrestrial broadcasting networks, transmitted to in-home radio equipment or to in-car radios. There are two categories of national terrestrial radio broadcast services in Ireland, namely RTÉ's Public Service Broadcasting radio services and national independent commercial radio services provided under a licensing contract with the Broadcasting Authority of Ireland (BAI) by Today FM and Newstalk. Non-national/local radio services are also provided by other independent broadcasters who have entered into contractual arrangements with the BAI.

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<sup>9</sup> Market A consists of the provision of terrestrial broadcasting transmission services (including distribution) to broadcast operators for the purpose of delivering terrestrial broadcasting content to end-users.

<sup>10</sup> Market B consists of the provision of digital terrestrial television (DTT) multiplexing services to downstream DTT broadcasters for the purpose of delivering digital terrestrial broadcasting content to end-users.

<sup>11</sup> According to ComReg, between 2005 and 2013 the Irish terrestrial audience has been steadily decreasing, from around [...] % in 2005 to around [...] % in 2012 of the national daily shares across all TV platforms. In the week of 27 January 2013, RTÉ (RTÉ One, RTÉ One +1 and RTÉ Two) still had a viewing market share of 29.8 %, TV3 had 12.0 % and TG4 had 1.5 % across all platforms.

<sup>12</sup> As of January 2013, approximately 14 % of TV homes have an FTA satellite service and 48 % a pay TV satellite service and such services are national in scope. However, due to content rights issues (i.e. the costs associated with purchasing broadcasting content rights), Irish terrestrial TV programme services are not available via FTA satellite. 25 % of TV homes have a cable TV service (with approximately 53 % of TV homes passed by cable television services), which requires a subscription fee and is limited in coverage. Internet Protocol TV (as a managed TV transmission service) can be regarded as another transmission platform for TV broadcasting; however, it is currently limited to urban areas and has low take-up at less than 2 % of television homes.

### II.3. Three criteria test

As the market has been removed from the Recommendation on relevant markets, ComReg has carried out the three criteria test<sup>13</sup> with regard to the notified market in order to assess its susceptibility to *ex ante* regulation.

With regard to the first criterion, ComReg finds that both Market A and Market B are subject to high and non-transitory entry barriers, due *inter alia* to the existence of structural barriers to entry arising from coverage requirements, the need to develop network infrastructure and high sunk and fixed costs.<sup>14</sup>

Concerning the second criterion, ComReg explains that the markets are characterised by very high market shares, no countervailing buyer power, high switching costs and limited prospects of potential competition.

With regard to the insufficiency of competition law (third criterion), ComReg explains in relation to Market A that competition law is limited to *ex post* investigations which can take considerable time to complete. In this market, addressing a particular harm through *ex post* competition law may not create sufficient legal/regulatory certainty or predictability for existing or potential market participants. Regarding Market B, ComReg observes on the other hand that should commercial DTT multiplex operations become established in the timeframe of this market review it would re-assess the market to determine whether the three criteria test remains satisfied or to amend/withdraw regulatory obligations where appropriate.

### II.4. Finding of significant market power

ComReg is of the view that RTÉ is a vertically integrated monopolistic wholesale supplier in both Market A and Market B and has a strong presence in downstream retail markets where it competes with other broadcasters (for audience market share and the related advertising revenues). Therefore, potential competition concerns arise in both Market A and Market B with the associated negative impact for end-users.

ComReg proposes to designate RTÉNL, being the sole terrestrial transmission supplier operating in Market A, as having SMP in this market.<sup>15</sup> RTÉNL has a 100% market share. There are no competitors in Market A and it is ComReg's view that this is unlikely to materially change within the period of this review.

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<sup>13</sup> In order to determine whether the market (i) is characterised by high non-transitory barriers to entry, (ii) lacks a tendency to effective competition, and (iii) cannot be safeguarded by competition law alone.

<sup>14</sup> ComReg finds that RTÉNL's infrastructure cannot be easily duplicated. Moreover, in its reply to the Commission's request for information ComReg indicated that site sharing, while encouraged by the planning guidelines, is not mandatory and would not, therefore, be considered as sufficient (or provide legal and regulatory certainty) to address the competition concerns identified in Market A in Ireland.

<sup>15</sup> The criteria used by ComReg are: market shares, overall size of the undertaking, relevant strength of existing competitors, control of infrastructure not easily duplicated, financial (sunk) costs, economies of scale, economies of scope, vertical integration, overall strength of potential competitors and countervailing buying power.

