

28 April 2021

Sent by email to: pac@oireachtas.ie

Brian Stanley, TD
Chair of Public Accounts Committee
Committee of Public Accounts
Leinster House
Kildare St
Dublin 2
D02 XR20

Dear Chair

Thank you to the Committee for their engagement and interest in RTÉ's work at the Committee session yesterday.

In the opening statement made by Deputy Carroll MacNeill, the matter of equity in relation to public service content, and more particularly the carriage of RTÉ channels on subscription services was raised. The option of requiring a mandatory contribution or fee for the provision of public service channels to such services, was explored by RTÉ a few years back when we commissioned research on the issue of 'retransmission fees'.

RTÉ channels remain among the most watched channels by Irish audiences who avail of pay TV subscription services and therefore are a key element of their overall consumer proposition.

I attach a copy of this research in case it is of interest to the Committee. It is notable that RTÉ has a range of "must offer" obligations; in that it must offer its services to a range of networks, with little security in a "must carry" scenario, whereby it can oblige platforms to ensure its carriage and prominence. There is scant provision for any attendant commercial return to RTÉ where RTÉ is obliged to offer its services. It is perhaps yet another example of how our broadcasting policies and legislation are lagging behind the significant changes that have occurred in viewing behaviour and in the structure and dynamic of the media market. The Broadcasting Act 2009 was implemented some eleven years ago, and so the legal framework is outdated.

On a separate issue, we would also like to make a clarification to the official records in relation to one aspect of the Evershed review outcomes. In response to a question raised as to the number of individuals who had been offered employment by RTÉ, Ms Eimear Cusack incorrectly stated that three individuals did not accept contracts of employment and had left the organisation. By way of clarification, two of those individuals are no longer with the organisation.. The third individual was designated an employee in that they continued to work for RTÉ with all relevant statutory entitlements being applied. We apologise for this inadvertent mistake and trust that this will be corrected in your own records.

Further to a question raised by Deputy Murphy as regards a recent settlement on a defamation claim, Ms Forbes stated that the cost of the payment in question had through a claim on our own insurance. On this occasion that was not in fact the case since the amount was below the insurance reserve within our policy.

That particular payment to charity arose because a guest during a live show incorrectly linked a particular party to the murder of a journalist. While it was clarified on the programme, there was a subsequent legal correspondence which resulted in a resolution by way of payment to charity.

Ireland, unlike the UK, does not have any defamation protections for live broadcasts. Defamation awards in Ireland are extremely high and many multiples of awards in personal injuries actions. Costs in defamation actions are also many multiples of costs in personal injuries actions. RTÉ has to take these matters into account in deciding whether or not to resolve matters outside of Court. Legal settlements for the most part are confidential. They are also commercially sensitive.

I trust this information is helpful.

Yours sincerely



Vivienne Flood
Head of Public Affairs, RTÉ

Private and Confidential

Submission to the Oireachtas Joint Committee on Communications, Climate Action and Environment

Platform-supplier relationships – the case for retransmission fees

On behalf of RTÉ

11th July 2017

“Asking cable companies and other distribution partners to pay a small portion of the profits they make by reselling broadcast channels, the most-watched channels on their systems, will help to ensure the health of the over-the-air industry in America.”

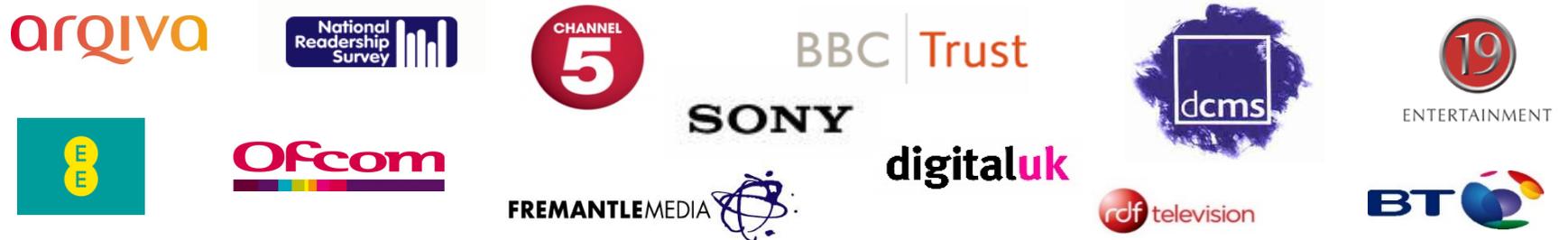
Rupert Murdoch speaking at News Corporation’s 2009 Annual Meeting

- Mediatique is a strategic advisory firm specialising in the media and communications industries
- Our experienced team of consultants serves the full spectrum of organisations within the media and communications sectors, including media & entertainment, digital marketing, technology & telecommunications, publishing, music and gaming

Strategy consulting



Market sizing and scoping



Commercial due diligence



- Platforms routinely pay “affiliate” fees to suppliers of pay TV channels, and have also paid for such services as VOD players and HD variants – this is in recognition of the value contributed by these services to the platform, confirming the latter’s ability to charge subscription fees for a bundle of services
- The amount payable arises out of commercial negotiation, whereby each side tests the others’ benefits and risks of carriage or non-carriage
- Platform operators have not paid for certain PSB channels in Ireland and the UK, as these have been available under various “must carry, must offer” rules and/or exemptions to Copyright
- It has become clear that certain functionality valued by pay TV customers – easy access to a range of popular channels, the ability to record and watch programmes at later time and VOD – is significantly enhanced by the availability of PSB channels on the platforms, with no compensation paid to the supplier
- Meanwhile, changes in Copyright rules and potentially in the regulatory framework for must offer, must carry, have again put the spotlight on “re-transmission” fees – that is, the payment of fees to suppliers of free to air services in recognition of their contribution to the business models of pay TV operators
- Both channel suppliers and platform operators benefit from the channels being available on platforms – the channel can charge advertisers for the eyeballs reached via the platform and the platform gets to derive subscription income through being able to offer a full range of popular services; the question is, who benefits most?
- Absent commercial negotiation, the only way of estimating an answer is to ask consumers what they would do if certain services were no longer available on a given platform – in other words, what revenues (advertising and subscription) are “at risk” if channels aren’t carried?

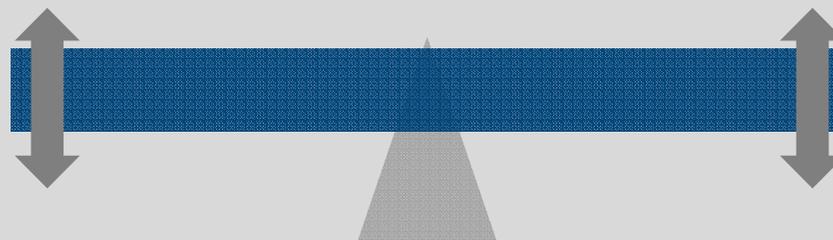
Mediatique has worked with RTÉ to consider the value of carrying Irish FTA channels to pay TV operators and the value of carriage to the channels themselves

- Channel suppliers and pay TV platforms in Ireland both benefit from the presence on pay TV platforms of mainstream TV channels:
 - the platform (e.g., Sky and Virgin Media) benefits by being able to offer popular channels and services fully integrated into pay TV propositions, thus helping to lock in paying customers
 - the channel supplier (e.g., RTÉ, TV3, TG4) benefits by generating viewing and advertising from Irish pay TV homes
- The regime covering distribution on pay TV platforms is rooted in ensuring universal free availability of these channels, and regulation obliges the free-to-air broadcasters to offer their channels (“must offer”) with limited options to negotiate the terms of carriage
- Such a regime takes no account of the relative benefits to each party of being carried – in a situation where one party benefits more than the other, this is inequitable and potentially damaging to commercial outcomes
- We have considered what might happen were key TV channels not available on pay TV platforms – informed by consumer research commissioned by RTÉ from Ipsos MRBI

