



Enforcement Decision Series (E/12/001)

Competition Act 2002

Decision of the Competition Authority (Case COM/10/02)

RTÉ's conduct in the market for television advertising

17 January 2012

EXECUTIVE SUMMARY

On 7 October 2011, the Competition Authority (the "Authority") entered into an Agreement and Undertakings with Raidió Teilifís Éireann ("RTÉ") following an investigation conducted by the Authority on the scheme operated by RTÉ for the sale of television advertising airtime. In particular, the Authority's investigation focused on the scheme under which the discounts granted to individual advertisers depended on, among other factors, the percentage (or share) of each advertiser's total television advertising budget committed to RTÉ. The scheme is hereinafter referred to as the "Share Deal".

The Authority's investigation raised concerns that the Share Deal could amount to a breach of section 5 of the Competition Act, 2002 (the "Act") and/or Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). The Authority was satisfied that the undertakings offered by RTÉ addressed its concerns under section 5 of the Act¹. Therefore, the Authority decided to close its investigation.

Section 5 of the Act and Article 102 TFEU prohibit an abuse by one or more undertakings of a dominant position. Conditional rebates with loyalty-inducing effects granted by a dominant undertaking may amount to an abuse of a dominant position in breach of section 5 of the Act and/or Article 102 TFEU. The Authority's investigation was initiated with the aim of reaching a view on the following issues: (i) the relevant market, (ii) whether RTÉ held a dominant position in the relevant market, and (iii) whether the Share Deal amounted to an abuse of its dominant position.

Based on the information gathered during its investigation, the Authority was concerned that the Share Deal could amount to a conditional rebate likely to have loyalty-inducing effects and hence could be anti-competitive. The Authority communicated its preliminary concerns to RTÉ and, in response,

¹ The Authority's preliminary concerns in this investigation also arose under Article 102 TFEU. However, the Authority is unable to accept undertakings under Articles 101 and 102 as this is a function reserved to the Courts in Ireland (see Statutory Instrument 195 of 2004). The undertakings provided in respect of section 5 of the Act effectively remedy any competition concerns that may have arisen under Article 102 TFEU.

RTÉ offered satisfactory undertakings to the Authority. In particular, RTÉ undertook to commence the process for implementing a new trading scheme which would exclude the share of budget element as of the date of formal acceptance of the undertakings by the Authority and that the new trading scheme would be implemented no later than 1 July 2012. RTÉ also informed the Authority that it had, in any event, intended to review how it sold television advertising airtime and the possibility of introducing a new scheme to, inter alia, improve efficiencies. As the undertakings offered by RTÉ addressed the Authority's concerns, the Authority did not need to continue its investigation and thus did not reach a final view on the application of section 5 and/or Article 102 to the Share Deal.

This Enforcement Decision, first, describes the main features of the Share Deal and summarises the procedural steps followed during the Authority's investigation. Second, it outlines the legal context relevant to this case. Third, it explains the Authority's preliminary legal and economic analysis of the Share Deal under section 5 of the Act and/or Article 102 TFEU. Finally, it summarises the proposal submitted by RTÉ to address the Authority's concerns regarding the competition implications of the Share Deal.

A copy of the Agreement and Undertakings is included as an Annex to this Enforcement Decision.

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1. INTRODUCTION

- 1.1 The Authority is responsible for enforcing Irish and European competition law in the State. Competition law, amongst other things, prohibits behaviour that deprives consumers of the benefits of competition. For any infringement of Irish or European competition law, the Authority has the right to take proceedings to bring the infringement to an end.
- 1.2 Section 30(1)(g) of the Act gives the Authority the function of “*carrying on such activities as it considers appropriate to inform the public about competition issues*”. In exercise of this function, the Authority may decide, for example, to publish enforcement decisions in respect of selected investigations where the Authority has found no breach of competition law or the party/parties under investigation have provided undertakings that address any competition concerns identified by the Authority during an investigation. Enforcement decisions outline the legal and economic assessment conducted by the Authority during an investigation. The main objective of an enforcement decision is to increase transparency and predictability in respect of the application of competition law to alleged anticompetitive behaviour. The Authority was of the view that the publication of an enforcement decision on its investigation concerning the Share Deal would help clarify the approach followed by the Authority in this type of case. Accordingly, the Authority decided to publish this Enforcement Decision.
- 1.3 This Enforcement Decision outlines the Authority’s economic and legal analysis of the Share Deal under section 5 of the Act and/or Article 102 TFEU. However, it is important to note that this Enforcement Decision sets out the preliminary views of the Authority at the point in its investigation when RTÉ made a proposal to the Authority to commence the process for implementing a new trading scheme which would exclude the share of budget element and to implement such new trading scheme no later than 1 July 2012.
- 1.4 As RTÉ’s proposal addressed the Authority’s concerns regarding the competition implications of the Share Deal, the Authority decided to close its investigation. At that point the Authority had not reached a final view on the relevant market, the question of dominance or whether there had been an abuse of dominance by RTÉ. As the proposal of RTÉ satisfactorily addressed the Authority’s concerns, the Authority did not need to continue its investigation and thus did not need to reach a final view on the application of section 5 and/or Article 102 to the Share Deal. For these reasons, this Enforcement Decision does not amount to a final decision as to whether or not there has been an infringement. In any event, under Irish law, only the Court can reach a final decision on whether or not an undertaking has infringed competition law in the State.
- 1.5 It is also important to note that during the investigation RTÉ disputed the Authority’s preliminary views on market definition, dominance and abuse of dominance. This Enforcement Decision summarises the principal arguments made by RTÉ during the investigation. RTÉ fully cooperated in the investigation and engaged with the Authority from an early stage to address the Authority’s concerns regarding the competition implications of the Share Deal.

2. THE ISSUES

The complaint

- 2.1 On 20 March 2009, TV3 Television Network Limited ("TV3") submitted a complaint to the Authority alleging that RTÉ had engaged in anticompetitive behaviour in breach of Irish and European competition law. In its complaint, TV3 raised a number of issues concerning the alleged anticompetitive behaviour of RTÉ. The Authority's investigation focused on TV3's allegation concerning the Share Deal.

The parties

- 2.2 RTÉ is a state-owned television and radio broadcaster in the State. RTÉ currently owns and operates two free-to-air national television channels (RTÉ One and RTÉ Two). RTÉ is financed from a combination of commercial and non-commercial revenues. Commercial revenues accrue from advertising, sponsorship, transmission fees and merchandising fees. Non-commercial revenue comes from TV licence fees.
- 2.3 TV3 is a private TV broadcaster in the State. TV3 owns and operates the national free-to-air channel TV3 and the pay-TV channel 3e. It also handles advertising sales for other TV channels - Living TV and Bubble Bits. TV3 is funded from a mixture of advertising sales, sponsorship and other sales.