ComReg proposes to designate RTÉ,<sup>16</sup> the sole DTT multiplex operator supplying in Market B, as having SMP<sup>17</sup> and proposes to impose a range of regulatory obligations on RTÉ.

RTÉ has a 100% market share. There are no competitors in Market B and ComReg believes that this is unlikely to materially change within the period of this review.

## II.5 Regulatory remedies

As RTÉ is vertically integrated, ComReg believes that market failures may arise where competing broadcast operators and DTT broadcasters may be charged excessive fees, discriminated against in the supply of wholesale services by RTÉNL/RTÉ to them, or (constructively) refused access to weaken their competitive threat at the wholesale and/or retail level.<sup>18</sup>

Having regard to a range of identified competition problems, ComReg proposes to impose a range of regulatory obligations on RTÉNL on Market A. These are obligations of access, non-discrimination, transparency, accounting separation, price control and cost accounting.<sup>19</sup>

On Market B, ComReg also envisages imposing on RTÉ obligations of access, non-discrimination, transparency, accounting separation, price control and cost accounting.<sup>20</sup>

## III. COMMENTS

The Commission has examined the notification and the additional information provided by ComReg and has the following comment:<sup>21</sup>

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<sup>16</sup> RTÉ is a vertically integrated entity and self-supplies terrestrial network services via its wholly owned subsidiary RTÉNL. RTÉ launched its DTT platform marketed as ‘Saorview’ in May 2011.

<sup>17</sup> The criteria used by ComReg are: market shares, overall size of the undertaking, relevant strength of existing competitors, control of infrastructure not easily duplicated, financial costs, vertical integration and countervailing buying power.

<sup>18</sup> Insofar as downstream retail broadcasting services are concerned, RTÉ competes with other broadcasters for advertising revenues based on audience market share and the type of audience reached. Therefore, RTÉ faces downstream competition from other terrestrial broadcasters’ programme services which may intensify with the entry/expansion of non-RTÉ terrestrial broadcasting programme service provision.

<sup>19</sup> ComReg has proposed cost orientation in Market A in order to facilitate effective conditions of entry for national analogue radio and multiplex operators. As indicated in the reply to the request for information, while not precluding such entry, ComReg’s focus is on ensuring that the right conditions exist to allow actual and potential customers (i.e. national analogue radio and multiplex operators) to gain effective access to Market A upstream inputs in order to facilitate downstream competition (including in Market B).

<sup>20</sup> In its reply to the request for information, ComReg indicates that potential competition in Market B through the entry of any new commercial DTT multiplex operators could, subject to the effectiveness of any such competition, ultimately lead to a lessening of remedies imposed on RTÉ in Market B, up to and including the possibility of de-regulation in this market. However, ComReg does not consider that the competitive conditions of Market B would change sufficiently within the timeframe of this review.

<sup>21</sup> In accordance with Article 7(3) of the Framework Directive.

### **Need to monitor the effectiveness of *ex ante* regulation**

The market for broadcasting transmission services is no longer recommended by the Commission for *ex ante* regulation, as greater platform competition and fewer capacity constraints, mainly due to the transition from analogue to digital transmission platforms, should render it effectively competitive.

The Commission notes, however, that the terrestrial broadcasting markets in Ireland present strong features of lack of competitive conditions, with only one vertically integrated supplier so far, and therefore appear to warrant *ex ante* regulation.

However, the Commission notes also that — following successful completion of a contract award process that would be conducted by the Broadcasting Authority of Ireland — entry of a number of commercial DTT multiplex operators on Market B may occur within the timeframe of the review and could therefore impact the competitive dynamics on the market.

The Commission therefore invites ComReg to closely monitor the development of competition in the two markets (and in particular Market B) in terms of infrastructure and services competition at both the retail and wholesale level and re-assess the need for and appropriateness of the remedies imposed if necessary.

Pursuant to Article 7(7) of the Framework Directive, the Commission for Communications Regulation (ComReg) shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>22</sup> the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>23</sup> within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.<sup>24</sup> You should give reasons for any such request.

Yours sincerely,  
For the Commission,  
Robert Madelin  
Director-General

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<sup>22</sup> Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

<sup>23</sup> Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

<sup>24</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.