Determining a fair balance of payments

The loss of subscribers to a **pay TV provider** would translate into lost revenue – in line with the subscription revenues placed at risk

While lack of PSB content on pay-TV platforms will lead to some subscribers cancelling their subscriptions, not all will do so – **free-to-air channels** will potentially lose viewing in those households that remain pay

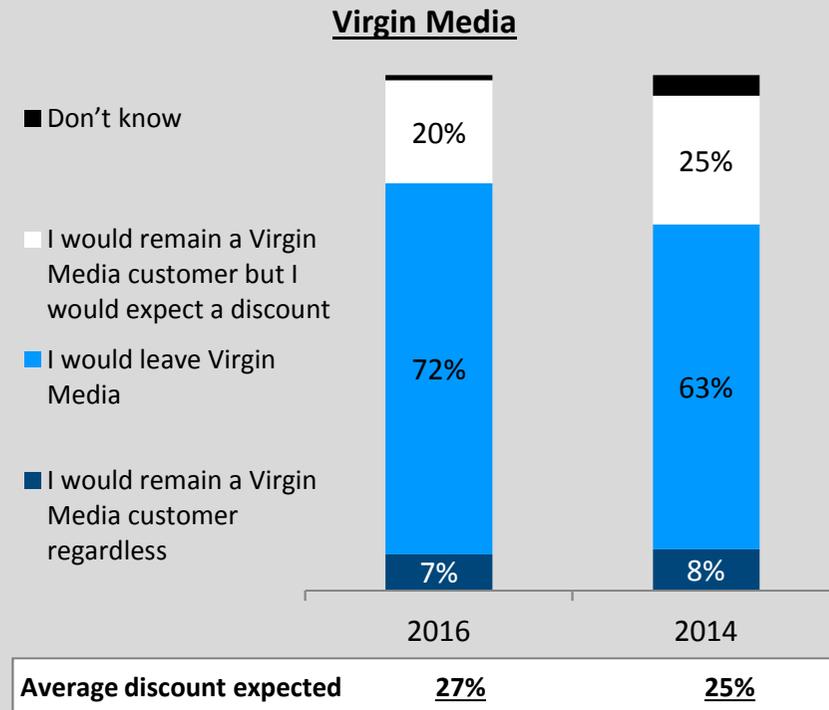
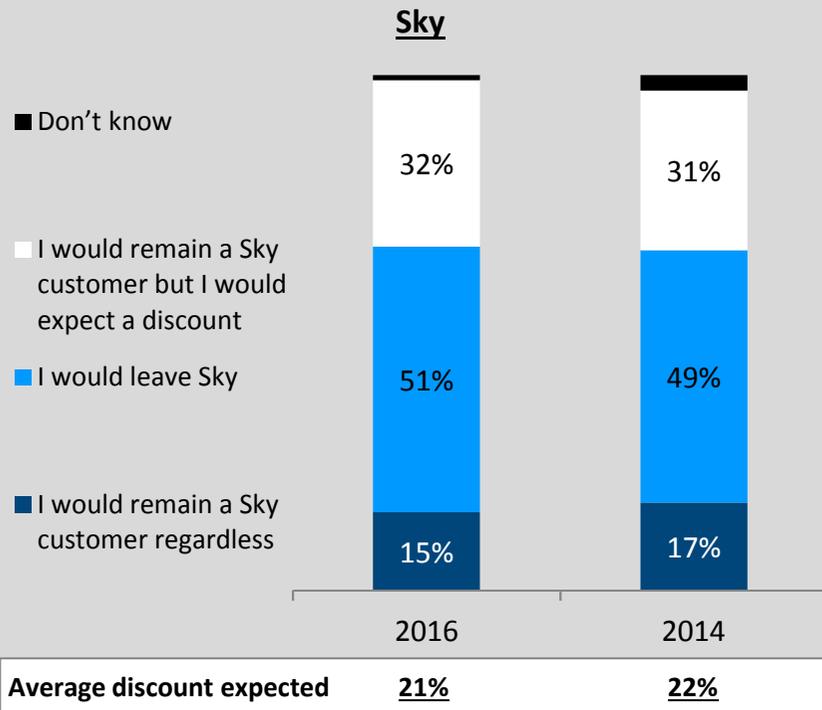


The difference between these two sets of “at risk” benefits determines the range of payments that ought to flow between the two parties in a negotiated outcome

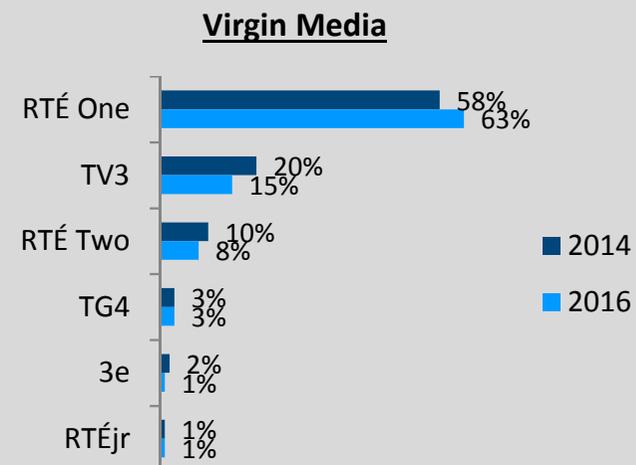
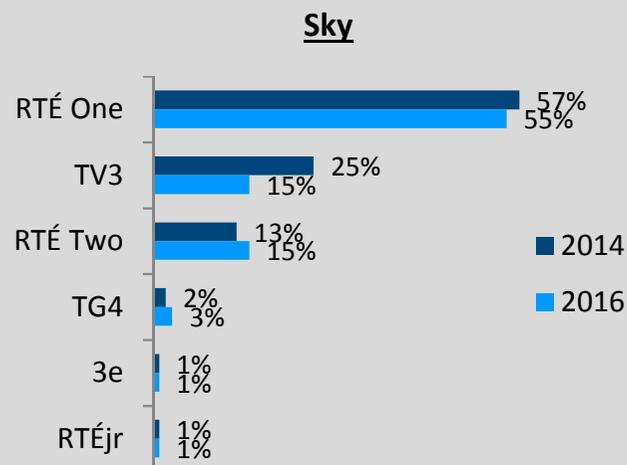
A fair balance of payments would arise where the parties agree to split the difference between their disbenefits – so that, at the end, each party profits equally from carriage

Survey results in 2014 and 2016 confirm that customers of Sky and Virgin Media ascribe significant value to the Irish free-to-air channels and would potentially cancel their subscriptions if the channels were not available

Imagine that your pay TV subscription would no longer give you access to Irish TV channels such as RTÉ One, RTÉ Two, TV3, 3e, TG4, UTV Ireland* and RTÉjr. Which of the following would you do?



Among all subscribers, which of these channels are the most important for you to be able to watch?