The practice concerned

- 2.4 As indicated above, the object of the Authority's investigation was the Share Deal, i.e., a scheme under which the discounts granted to individual advertisers depended on, among other factors, the percentage (or share) of each advertiser's total television advertising budget committed to RTÉ.
- 2.5 This sub-section provides a brief description of how television advertising airtime is sold and how Share Deal agreements were negotiated between RTÉ and advertisers.

How television advertising is sold

- 2.6 Television advertising is sold as "commercial impacts" or "impacts", rather than minutes of advertising airtime. One commercial impact is defined as one person watching one advertisement once.
- 2.7 Impacts are differentiated products. Television audiences typically comprise a mix of different demographic groups. Impacts are sold against these audience groups. Depending on the products concerned and the objectives of individual advertising campaigns, impacts for different audience groups are usually viewed differently by advertisers. Even within the same audience group, impacts achieved at different times of the day or through different programmes or television channels may have different commercial values to advertisers.
- 2.8 The price of impacts is expressed as cost per thousand (CPT) impacts for each audience group. RTÉ publishes CPTs across 18 audience groups (such as All Adults, Men, Women, Housekeepers and Children)

prior to annual negotiations. These published prices are used as reference prices during annual deal negotiations. Discounts are negotiated against these reference prices.

- 2.9 The Authority's preliminary market investigation suggested that other broadcasters also use RTÉ's published prices as a benchmark during their negotiations with advertisers or advertising agencies.

Negotiations between RTÉ and advertising agencies

- 2.10 The vast majority of television advertising airtime in the State is sold through advertising agencies. Advertising agencies provide two main services: they negotiate terms of annual contracts with broadcasters on behalf of advertisers and liaise throughout the year with broadcasters on buying individual campaigns. There are, however, some advertisers that negotiate contracts directly with broadcasters.
- 2.11 Advertisers often monitor the effectiveness of advertising agencies using media auditors.
- 2.12 Typically, contracts for the sale of television advertising airtime are negotiated between broadcasters and advertising agencies on an annual basis. Negotiations usually begin in the autumn prior to the start of each new advertising year in January. Apart from annual deals, RTÉ also offers special event deals, late bookings, and airtime special offers.
- 2.13 RTÉ's contracts with advertisers are on a line-by-line basis. In other words, RTÉ negotiates with advertising agencies (or directly with advertisers) specific terms of the contracts for each individual advertiser. The Authority understands that some other television stations have umbrella agency deals which encompass the agency's portfolio of advertisers.

Negotiations of share of budget commitment and discounts

- 2.14 The share of the total television advertising budget that advertisers would commit to RTÉ was a central factor in the negotiations between RTÉ and advertisers/advertising agencies.
- 2.15 In simple terms, everything else being equal, the higher the share of total television advertising budget that an advertiser committed to RTÉ, the larger the discount RTÉ would typically offer to that advertiser. In some cases, if the share of budget committed was very low, the advertiser might have received no discount at all, or might even have had to pay a premium. RTÉ used what it called the "reference share" of [60-70]% as a benchmark for negotiations. However, the Authority understands that RTÉ also negotiated deals below the "reference share". Moreover, the Authority understands from its investigation that RTÉ sometimes offered a larger discount to a customer with a lower budget share commitment than to a customer with a higher budget share commitment.
- 2.16 In addition to the share of budget, many other factors played an important role in determining the ultimate level of discount granted to advertisers. These included the volume of the budget, the deal history,

the target audience, the optimisation potential², the product category, the split between RTÉ One and RTÉ Two, other qualitative aspects of the deals and the negotiation skills of the parties.

² Optimisation means slotting adverts into breaks that are most watched by the specific audience that the advertiser wishes to target. For example, an advert for a children's toy would be slotted around children's programming to optimise its effect. The more an advertiser's airtime can be optimised, the greater the potential discount that the advertising agencies and/or the advertisers can negotiate.

3. PROCEDURAL STEPS

- 3.1 On 20 March 2009, TV3 submitted a complaint to the Authority. The Authority initiated its assessment of the complaint following the receipt of further information which it had requested from the complainant. The Authority made additional requests for information from both TV3 and RTÉ to clarify the nature of the allegations and to understand the economic and regulatory context of the markets involved. As part of the assessment process, the Authority's analysis also considered whether the alleged anticompetitive behaviour was likely to have a significant impact on competition in the State.
- 3.1 On 22 October 2010, the Authority opened a formal investigation focussing on RTÉ's Share Deal. Within the framework of this investigation, the Authority contacted a number of sources, including television broadcasters (based in the State and outside the State), advertising agencies, the UK Office of Communications (Ofcom) and other competition authorities.
- 3.2 On 15 March 2011, the Authority issued a letter to RTÉ setting out its concerns in respect of the Share Deal. In particular, the Authority was concerned that the Share Deal could amount to an abuse of a dominant position in breach of section 5 of the Act and/or Article 102 TFEU.
- 3.3 On 13 May 2011, RTÉ submitted its response to the Authority's letter of 15 March 2011. In its response, RTÉ disputed the Authority's views on market definition, dominance and abuse of dominance.
- 3.4 On 26 August 2011, RTÉ submitted a proposal to commence the process for implementing a new trading scheme which would exclude the share of budget element and to implement such new trading scheme no later than 1 July 2012. This proposal was provided to the Authority on a without prejudice basis.
- 3.5 On 1 September 2011, the Authority met with RTÉ to discuss RTÉ's proposal. RTÉ informed the Authority that it had, in any event, intended to review how it sold television advertising airtime and the possibility of introducing a new scheme to, inter alia, improve efficiencies.
- 3.6 On 6 September 2011, additional information concerning RTÉ's proposal was submitted by RTÉ, at the request of the Authority.
- 3.7 On 7 October 2011, the Authority and RTÉ entered into the Agreement and Undertakings.

4. LEGAL CONTEXT

- 4.1 This section briefly outlines the relevant legal framework for the Authority's assessment of RTÉ's Share Deal.
- 4.2 At the point in its investigation when RTÉ offered a proposal to address the Authority's concerns, the Authority was of the preliminary view that the Share Deal could amount to an infringement of section 5 of the Act and/or Article 102 TFEU.
- 4.3 Section 5 of the Act prohibits an abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or any part of the State. Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between Member States.
- 4.4 To establish an infringement of Article 102 TFEU, it is therefore necessary to prove that the abuse "*may affect trade between Member States*". According to settled case law, it is sufficient that the abuse is capable of affecting trade for Article 102 TFEU to apply³. Abuses that have an impact on the competitive structure in more than one Member State are by their very nature capable of affecting trade between Member States⁴. The effect on trade of the abuse must be appreciable. This will mainly be assessed with reference to the position of the undertaking(s) on the market for the product concerned⁵.
- 4.5 As many television broadcasters (actual and potential competitors of RTÉ) and many advertisers (actual and potential customers of RTÉ) are based outside the State, the Authority was of the opinion that RTÉ's Share Deal was capable of having a potential effect on the competitive structure of the market for television advertising in more than one Member State and therefore on trade between Member States. Based on the size of the market concerned and RTÉ's position on that market, the Authority was of the preliminary view that the effect on trade would be appreciable.
- 4.6 Accordingly, the Authority was of the view that if the Share Deal amounted to an abuse of dominance by RTÉ, then this would involve an infringement of Article 102 TFEU as well as section 5 of the Act.

³ Joined Cases C-241/91 P and C-242/91 *RTÉ and ITP v Commission* [1995] ECR I-743, paragraph 69.

⁴ Joined Cases 6 and 7/73 *Commercial Solvents v Commission*, [1974] ECR 223; Case 6/72 *Continental Can* [1973] ECR 215.

⁵ Case 5/69 *Volk v Vervaecke* [1969] ECR 295.

5. PRELIMINARY LEGAL AND ECONOMIC ANALYSIS

- 5.1 This section outlines the Authority's legal and economic analysis of the Share Deal under section 5 of the Act and/or Article 102 TFEU.
- 5.2 Section 5 of the Act and Article 102 TFEU apply only to dominant undertakings. A finding of dominance involves a two step procedure. The first step is to determine the relevant market. The second step is to assess the firm's position on the relevant market.
- 5.3 If a firm has a dominant position in the relevant market, it is then necessary to consider whether the firm's conduct amounts to an abuse of its dominant position. This involves assessing the likely foreclosure effect of the conduct as well as any plausible objective justifications.

Relevant markets

- 5.4 For the purposes of assessing RTÉ's Share Deal, the Authority considered that the relevant market was likely to be the *market for television advertising airtime in the State*. The Authority did not reach a definitive view on the relevant market and notes that further investigation and analysis of RTÉ's competitive constraints would have been required in order to do so.
- 5.5 In the Authority's preliminary view, the relevant product market was likely to be the *market for television advertising airtime*. The Authority considered the possibility of a wider product market definition (to include other media advertising) but did not find sufficient evidence during the course of its investigation to support the existence of a wider market. This preliminary view was supported by previous decisions of the Authority in the market for radio advertising⁶, and decisions of the European Commission (the "Commission")⁷, the UK Competition Commission⁸, the Bundeskartellamt⁹, and OFCOM¹⁰.
- 5.6 As discussed in paragraphs 2.6 to 2.9, the Authority found that there was a degree of product differentiation within the market for television advertising airtime. However, the Authority also recognised there was a degree of substitution between impacts for different audience groups¹¹ and impacts at different times of the day within each audience group. On balance the Authority, during the course of its investigation, did not consider there to be sufficient evidence to suggest that it should adopt a narrower product market definition.
- 5.7 In the Authority's preliminary view, the relevant geographic market was likely to be the State. However, the Authority recognised that

⁶ See for example, M/07/040 – Communicorp/Scottish Radio Holding and M/07/069 – UTV/FM104.

⁷ See for example, case M553 - RTL/Veronica/Endemol.

⁸ Competition Commission's final decision on ITV's CRR obligations issued on 19 January 2010 (www.competition-commission.org.uk/inquiries/ref2009/itv/provisional_decision_remedy.htm.)

⁹ http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B06-094-10_endg.pdf

¹⁰ Competition issues in the UK TV advertising airtime trading mechanism, OFCOM. See http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/summary/TV_advertising_MIR.pdf

¹¹ For instance, an advert for a beer product aimed at Men 18-34 may be placed at a programme that mainly delivers to the Men 18-34 audience category, or may be placed at a programme that delivers to the All Men audience category. There is a certain degree of inter-changeability between the All Men and Men 18-34 categories.

advertisements broadcast on television channels outside the State are also viewed in the State. This is known as the “spill-over” effect. On balance, the Authority was of the preliminary view that the spill-over effect was unlikely to materially affect the definition of the relevant geographic market.

- 5.8 RTÉ challenged the Authority’s views on the relevant market principally on the basis that the Authority (i) failed to examine the increasing competitive constraints imposed by new forms of advertising media, in particular, digital media, and (ii) did not adequately assess the extent of the spill-over effect from channels that did not have advertising specifically targeted at viewers located in the State, but which were available in the State. RTÉ submitted that a full market assessment would suggest that the market was in fact wider, and would likely encompass a number of different forms of advertising media and/or all channels available in the State.
- 5.9 As stated above, reaching a final conclusion on market definition would require further inquiry and investigation. However, this was not necessary in light of the Agreement and Undertakings entered into by RTÉ and the Authority.

Dominance

- 5.10 The Authority was of the preliminary view that RTÉ was likely to hold a dominant position in the market for television advertising airtime in the State. As already mentioned, RTÉ disagreed with the Authority’s preliminary view on dominance. However, as the matter was settled when the Authority and RTÉ entered into the Agreement and Undertakings, the Authority did not have to reach a definitive view on this issue.
- 5.11 The concept of dominance has been defined by the Court of Justice as a *“position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”*¹².
- 5.12 The Authority was of the preliminary view that it was likely that RTÉ was capable, to an appreciable extent, of acting independently of its competitors in the market for television advertising airtime in the State. In support of this, the Authority had regard to RTÉ’s substantial share of the relevant market, and other factors such as barriers to expansion, mainly resulting from RTÉ’s “unavoidable trading partner” status, insufficient countervailing buying power and possibly RTÉ’s dual funded status. RTÉ disputed this view for reasons that are described below.

Market shares

- 5.13 As indicated above, the market share of an undertaking concerned is an important factor relevant to establishing dominance. It is accepted by the European Courts that *“very large market shares are in themselves and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very*

¹² United Brands v. Commission, [1978] ECR 207, paragraph 65.

large market share and holds it for some time... is by virtue of that share in a position of strength..."¹³. In the Commission's view, "very large market shares, of over 50%, are considered in themselves, and but for exceptional circumstances, evidence of a dominant position"¹⁴.