Source: Ipsos MRBI survey (2014, 2016)

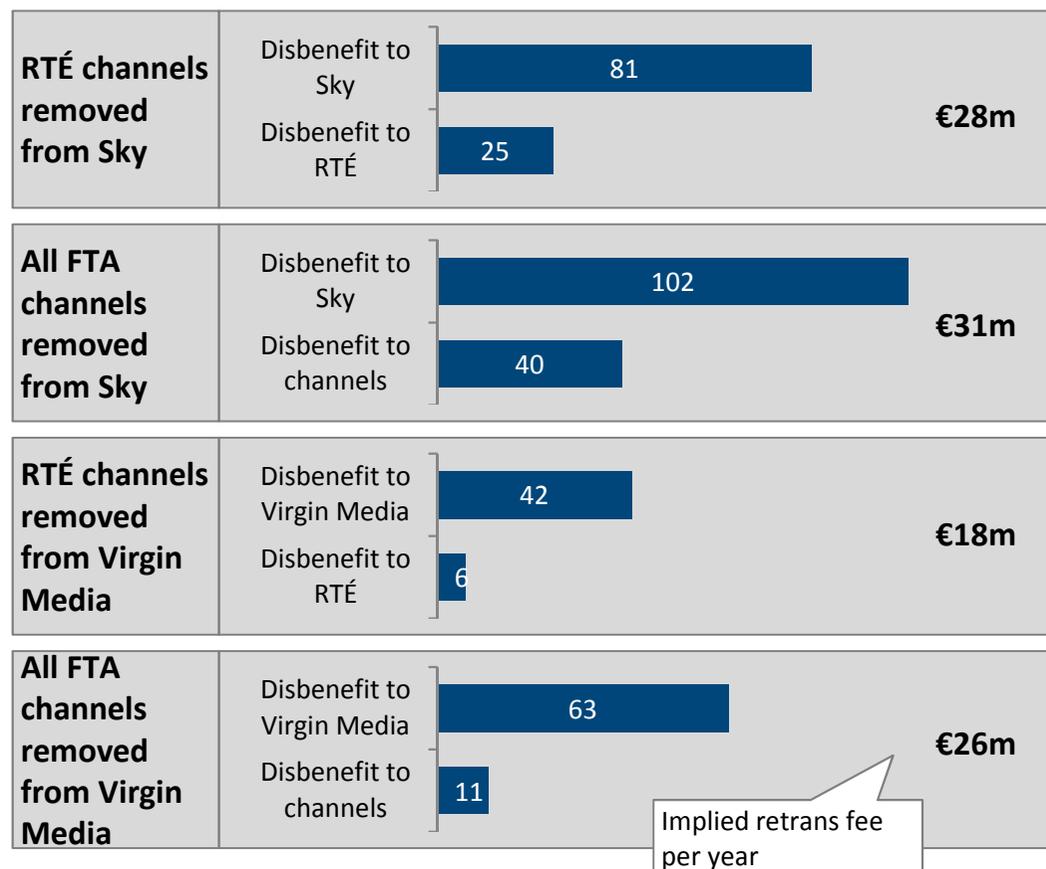
* UTV Ireland only launched in 2015 and was not broadcasting at the time of the first survey; it was subsequently acquired by TV3 Group (in turn owned by Virgin Media) and renamed be3

Independent research suggests that the benefits that accrue to platform operators outweigh the benefits to FTA broadcasters

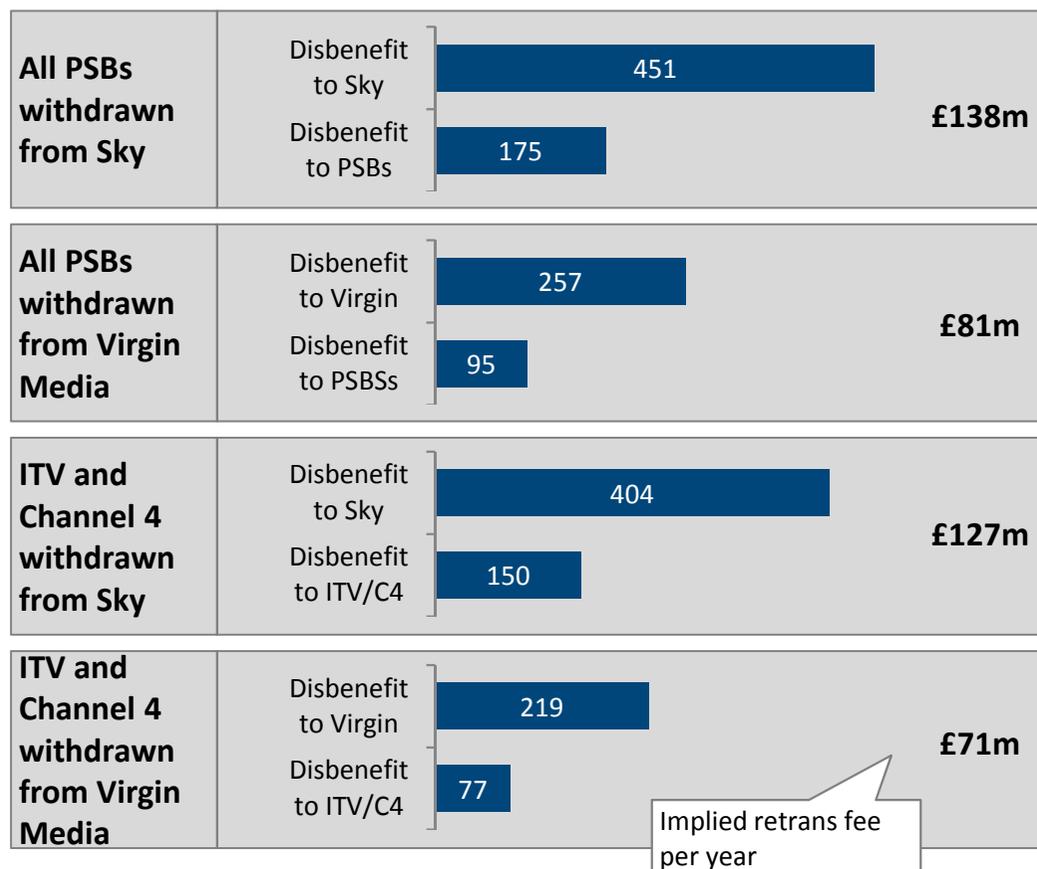
See appendix for detailed methodology

- To test the relative scale of benefits to platforms/channels, we assessed the impact of removing FTA channels from Sky and Virgin and the resultant impacts on (1) platform subscription (and other) income, and (2) channel advertising income
- Informed by survey data in Ireland and the UK, the scale of benefits are skewed in favour of platforms

Platform/channel disbenefits from withdrawn carriage, €m (2016 data)



Platform/channel disbenefits from withdrawn carriage (2014), £m



Three key developments in the UK are likely to be of interest to the Irish government and regulators....