- 5.14 During its investigation, the Authority obtained information on the estimated market shares of the major broadcasters in the State measured by both television advertising revenue and impacts. The Authority was of the view that market shares by revenue were an appropriate measure to assess RTÉ's market power in this case. The Authority's view was guided by the Commission's "Notice on the definition of the relevant market for the purposes of community law" which states that "in cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier"¹⁵.
- 5.15 The information obtained by the Authority showed that RTÉ's market share by revenue has been quite substantial and relatively stable between 2002 and 2007, at [55-65%], albeit declining at a moderate rate since 2008. The Authority was of the view that this was a strong indicator of RTÉ's dominant position.
- 5.16 When looking at market shares, it is also relevant to look at the largest firm's share relative to those of its competitors. In this regard, the information obtained by the Authority showed that RTÉ's market share was substantially higher than that of its closest competitors TV3 and Sky TV. In the Authority's preliminary view, the disparity in the size of market shares together with the actual size of RTÉ's market share indicated that RTÉ was likely to be dominant on the market for television advertising airtime in the State.
- 5.17 RTÉ was of the view that market share is more appropriately measured by impacts on the basis that impacts provide the most reliable indicator of market positions. RTÉ's relevant share by impacts of the four most commercially demanded audiences has declined at a moderate rate since 2002; being [50-60]% in 2002 and [40-50]% in 2010 (a reduction of [10-20] percentage points).
- 5.18 RTÉ submitted the following arguments during the investigation as evidence that it cannot be regarded as dominant in the market for television advertising airtime in the State based on its market share: (i) RTÉ's relevant market share (based on impacts) is less than 50%; (ii) RTÉ's market share (based on impacts) has been consistently decreasing since 2002¹⁶; and, (iii) two other broadcasters with significant market shares, namely TV3 and Sky TV can and do, according to RTÉ, constrain RTÉ. As presented earlier, the Authority considered that RTÉ's market share remained substantial in recent years and was much larger than those of its competitors.

¹³ AAMS v Commission, [2001] ECR II-3413, paragraph 51.

¹⁴ Case COMP/C-3/37.792 Microsoft [2004], paragraph 435.

¹⁵ OJ C 372, 9.12.1997.

¹⁶ The Irish High Court has found that "a market share of 60% in the context of a steady increase in share over a period of years is much more likely to indicate dominance than the same share in the context of a decline over a period" (case Meridian Communications Limited and Cellular Three Limited v Eircell Limited [2001], IEHC 195, paragraph 33).

Barriers to entry and expansion

- 5.19 Market enquiries carried out by the Authority suggested that RTÉ could potentially be considered as an “unavoidable trading partner” by advertisers and/or advertising agencies. Many advertisers felt that they had to advertise on RTÉ because of its status as an important part of Irish culture, its popular programmes and its ability to deliver mass audiences quickly. This “unavoidable trading partner” status could be considered as a barrier to expansion for television broadcasters if advertisers or advertising agencies were so dependent upon RTÉ for the provision of television advertising services that they did not wish to switch a significant percentage of their budget to other channels. The Authority was of the preliminary view that the potential “unavoidable trading partner” status could constitute further evidence that RTÉ may have a dominant position.
- 5.20 In addition, the Authority was of the preliminary view that RTÉ’s Share Deal could create a barrier to expansion on the market for television advertising airtime in the State. By rewarding a higher share of budget commitment, RTÉ restricted the ability of its competitors to expand on the market. Moreover, RTÉ’s request for a large share of revenue from advertisers could in itself demonstrate the existence of a dominant position.
- 5.21 RTÉ argued that the Authority’s contention that RTÉ was an “unavoidable trading partner” was unsustainable in light of numerous examples of advertisers with high or medium size budgets, including multi-national companies, which did not advertise with RTÉ but advertised with other channels in the State. The Authority acknowledged that a number of advertisers did not advertise with RTÉ, but considered that they only represented a small proportion of the market for television advertising airtime in the State.
- 5.22 RTÉ submitted that the television advertising sector could be characterised as having low barriers to entry and expansion. In RTÉ’s view, the existence of low barriers to entry was confirmed by the fact that there had been a significant amount of new entry and expansion in Irish television advertising airtime in the past ten years, both in the case of new channels (e.g., 3e and Setanta) and in the case of the expansion of existing foreign channels (e.g., Sky channels). According to RTÉ, the entry of new market players is counter-indicative of dominance. RTÉ also pointed out that its competitors had recently received regulatory consent to sell double the amount of minutage as RTÉ. The Authority recognised that while there had been some entry and expansion by competitors over the preceding ten years, RTÉ’s market share had remained significant during this period.

Countervailing buyer power

- 5.23 RTÉ submitted that advertising agencies exercised significant countervailing buying power. For example, one advertising agency represents advertisers who collectively account for [20-30]% of RTÉ’s total television advertising revenue, and the top 4 advertising agencies represent advertisers who collectively account for over 80% of RTÉ’s total television advertising revenue. Accordingly, RTÉ argued that it did not have the ability to behave to an appreciable extent independently of its customers.

5.24 In the Authority's preliminary view, RTÉ's potential unavoidable trading partner status implied that even the largest advertising agencies were not likely to be able to switch or credibly threaten to switch quickly to competing broadcasters, and therefore were not able to place sufficient constraint on the market power of RTÉ. The information gathered by the Authority during its investigation suggested that advertising agencies may not have the ability to play one broadcaster off another. Furthermore, the Authority understood that advertising agencies negotiated annual contracts with RTÉ for each individual advertiser on a line-by-line basis. This form of negotiation, in the Authority's view, was likely to further reduce the buyer power of the advertising agencies.

Dual funded status

5.25 TV3 submitted that an additional factor that should be taken into account to establish RTÉ's dominance was RTÉ's dual funded status. The Broadcasting Act, 2009 provides for RTÉ to be funded via a TV licence fee, as well as from commercial sources such as advertising. According to TV3, RTÉ's dual-funded status gave RTÉ an advantage over its competitors who relied almost exclusively on commercial revenues.

5.26 In a 2005 state aid decision in respect of licence fee funding of RTÉ and TG4, the Commission stated that RTÉ's "*financing from license fee money reduces the operating costs that RTÉ would normally have to bear and provides RTÉ with an economic advantage compared to other broadcasters which finance their activities based on commercial revenues only*"¹⁷.