- Against major market developments (including growth of PVR use and VOD), channel groups have been seeking better terms for the supply of their services to platform operators
- This has been informed particularly by concerns that popular services tending to lock in pay TV subscribers are highly reliant on access to PSB content for which the platform operators do not pay
- The chances of re-calibrating the relationship between platforms and channels appear altered by three key events, all of them inter-connected

Repeal of s.73 of Copyright, Designs and Patents Act 1998

- Following the 2016 ruling on TVCatchup by the CJEU, the UK Government conceded exemptions for cable were no longer fit for purpose
- Reviewing the issue of re-transmission payments and whether EPG prominence was a countervailing source of value, initially concluded the repeal should lead to a “zero net fee” position
- In subsequent debates on the Digital Economy Bill, government ministers shifted to the possibility of “contractual arrangement” between platform providers and PSBs

Virgin’s EPG policy review

- In May 2017, Virgin Media launched a consultation on its EPG listing policy
- It proposes auctioning empty slots – thereby generating a commercial value even to non-traded slots by implication
- The suggestion has been severely repulsed by the PSBs and may be subject to a formal complaint
- Virgin will likely point to this as a means of determining that any value generated for platforms by carrying PSBs is offset by the value the PSBs derive from being prominently displayed on platform EPGs

Ofcom’s statutory review of EPG codes under the Digital Economy Act

- Section 34 of the Digital Economy Act 2017 calls for Ofcom to review EPG codes by 2020 at the latest
- This was a pre-election compromise in response to efforts in the Lords to extend appropriate prominence to non-linear services
- In light of concerns expressed by PSBs about the Virgin EPG code review, we understand Ofcom will advance its review of EPG codes to late 2017/early 2018, which may result in greater clarity around EPG positions and their value in the content of platform fees

The relationship between platforms and channels – including the payment of Copyright fees – varies considerably by territory. Notably, the US market is one of many characterised by payments to FTA channels

Platform/channel relationships in territories where Sky and Virgin Media operate

Country	Copyright fees paid to broadcaster / producer	Carriage / access terms favour broadcasters over platforms	Extra transmission cost paid by platform
Austria		?	
Belgium ¹	²	?	
Czech Republic			
Germany			
Hungary ³			
Italy	⁴		
Netherlands			
Poland			?
Romania	?	?	
Slovakia	?		?
Switzerland ⁵	⁶	?	
UK			
US			
	<i>Extent to which copyright protections extend to payment of re-transmission fees to FTA networks</i>	<i>Extent to which must offer obligations are matched by must carry (e.g., US has no must offer obligation on channels)</i>	<i>Extent to which satellite transponder costs are funded by platform operator(s) (vs the channels themselves)</i>

See appendix for list of sources

¹ For the purpose of this exercise, we have ignored the different regimes applying to different regions in Belgium

² The academic literature available suggests that copyright fees paid to producers / broadcasters amount to up to 15%

³ Copyright fees are paid by the manager of the Broadcasting Fund, a public institution – not clear if this is funded by cable operators

⁴ A decision by the Italian regulator AGCOM in 2015 required Sky, the only pay TV DSat provider, to pay retransmission fees to RAI. Since then, Mediaset – the largest commercial FTA broadcaster – has taken its channels off of Sky and sued it in order to obtain payment of retransmission fees. The legal dispute is still pending; however, AGCOM has issued a note explaining that its 2015 decision only pertained RAI and not commercial broadcasters

⁵ Not subject to EU legislation

⁶ The academic literature available suggests that copyright fees paid to producers / broadcasters amount to an average of 12%

Re-transmission fees are payable (in some form) in many jurisdictions globally – key benchmarks suggest that Mediatique’s estimates are broadly in line

The US market will generate up to \$7bn in retransmissions fees in 2017

- US FTA networks are able to resist re-transmission unless platforms negotiate a consent fee – with up to \$7bn payable in 2017 to a range of FTA channels
 - As an example, CBS might secure a net fee of \$0.80 per subscriber per month (after adjusting for payments between networks and affiliates), based on a viewing share of 7% across all homes (Source: Kagan, Pivotal)
 - If we upgrade the payment per subscriber by the differential in viewing share between RTE and CBS, then RTE’s read-across would be around \$2.85 per subscriber per month, or €40m across all Irish pay TV homes
- Interestingly, Rupert Murdoch’s 21st Century Fox is a prime beneficiary of such payments, linked to the FTA Fox TV services, even though Fox’s sister company Sky in the UK and Ireland disputes that retransmission fees have any role to play here

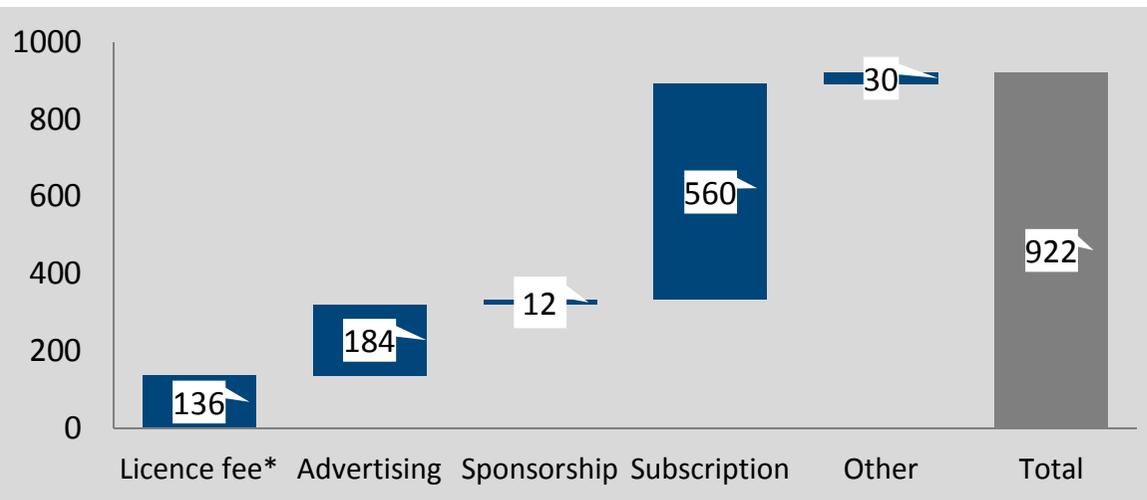
The European position is less clear...

- Despite “harmonisation” within the European Union, there is in fact very little commonality of approach in relation to payments made between channel groups and platforms (different markets have evolved different systems)
- In Belgium (another country sharing linguistically porous borders with larger markets), payments are made by platform operators to VRT, set at around 15% of cable operator entry-level prices for all Belgian PSBs
- Applied to the Irish market, this would suggest a payment of around €18m for the Irish PSBs –in line with Mediatique’s modelling of a “fair” payment for RTÉ from Virgin

A comparison of the scale of TV revenues in Ireland indicates the relative market power of key market participants, with pay TV operators in particular able to generate significant sums

Subscription TV is by far the largest revenue stream in the Irish market

Total Republic of Ireland TV market by income category, 2016 (€m)



- Pay TV operators generate revenues from TV, broadband and telephony
- Current prices and take-up suggest an average TV ARPU for Sky of €48 (including VAT) and subscription revenues of €318m; assuming a lower TV ARPU for Virgin of €31, this implies subscription revenues of €116m
- In 2016, RTÉ allocated c.€115m of total Licence Fee income to TV. A further c.€21m of TV Licence Fee income was allocated to the Broadcasting Fund (TV) and TG4 support

Sources: RTÉ, Core Media, press reports, Mediatique. * Indicates licence fee income attributable RTÉ TV, TG4 and Sound & Vision (TV)

The pay TV operators are also able to secure advertising income themselves

Main ad sales houses SOV and advertising revenues generated – 2016 ROI

Channel Group	Share of Viewing*	Share of Commercial Impacts	Share of Advertising Revenues	Advertising revenues**
RTÉ	26%	34%	46%	€85m
TV3	16%	30%	29%	€53m
Sky Media, C4, Medialink	18%	30%	22%	€40m
Other	40%	6%	3%	€6m

- Both Sky and Virgin generate TV advertising income in Ireland (around €53m for TV3 Group and €25m for the Sky channels)

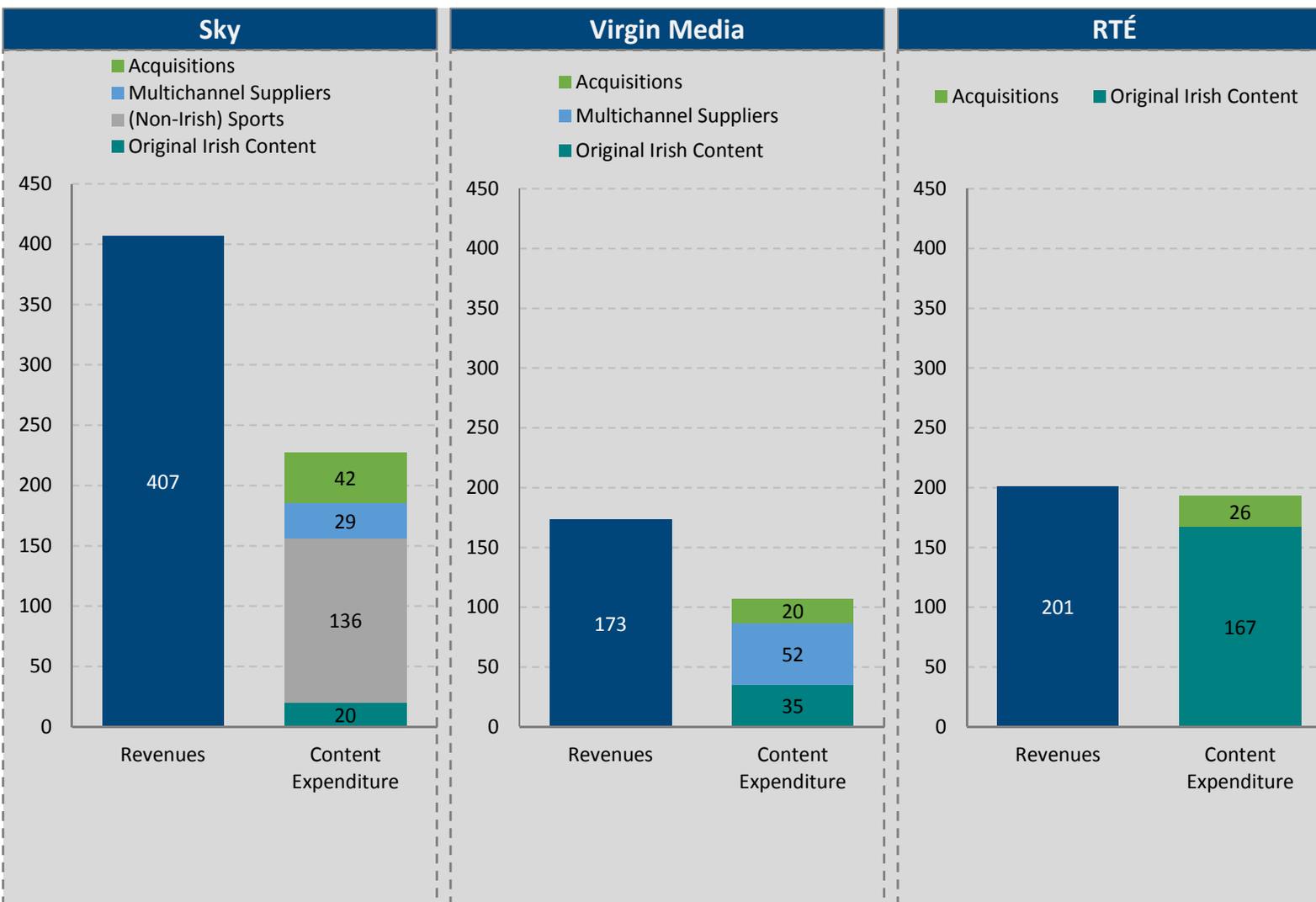
Sources: Mediatique, TAM, press reports; figures subject to confirmation from TAM later in 2017

*Viewing shares are for April 2017; all other figures relate to 2016

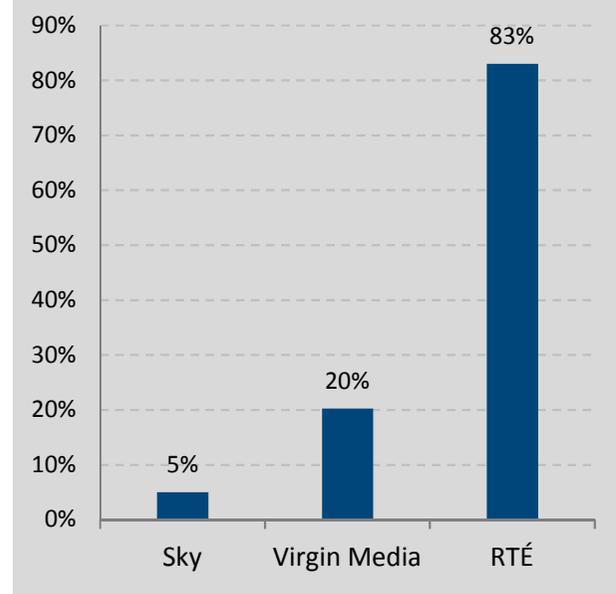
**Net of sales commissions and other payments; excludes sponsorship

These revenue streams, and the content expenditure they enable, confirm that RTÉ is by far more likely to spend incremental revenue on original Irish content – unsurprisingly, given its status, remit and objectives

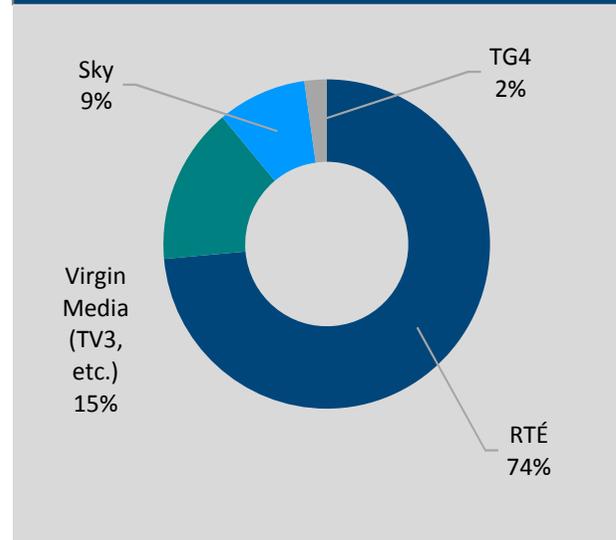
Relevant content expenditure (annualised) in the Republic of Ireland, 2016 (€m)



% of revenues spent on Irish originations



Irish originations spend by broadcaster



Where data on Irish programming is not available, we have used the Mediatique's estimate of the total UK + EIRE content expenditure and attributed a proportion of this to the Republic of Ireland equal to the percentage of customers in the Republic of Ireland out of the total UK/EIRE customer bases of the two pay TV companies

Source: Mediatique, company reports, press and trade estimates; all values latest full FY available and Mediatique estimates

Appendices

Appendix: a number of criticisms of a retrans framework have been routinely raised in both the UK and Ireland on behalf of platform operators; we dispute many of these claims...