5.27 RTÉ rejected this allegation by TV3 that its dual-funded status gives it an advantage over its competitors. RTÉ pointed out that the "*Communication from the Commission on the application of State aid rules to public service broadcasting*"¹⁸ provides that "*the Commission had no objection in principle to the choice of a dual financing scheme rather than a single funding scheme*"¹⁹. In terms of any alleged competitive advantage, RTÉ argued that it was significantly constrained by (i) its public service remit which means that RTÉ produce programmes that are commercially less attractive to the public and (ii) by the limits on its advertising minutage which are greater than that of its commercial competitors²⁰.

5.28 RTÉ further submitted to the Authority that Irish law provided for extensive safeguards through the Broadcasting Act, 2009 to ensure clear and appropriate separation between public service activities and non-public service activities (including advertising), by requiring RTÉ to, among other things, maintain separate accounts and keep arm's length relations with any commercial subsidiaries.

5.29 The Authority acknowledged that the separation of the accounting systems may help to prevent cross-subsidies between public service and non-public service activities, but in its preliminary view this does

¹⁷ State Aid E 4/2005 (ex NN 99/1999) –State Financing of RTÉ and TG4, Brussels 27.02.2008 C(2008)723 final, at paragraph 56.

¹⁸ OJ 2009/C257/01.

¹⁹ Paragraph 58.

²⁰ Regulatory commercial minutage limits allow RTÉ 6 minutes per hour, in contrast to its Irish commercial competitors which are permitted up to 12 minutes of advertising per hour.

not necessarily mean that licence fee revenues do not afford RTÉ a competitive advantage. It may be argued that the public funding gives RTÉ the unique status it enjoys today, such as its image as the State broadcaster, its ability to deliver mass audiences and consumers' affinity with RTÉ. This, in turn, would make RTÉ more appealing to advertisers. RTÉ rejected the suggestion that its dual-funded status provided it with an advantage over its competitors.

Abuse of dominance

Overview of loyalty rebates

- 5.30 The granting of rebates and discounts²¹ is a common way in which suppliers compete on price and try to attract customers to themselves and away from competitors. However, according to the case law of the European Courts, the decisions of the Commission and the communication from the Commission entitled "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*"²² (the "Guidance Paper on Article 102"), loyalty discounts and rebates can be anti-competitive in certain circumstances. Specifically, conditional rebates with loyalty-inducing effects by a dominant undertaking may infringe Article 102 TFEU unless they are objectively justified.
- 5.31 Rebates are generally of a conditional nature since they are aimed at rewarding customers for a particular purchasing behaviour. The Guidance Paper on Article 102 identifies target rebates as the usual type of a conditional rebate²³. Target rebates are discounts conditional on the customer reaching or exceeding a *purchasing target* during a certain period (known as the "reference period"). The purchasing target may take different forms, such as a certain quantity or a percentage share of the customer's requirements.
- 5.32 Target rebates with loyalty-inducing effects when applied by a dominant undertaking are likely to amount to a breach of Article 102 TFEU. Case law has deemed the following factors to be of particular importance in determining whether a given system of target rebates is likely to have loyalty-inducing effects: (a) whether or not the target rebate is an "all-units" rebate - all-units rebates (also known as "retroactive" or "rollback" rebates) are those that apply to all the purchases made during the reference period and not only to those purchases made in excess of the purchasing target(s); (b) the progressive nature of the rebate and the magnitude of the level of discounts; (c) the individualised nature of the purchasing target; (d) the duration of the reference period; (e) the market shares of the competitors of the dominant undertaking; and, (f) the economic analysis of the potential foreclosure effect. Each of these factors will be examined below. It is important to note that it is not necessary that all of these factors are present for a target rebate scheme to have loyalty-inducing effects. The likelihood of loyalty-inducing effects is higher where multiple factors are present.

²¹ In this Enforcement Decision, the terms rebates and discounts are used interchangeably.

²² OJ 2009/C45/02.

²³ Paragraph 37.

5.33 The reason why rebates with loyalty-inducing effects have been found to infringe Article 102 TFEU is because they seek to tie customers to the dominant undertaking and, therefore, they are capable of foreclosing competitors. The case law has based the finding of abuse on the capability of loyalty rebates to induce incremental purchases by customers of the dominant undertaking and, therefore foreclose competitors²⁴. It is not necessary to analyse any actual foreclosure effects of a loyalty rebate in the market for Article 102 to apply. In the recent *Tomra* case²⁵, the General Court confirmed existing case law and rejected the need to analyse any actual foreclosure effects, provided that the conduct in question is capable of foreclosing competition. The Court stated that:

“It may be concluded from that line of cases, as the applicant indeed maintain, that in order to determine whether exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes are compatible with Article 82 EC, it is necessary to ascertain whether, following an assessment of all the circumstances [...], those practices are **intended** to restrict or foreclose competition on the relevant market or are **capable** of doing so”. (Paragraph 215) (Emphasis added)

“It must also be stated that, for the purposes of establishing an infringement of Article 82 EC, **it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets**. It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (*Michelin II*, paragraph 239, and *British Airways v Commission*, paragraph 293)” (Paragraph 289) (Emphasis added).

5.34 Paragraph 38 of the Guidance Paper on Article 102 also suggests this approach when stating that:

“[...] the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates **is liable to result** in anti-competitive foreclosure and, consequently, be part of the Commission’s enforcement priorities” (Emphasis added).

The loyalty-inducing effects of the Share Deal

5.35 The Authority’s preliminary view was that the Share Deal was likely to be a target rebate scheme with loyalty-inducing effects and therefore capable of foreclosing RTÉ’s competitors. The Share Deal could be classified as a target rebate because discounts were conditional on advertisers committing a specific share of their total television advertising budget with RTÉ (the “purchasing target”) during a reference period, which was normally of one year. The Authority was of the view that the Share Deal may have had loyalty-inducing effects and, therefore, may have been capable of foreclosing RTÉ’s competitors. The Authority’s view was supported by the factors relied upon by the European Courts and the Commission to establish potential loyalty-inducing effects. As it proved unnecessary to pursue the investigation further, the Authority did not draw any final conclusions on whether the Share Deal was in fact loyalty-inducing and detrimental to competition.

5.36 During the investigation, RTÉ argued that the Authority’s application of the factors below to the Share Deal did not demonstrate a loyalty-inducing effect to the legal standard required by the case law.

²⁴ See, for example, Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331 (paragraph 68).

²⁵ Case T-155/06, *Tomra v Commission*, OJ C 288, 23.10.2010.

(a) All-units rebate

5.37 All-units rebates (also known as “retroactive” or “rollback” rebates) are those that apply to all the purchases made during the reference period and not only to those purchases made in excess of the purchasing target(s) (incremental rebates). The loyalty-inducing effect of all-units rebates is very significant since they represent a strong incentive to reach the purchasing target(s) in order to benefit from discounts on the total purchases made over the reference period²⁶. In other words, all-units rebates make it less attractive for customers to switch to an alternative supplier even for a small number of units.