“Payments will be passed on to the consumer – and licence fee payer”

- The US experience proves that a significant share of any fee for FTA channels is absorbed by the platform operator, given competitive restraint and in recognition of the clear value platforms derive from having access to popular content
- As context, Virgin and Sky have increased prices well above inflation in Ireland without incurring any cost to date related to the supply of mainstream RTÉ channels – these operators not require re-transmission fees as “cover” for subscription increases
- The fear of “double taxation” is only relevant in the case of broadcasters funded wholly via public funds – RTÉ has dual income streams
- RTÉ is also funded significantly from sources that are placed increasingly at risk by catch-up/PVRs offered by pay TV operators, and yet these operators do not pay for access to the services which are most likely to drive usage

“Viewers will experience blackouts if agreement cannot be reached”

- The risks of any blackout are shared – by the platform and channel supplier – suggesting they are unlikely to occur in a fair and open negotiation between parties from the two sides of the bargain
- In the US, black outs have been relatively short-lived, and nearly always settled in favour of the channel supplier

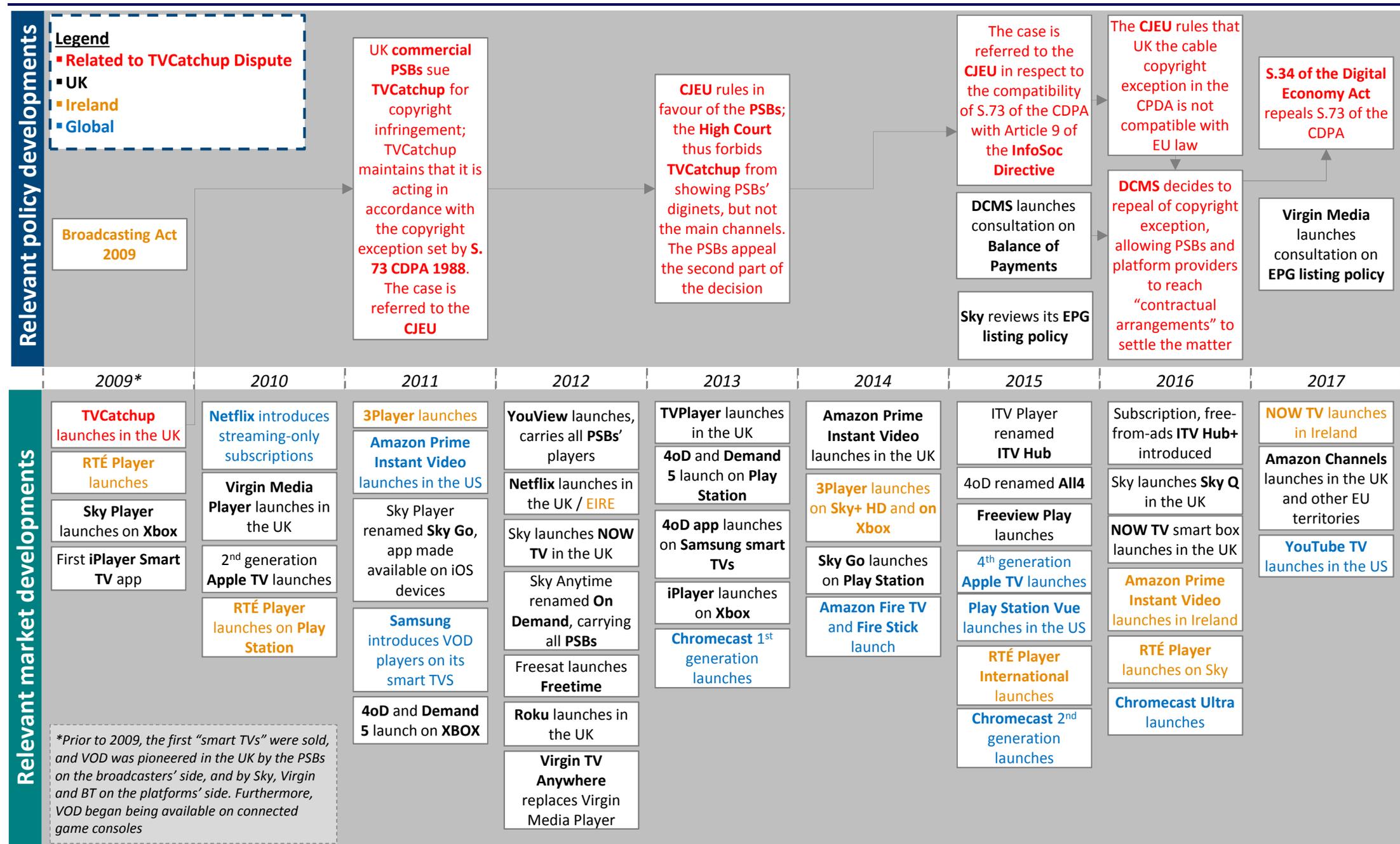
“Retrans fees ignore the value that channels secure through prominence”

- Appropriate prominence or “priority” is part of the PSB compact, given to PSB channels in return to obligations – it is not in the gift of platform operators
- While prominence on EPGs may be “tradeable” by platform operators, this does not extend to the ability of platforms to disregard “priority” in the Act
- Our modelling explicitly includes the value of EPG position by considering the impact on channels of not being on the EPG at all (by definition a greater impairment than simply losing relative positioning on the EPG)

“Determination of fees sets a dangerous precedent for the wider economy”

- We do not dispute that “determination” is not a valid backstop if negotiations fail
- The objective here is only to allow, through relevant reforms, platforms and channels to negotiate a fair commercial settlement – not to impose an outcome by regulatory fiat

Appendix: a range of market developments in the UK, punctuated by evolution in regulation and legal skirmishes, gave rise to complexities around platform payments and copyright....