5.38 The Guidance Paper on Article 102 deals with all-units rebates in paragraphs 37 and 40 as follows:

“[...] The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates) [...]”. (Paragraph 37)

“In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to a loss of the retroactive rebates²⁷. The potential foreclosing effect of the retroactive rebates is in principle strongest on the last purchased unit of the product before the threshold is exceeded. However, what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit, but the foreclosing effect of the rebate system on actual or potential competitors of the dominant supplier. The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.” (Paragraph 40)

5.39 In the *Tomra* case²⁸, the General Court acknowledged that all-units rebate schemes “ensure that, from the point of view of the customer, the effective price for the last units [before the target] is very low because of the ‘suction effect’”²⁹ and that “a competitor’s average price will remain structurally unattractive” in the presence of a all-units rebate³⁰.

5.40 The Authority was of the preliminary view that the Share Deal was an all-units rebate scheme. At the point of the annual negotiation, an advertiser committed a given percentage share of its total television advertising budget with RTÉ for the relevant year. This was done on the understanding that the particular level of discount corresponding to that share of budget commitment would apply to all the purchases of television advertising airtime made by that advertiser from RTÉ during that year. A different (lower or higher) share of budget commitment would attract a different (lower or higher) level of discount applying to all the purchases of television advertising airtime made by that advertiser from RTÉ during that year. In the Authority’s preliminary view, the Share Deal was likely to make it less attractive for advertisers to switch even small amounts of demand for television

²⁶Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission (Michelin I)* [1983] ECR3461, paragraphs 70 to 73; Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, paragraphs 73 and 74.

²⁷ Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission (Michelin I)* [1983] ECR3461, paragraphs 70 to 73.

²⁸ Case T-155/06, *Tomra v Commission*, OJ C 288, 23.10.2010.

²⁹ Paragraph 267.

³⁰ Paragraph 270.

advertising airtime to RTÉ's competitors at the negotiation stage in order to benefit from the discounts on all the purchases of television advertising airtime made from RTÉ. In addition, it was likely that television broadcasters, in order to compete effectively with RTÉ, would have had to compensate advertisers for the loss of the discount over all the purchases made from RTÉ.

(b) The progressive nature and the magnitude of the level of discounts

- 5.41 Another important factor that may cause a discount scheme to have loyalty-inducing effects is its progressive nature. A scheme is said to be progressive if the discount rate increases according to the purchases made from the dominant undertaking³¹. This loyalty-inducing effect will be reinforced if, in the case of multiple purchasing targets, the discount rates corresponding to the higher purchasing targets are substantial³².
- 5.42 This factor has also been taken into account in the Guidance Paper on Article 102. According to paragraph 40:
- "The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors."
- 5.43 While the Authority acknowledged that the level of the final discount given to an advertiser under the Share Deal did not exclusively depend on the level of share of budget committed to RTÉ, the investigation showed that it was a very important factor in establishing the final discount granted to an advertiser. In general terms, the larger the share of budget committed to RTÉ, the larger the level of discount RTÉ would offer.
- 5.44 Under the Share Deal, the discounts corresponding to high budget commitments were substantial. The Authority's investigation showed that the Share Deal was designed to work most effectively for shares of budget commitments ranging between 50% and 70%, which, according to RTÉ, is a realistic negotiated share range. RTÉ tried to negotiate the largest share of budget possible and used a "supporting share" of [60-70]% as a benchmark for negotiations with advertisers. In 2008 and 2009, advertisers on average met the "supporting share" commitment and received a [20-30]% discount.
- 5.45 During the course of the Authority's investigation, advertising customers of RTÉ suggested to the Authority that committing a substantial share of budget with RTÉ was, in some instances, necessary to make placing an advertisement with RTÉ economically viable. A reduction of the share of budget committed to RTÉ could lead to a substantial reduction of the level of discount to the extent that, in some instances, low levels of budget commitment made placing the advertisement prohibitively expensive. Advertisers were thus encouraged to commit a substantial share of budget with RTÉ in order to benefit from a "decent"³³ level of discount.

³¹ Case T-219/99 British Airways v Commission [2003] ECR II-5917, paragraph 272.

³² Case T-203/01 Michelin v Commission [2003] ECR II-4071, paragraph 95.

³³ This is the term used by some of the advertisers contacted by the Authority.

(c) The individualised nature of the target

5.46 The Court of Justice of the European Union and the Commission have also given consideration as to whether the purchasing target set by the dominant firm is of an individualised nature (i.e., where the target is set for a specific customer) or standardised (i.e., where the target is the same for all or a group of customers). In general, the case law suggests that individualised targets are more likely to have a loyalty-inducing effect since they allow the dominant supplier to set a target which is close to all or most of the expected requirements of an individual customer, having regard to its historical purchases.

5.47 Paragraph 45 of the Guidance Paper on Article 102 also deals with the distinction between individualised targets and standardised targets as follows:

“It is normally important to consider whether the rebate system is applied with an individualised or standardised threshold. An individualised threshold – one based on a percentage of the total requirements of the customer or an individualised volume target – allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect. By contrast, a standardised volume threshold – where the threshold is the same for all or a group of customers – may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. If, however, it can be established that a standardised volume threshold approximates the requirements of an appreciable proportion of customers, the Commission is likely to consider that such a standardised system of rebates may produce anti-competitive foreclosure effects”.

5.48 The Authority was of the preliminary view that the Share Deal was likely to be an individualised rebate scheme. As indicated above, RTÉ’s contracts with advertisers are on a line-by-line basis. In other words, RTÉ negotiates with advertising agencies (or directly with advertisers) specific terms of the contracts for each individual advertiser. Despite being an important factor, the share commitment was not the only factor to determine the total discount given to the advertisers. Other factors such as volume, deal history, target audience and optimisation potential also had a significant impact on the level of discount. All of these factors would be assessed by RTÉ during the course of the individual negotiations with the advertisers. Under the Share Deal, the final discount depended on the individual negotiations between RTÉ and each advertiser. This suggested that the Share Deal may have amounted to an individualised rebate system liable to have foreclosing effects in the market.

(d) The duration of the reference period

5.49 According to the case law, it has been found that the loyalty-inducing nature of a system increases in proportion to the length of the reference period on which the rebate applies (i.e., the longer the reference period, the more loyalty-inducing the target rebate scheme). In the *Michelin* case³⁴, a reference period of one year was sufficient for the rebate scheme to have loyalty-inducing effects. According to the Court:

“[...] a quantity rebate system in which there is a significant variation in the discount rates between the lower and higher steps, which has a reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period, has the characteristics of a loyalty-inducing discount system.”

³⁴ Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 95.

5.50 Therefore, the Authority was of the preliminary view that the length of the reference period under which the Share Deal operated (i.e., one year) was substantial and thus likely to have a loyalty-inducing effect.

5.51 RTÉ disputed the Authority's apparent assumption that the length of the contract was driven by loyalty-inducing desires pointing to contextual factors such as (a) programme planning and commissioning is a long term process (6-9 months) and (b) TV advertisers plan their spending over their fiscal year.

(e) The market shares of competitors

5.52 The case law³⁵ suggests that the loyalty-inducing effects of a rebate scheme increases where the dominant undertaking holds a much larger market share than its competitors. A dominant undertaking with a market share significantly higher than its competitors generally constitutes an unavoidable trading partner in the market. This implies that customers will use alternative suppliers only for a limited portion of their purchases and such alternative suppliers would have to offer significantly higher rates of discounts in order to attract the dominant undertaking's customers. In the *British Airways* case, the Court took the view that that:

"[...] the pressure exerted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors (see, to that effect, *Michelin*, paragraph 82). It held that, in those circumstances, it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts or bonuses based on overall sales volume. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, even over more generous offers of its competitors. In order to attract the co-contractors of the undertaking in a dominant position, or to receive a sufficient volume of orders from them, those competitors would have to offer them significantly higher rates of discount or bonus". (Paragraph 75) (Emphasis added).

5.53 The information obtained during the Authority's investigation suggested that RTÉ held a much larger market share than its competitors. The Authority was of the preliminary view that the position of RTÉ in the market enhanced the likely loyalty-inducing effects of the Share Deal. As already noted, RTÉ disputed the Authority's preliminary views on the relevant market and its position in that market³⁶.

(f) Economic analysis of the potential foreclosure effect

5.54 The Guidance Paper on Article 102³⁷ outlines an additional factor or test which may indicate that a conditional rebate is capable of foreclosing competition. In relation to the assessment of price based exclusionary conduct, such as conditional rebate schemes, the Guidance Paper on Article 102, outlines an "as efficient competitor test"³⁸.

³⁵ Case T-155/06, *Tomra v Commission*, OJ C 288, 23.10.2010, paragraph 269; Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, paragraph 75.

³⁶ In particular, RTÉ noted that the available market share data did not reflect the recent increase in advertising minutage for RTÉ's competitors (an increase from 10 to 12 minutes per hour).

³⁷ OJ 2009/C45/02.

³⁸ Paragraphs 41 to 45.

- 5.55 With price based exclusionary conduct, an “as efficient competitor test” attempts to establish whether a hypothetical competitor, as efficient as the dominant firm, could effectively compete, given the pricing conduct of the dominant firm. This is done by comparing “the price” charged by the dominant firm with an appropriate measure of cost. The lower the price, the more likely it is that the conduct has a foreclosing effect.
- 5.56 With conditional rebates, “the price” which is compared against the appropriate cost benchmark is referred to as the “effective price”.

The effective price that the rival will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate it loses by switching, calculated over the relevant range of sales and in the relevant period of time.³⁹

- 5.57 The notion of the effective price therefore is based on the principle that a competitor would have to offer a price low enough to compensate a buyer for their loss of rebate if the latter switches part of its demand away from the dominant undertaking. If the effective price is below a certain cost benchmark, then the conduct is capable of foreclosing an as efficient competitor.
- 5.58 The Guidance Paper on Article 102 notes that the “as efficient competitor test” is carried out using economic data on costs and sales where such data is available and reliable. In this regard, two points are of note.
- 5.59 First, broadcasting is a two-sided market. On one side of the market, broadcasters attract viewers with programming. On the other side of the market, broadcasters attract advertisers based on their viewership. The two-sided nature of the market complicates the exercise of comparing the effective price with the appropriate cost benchmark.
- 5.60 Second, and as suggested in the Guidance Paper on Article 102, where a comparison of the effective price with an appropriate benchmark is, for whatever reason, not possible, the effective price may by itself provide an indication of loyalty-inducing effects of the rebate scheme.

The lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect.⁴⁰

- 5.61 The Authority did not carry out an “as efficient competitor test”. However, as suggested in the Guidance Paper on Article 102, the Authority did attempt to make a comparison between the effective price and the average price. The estimation of the effective price conducted by the Authority was based on what a competitor would have to offer to attract 1% of an advertiser’s budget away from RTÉ. As a working assumption therefore, the ‘relevant range’ (or “contestable share”)⁴¹ referred to in the Guidance Paper on Article 102 corresponded to a 1% share of budget. Based on this exercise the Authority found evidence that the effective price was low relative to the average price. In the Authority’s preliminary view, the Share Deal, therefore, could amount to a conditional rebate scheme with a loyalty-inducing effect.

³⁹ OJ 2009/C45/02, paragraph 40.

⁴⁰ OJ 2009/C45/02, paragraph 42

⁴¹ The contestable share of the demand is the amount for which the customer may prefer and be able to find substitutes.

5.62 These preliminary results had not been shared with RTÉ by the time RTÉ had made a proposal which satisfactorily addressed the Authority's concerns. Had the investigation proceeded, the Authority would have gone further in its analysis of the effective price and how it compared to the average price. In particular, the Authority would have refined its view of the 'relevant range', based on market enquiries, and recalculated the effective price(s) correspondingly.

Objective justification

5.63 In the enforcement of section 5 of the Act and/or Article 102 TFEU, the Authority will also take into account submissions made by a dominant undertaking that its conduct is justified⁴². According to the Guidance Paper on Article 102, a dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers⁴³. In this context, it is necessary to assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

5.64 The question as to whether the conduct is objectively necessary must be determined on the basis of factors external to the dominant undertaking (such as health and safety reasons)⁴⁴. The question as to whether the conduct results in substantial efficiencies that outweigh any anticompetitive effects requires demonstrating that the following cumulative conditions are fulfilled: (i) the efficiencies have been, or are likely to be, realised as a result of the conduct; (ii) the conduct is indispensable to the realisation of those efficiencies; (iii) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare; and, (iv) the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition⁴⁵.

5.65 It is incumbent upon the dominant undertaking to prove any objective justification and to support it with arguments and evidence. In this regard, it is not sufficient for the dominant undertaking to put forward "*vague, general and theoretical arguments*" in support of its objective justification⁴⁶.