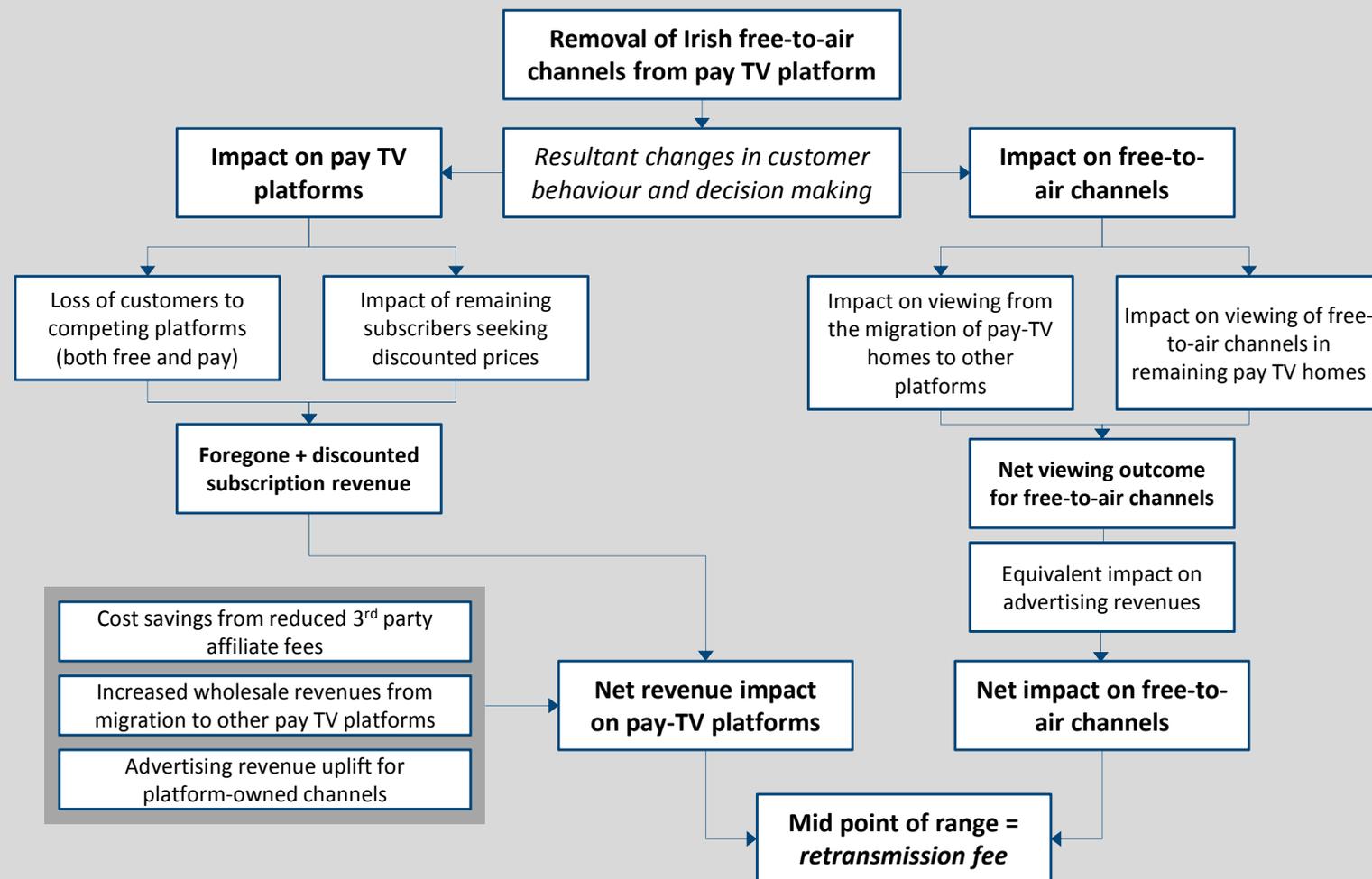


Appendix: we developed a detailed methodology to evaluate how a withdrawal of Irish free-to-air channels would affect both pay TV platform operators and the channels themselves

- A scenario where pay TV customers are faced with the loss of Irish free-to-air channels would result in a range of customer behaviours:
 - Some pay TV customers would cancel their subscriptions or seek a discount to their package prices
 - Some customers would remain pay TV subscribers and choose to forgo access to the Irish free-to-air channels, or rely on other means to access these channels (at some inconvenience)

- A fair balance of payments would arise where the parties agree to split the difference between their disbenefits – so that, at the end, each party profits equally from carriage

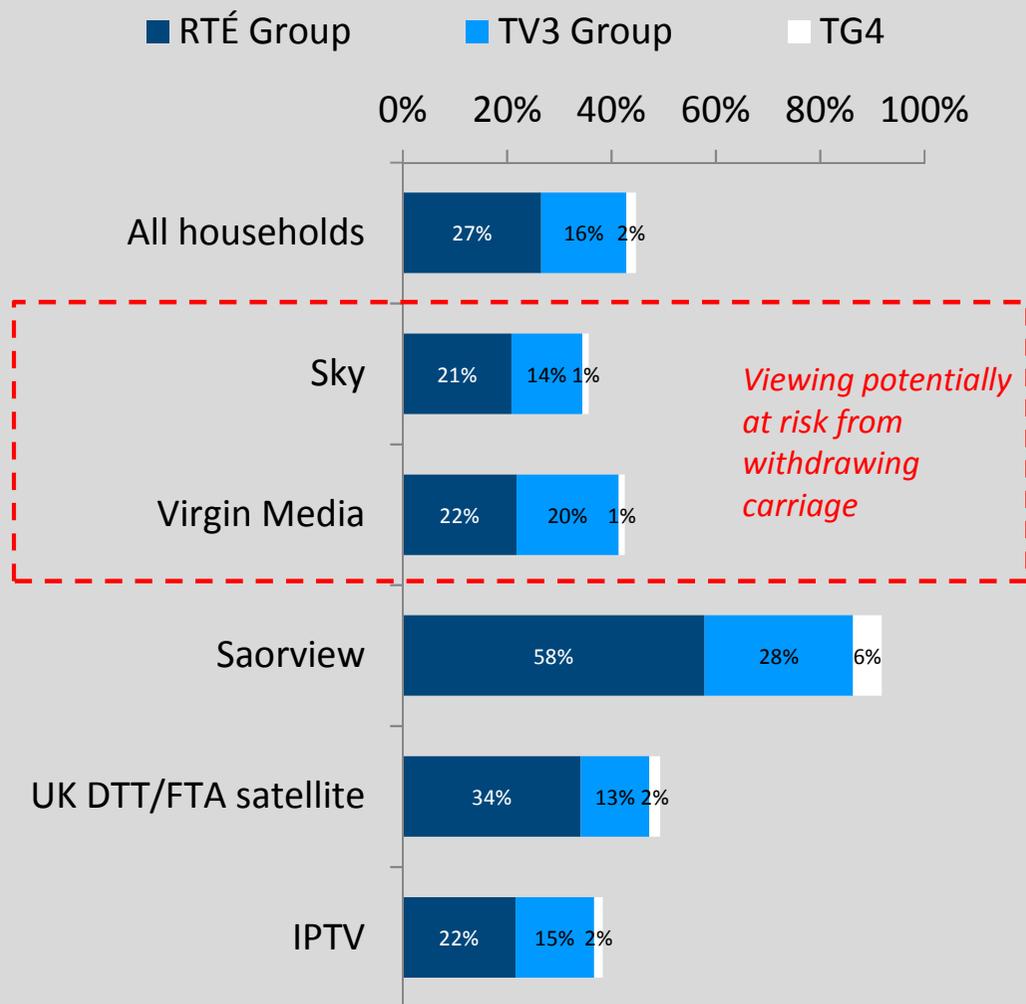
Methodology for determining potential retransmission fees



Calculations only relate to Sky and Virgin Media (formerly UPC), and exclude impact of withdrawing RTÉ Player

Appendix: were the Irish FTA channels to withdraw carriage from Sky or Virgin Media, they would place at risk viewing and advertising income derived from these platforms

FTA channels viewing share, by platform (2017)



RTÉ Group includes RTÉ One, RTÉ 2, RTÉ Jr, RTÉ News Now and relevant +1 channels
 TV3 Group includes TV3, 3e, be3 and relevant +1 channels

- The withdrawal of carriage from Sky or Virgin Media has mixed outcomes for the FTA channels
 - A withdrawal places at risk all viewing in those homes that remain
 - Conversely, channels will benefit from an improved viewing profile among those homes that switch to free-to-air platforms (where viewing shares are higher)
- Even those homes that choose to remain with Sky/Virgin may still watch the FTA channels via other devices – however, they may well reduce their overall viewing of these channels as they would not be listed on platform’s EPG and thus will not be as findable

Impact of withdrawing carriage from pay TV operators (pages 5-9)

- Ipsos MRBI survey (2014, 2016) – undertaken for RTÉ
- TAM Ireland – viewing share
- Nielsen – platform market share
- Mediatique – advertising market performance and future forecasts

Nature of carriage relationships in other territories (page 15)

- [Cullen International, 2006](#)
- [European Audiovisual Observatory, 2015](#)
- [EBU, 2007](#)
- [O&O 2011](#)
- [Advanced Television](#)

Retransmission payments in other territories (page 16)

- [PR Newswire](#)
- [Financial Times](#)

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10th July 2017

Submission of Raidió Teilifís Éireann for amendments to section 77 of the Broadcasting Act 2009 and section 103 of the Copyright and Related Rights Act, 2000.

1. Proposed Amendments to the Broadcasting Act, 2009 (“the Broadcasting Act”).

For ease of reference, RTÉ has inserted its proposed amendments below (marked in red) within the relevant sections of the Act. The amendments proposed are straightforward, and they are set out below with accompanying explanation provided as to why the amendments are sought. As the obligations set out in the Broadcasting Act apply to RTÉ, TG4 and TV3, the amendments proposed will apply to other Irish indigenous broadcasters.