5.66 During the investigation, RTÉ submitted that the Share Deal was objectively justified mainly for the following reasons:

- (i) The Share Deal is required to sell advertising airtime in an efficient manner.
- (ii) Discounts based on volume would not be appropriate.

⁴² Case 27/76 United Brands v Commission [1978] ECR 207, paragraph 184; Case 311/84 Centre Belge d'études de marché — Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) [1985] ECR 3261, paragraph 27; Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraphs 102 to 119; Case T-83/91 Tetra Pak International v Commission (Tetra Pak II) [1994] ECR II-755, paragraphs 136 and 207; Case C-95/04 P British Airways v Commission [2007] ECR I-2331, paragraphs 69 and 86.

⁴³ The Guidance Paper on Article 102, paragraph 27

⁴⁴ The Guidance Paper on Article 102, paragraph 29.

⁴⁵ The Guidance Paper on Article 102, paragraph 30.

⁴⁶ Case T-201/04 Microsoft Corp'n v Commission [2007] ECR II-000, paragraph 698.

(iii) The annual reference period under the Share Deal ensures efficient negotiations from the perspective of both RTÉ and advertisers.

5.67 The Authority took the preliminary view that RTÉ did not present full and precise evidence of any objective justification or substantial efficiencies that would outweigh any anticompetitive effects with the precision required by the Guidance Paper on Article 102. However, as stated earlier, at the point when the investigation was closed, the Authority had not come to a final view as to whether the Share Deal amounted to an abuse of a dominant position. Therefore, the Authority did not require RTÉ to substantiate any objective justification or efficiencies that would outweigh any anticompetitive effects.

Conclusion on abuse of dominance

5.68 At the time that RTÉ entered into the Agreement and Undertakings with the Authority, the Authority was of the preliminary view that the operation of the Share Deal may have loyalty-inducing effects which could amount to unlawful conduct by RTÉ in the market for television advertising airtime in the State contrary to section 5 of the Act and/or Article 102 TFEU.

6. THE PROPOSAL

- 6.1 On 26 August 2011, RTÉ submitted a proposal to the Authority. In its proposal, RTÉ undertook to modify its conduct in respect of the sale of television advertising airtime. In particular, RTÉ proposed that “... *it will continue to trade using share of TV revenue as a component up until the 30th of June 2012 only. RTÉ proposes that after this period the revenue share deal component will be abolished and will no longer feature as a component of selling airtime*”. In effect, RTÉ proposed to abolish the Share Deal from 1 July 2012.
- 6.2 The Authority raised some initial concerns in respect of the timeframe suggested by RTÉ to remove the Share Deal and asked RTÉ to provide further details as to why it required until 1 July 2012 to implement the new trading scheme. According to RTÉ, it was not possible to implement the new scheme earlier as RTÉ planned a fundamental change to the manner in which it sells airtime. While advertisers can plan and agree commercial terms on a quarterly basis, implementing the new scheme in the second quarter (i.e., March) of 2012 would, according to RTÉ, neither be technically nor practically feasible. However, RTÉ would commence the process of implementing a new trading scheme which would exclude the share of budget element as of the date of formal acceptance of the proposal by the Authority and the new trading scheme would be implemented no later than 1 July 2012.
- 6.3 The Authority was satisfied with the reasons provided by RTÉ regarding the proposed timeframe for the implementation of the new scheme.
- 6.4 RTÉ’s proposal forms the basis of the Agreement and Undertakings included as an Annex to this Enforcement Decision.

7. THE DECISION

- 7.1 The Authority is satisfied that RTÉ's legally binding undertakings included in the Agreement and Undertakings address the preliminary competition concerns identified during the investigation. Therefore, the Authority has decided to close its investigation concerning RTÉ's Share Deal.
- 7.2 The Authority retains full discretion to investigate any anti-competitive practices under Irish and European competition law whether or not they are covered by the Agreement and Undertakings in this case.

For the Competition Authority

Isolde Goggin
Chairperson

17 January 2012

ANNEX - AGREEMENT AND UNDERTAKINGS

The Competition Authority

-and-

Raidió Teilifís Éireann

AGREEMENT AND UNDERTAKINGS

This Agreement and Undertakings is made by and between the Competition Authority (the "Authority") and Raidió Teilifís Éireann ("RTÉ") on the date set forth below. The Authority and RTÉ are referred to collectively herein as the "Parties".

WHEREAS:

1. The Authority has been investigating allegations that RTÉ was operating an anticompetitive discount scheme (share deal) contrary to section 5 of the Competition Act 2002 (the 'Act'). RTÉ cooperated fully with the Authority's investigation and responded to all queries arising from the aforementioned allegations.
2. Section 5 of the Act prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State.
3. The Authority's investigation identified concerns that the Authority has in respect of certain types of arrangements used by RTÉ for trading television advertising airtime. In particular, the Authority was concerned that RTÉ's scheme for the sale of television advertising airtime under which the discounts given to advertisers depend, among other things, on the percentage (i.e. share) of the advertiser's total television advertising budget committed with RTÉ may give rise to an infringement of section 5 of the Act.
4. The Authority notes that RTÉ indicated to it that quite separate to the concerns raised by the Authority that RTÉ intended a fundamental review of how it sells airtime along with the planned introduction of a new scheme in order to *inter alia* improve efficiencies within RTÉ.
5. The Authority informed RTÉ that this Agreement and Undertakings resolves the concerns of the Authority.

Undertakings

6. RTÉ undertakes that, from 1 July 2012, the share of budget element of their scheme for the sale of television advertising airtime shall be discontinued and abolished and shall no longer feature as a component of RTÉ's trading scheme. Under the new trading scheme, discounts given to advertisers shall not depend on the share of the advertiser's total television advertising budget committed with RTÉ.
7. RTÉ undertakes that it shall start the process for implementing the new trading scheme (excluding the share of budget element) as at the date of formal acceptance of the Undertakings by the Authority, such new trading scheme to be implemented no later than 1 July 2012.
8. On the execution of this Agreement and Undertakings, the Authority undertakes that it shall conclude its investigation in this matter and shall refrain from instituting proceedings against RTÉ in relation to the operation of the share deal scheme for so long as RTÉ remains in compliance with the undertakings set out in paragraphs 6 and 7 above.
9. This Agreement and Undertakings shall be and is intended by the Parties to be a binding and enforceable agreement which may be enforced by the Parties by an action in any court of competent jurisdiction in the State.
10. This Agreement and Undertakings shall be binding on both RTÉ and on any organisation which in the future carries on business which is the same or materially similar to the business of RTÉ.