Amendments to Section 77(11)

(11) *Without prejudice to the requirements imposed under sub-section (4), RTÉ, TG4 and the television service programme contractor shall ensure that their must-offer services are at all times offered for re-transmission (subject to agreement as to fair, reasonable and non-discriminatory terms of use and payment) by means of any appropriate network that is ~~available for reception in an intelligible form by members of the public on the whole of or in part of the State.~~ used by a significant number of end users as their principal means of receiving transmissions of programme material.*

The first proposed amendment is the addition of the words “and payment”. This would, in RTÉ’s view, address the issue that the must offer obligation as currently expressed in the Act can be read as requiring RTÉ, TG4 and TV3 (as the television programme contractor) to make their free to air television services/content available to a wide range of networks, with no return or consideration for that content being made to any of those broadcasters. The market for the distribution of high quality television content and channels in Ireland and elsewhere has changed radically. New platform operators are entering into the distribution market, bundling television phone (fixed and mobile) and broadband services. Larger network owners such as Virgin Media / Liberty Global and Sky have been launching a range of ancillary internet based television services to add to their existing cable and satellite offerings in order to increase their subscriber base. The market does not currently reflect the true value of Irish channels and content to those networks. As currently worded, the Act could be read as preventing a broadcaster from seeking to make any return, or from seeking to receive any payment

in respect of its channels and content being re-transmitted on such networks. This in turn limits the amount of investment that can be made by the broadcasters in indigenous content production.

The second proposed amendment, the wording inserted at the end of Section 77(11), addresses a separate issue. The wording proposed is designed to ensure that the wide ranging must offer obligation imposed on RTÉ, TG4 and TV3, which (as noted above) potentially extends to a vast number of networks irrespective of size, is at least proportional in its application to the broadcaster. The wording proposed at the end of the Section 77(11) above largely reflects the wording that is found at Section 272 of the UK's Communications Act, 2003 which sets out the must offer obligation applicable to relevant broadcasters in the UK. This proposed amendment also reflects the wording that already appears at Section 77(2) of the Act. The latter provision permits the BAI in consultation with ComReg to determine whether a network is used by a significant number of end users as their principal means of receiving transmissions of programme material. This arises in the context of Section 77(4) for example and the other sub-sections cited at Section 77(2). RTÉ would propose that a similar consultative process could apply with regard to the obligation of must offer at Section 77(11) thus ensuring consistency of approach to the obligation imposed on the broadcaster.

Amendment to Section 77(12)

RTÉ, TG4 and the television service programme contractor shall ensure that their must-offer services are at all times offered for broadcast or re-transmission (subject to agreement as to fair, reasonable and non-discriminatory terms of use and payment) by means of every satellite television service.

This is a similar amendment as already proposed to sub-section (11) above to address the issue that the broadcasters in question are obliged to offer their free to air television services to satellite television service providers without, on the face of it, any attendant entitlement to charge or secure any return or benefit in respect of the value of their content. The research that RTÉ has conducted confirms that the inclusion of high quality Irish channels and content (such as that provided by RTÉ, TG4 and TV3) within an offering by the likes of Sky directly benefits that platform in securing Irish subscribers. Again RTÉ would re-iterate the points made above with regard to the manner in which the distribution market has changed in Ireland and elsewhere. There is an urgent need to address within the legislative landscape, the unlevel playing field that currently exists between Irish broadcasters as content and channel providers on the one hand, and operators of satellite, cable and internet platforms on the other.

2. Proposed Amendments to the Copyright and Related Rights Act, 2000 **Section 103**

Repeal of Section 103

RTÉ proposes that the exception created by section 103 of the Copyright and Related Rights Act, 2000 is repealed in its entirety.

RTÉ proposes this for a number of reasons.

The first is that the Court of Justice of the European Union has ruled (in *ITV Broadcasting v TV Catchup*. C-275/15) that a similar provision in the UK's Copyright, Designs and Patents Act 1988 is not compatible with the Information Society Directive:

“Article 9 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, and specifically the concept of ‘access to cable of broadcasting services’, must be interpreted as not covering, and not permitting, national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations.”

The UK provision, section 73 and 73A of the 1988 Act, has now been repealed by the Digital Economy Act 2017, with the repeal shortly to become effective.

In the light of the CJEU's decisions in this case, it is clear that unless section 103 is repealed, the European Commission will be entitled to take proceedings against the State for contravening the requirements of the Information Society Directive.

The exception permits an operator of a cable programme service to re-transmit the free to air television broadcasts of RTÉ, TG4 and TV3 without any requirement to clear copyright. This exception was designed to ensure that where cable and MMDS providers were obliged to ensure that the then RTÉ television and radio services were carried, they would not additionally be obliged to clear copyright. This exception encouraged the roll out of cable and MMDS as a competing platform to off-air reception of terrestrial television broadcasts. Given the current state of development of the cable market in Ireland the rationale that informed the creation of section 103 has now fallen away and is no longer relevant.

In addition, cable companies no longer have local monopoly characteristics as the market for distribution in Ireland has fundamentally changed since the inception of this copyright exception in the Copyright Act, 1963. The obligation by way of “must carry” with regard to Irish channels has no relevance, as much has changed with the development of digital television on cable and satellite and on IP platforms. There is now a multiplicity of networks which make television content available as exemplified by the definition of “electronic communications networks” set out at the beginning of the Broadcasting Act. Irish broadcasters are already under an extensive must offer obligation in respect of a whole range of networks, of which cable/MMDS networks are

but one. Therefore the case for having a specific copyright exception for a specific platform simply no longer applies.

Amendment to Section 101

RTÉ proposes that Section 101 of the Copyright and Related Rights Act, 2000 is amended as follows:

*—(1) The making **in domestic premises** for private and domestic use of a fixation of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at another time ~~or place~~ shall not infringe the copyright in the broadcast or cable programme or in any work included in such a broadcast or cable programme.*

~~(2) Subject to subsection (3), the making by an establishment for private and domestic use of a fixation of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at another time shall not infringe the copyright in the broadcast or cable programme or in any work included in such a broadcast or cable programme.~~

~~(3) The Minister may specify by order establishments for the purposes of this section.~~

(4) Where a fixation which would otherwise be an infringing copy is made under this section and is subsequently sold, rented or (otherwise than to a person's family member or friend for private and domestic purposes) lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be deemed to be an infringing copy for those purposes and for all subsequent purposes.

RTÉ is suggesting these amendments to keep pace with fast changing PVR and set-top box technology.

The storage capacities of current set-top boxes have increased substantially in recent years. The volume of TV programming that can now be copied on the set top box within the home and stored indefinitely for later viewing has increased dramatically since the VCR-era when this provision was drafted.

Such deferred viewing, enabled by the commercial cable/satellite/IPTV network providers, where a viewer can choose to avoid watching advertisements (without any remuneration or compensation to broadcasters) has significant implications for the revenues of all broadcasters reliant on advertising.

More recent developments in cloud based digital storage are potentially even more damaging to broadcasters, whereby entire schedules of multiple channels are recorded in the cloud from which specific programmes can then be streamed back to subscribers at their request. Effectively, soon there may be no limitation on how much broadcast programming could be recorded or for how long it could be made available.

There are situations in other EU countries where, as RTÉ understands it, cable/IPTV operators who wish to move to using cloud storage (largely for cost reasons) are

inserting as standard clauses in their customer subscriber contracts a clause whereby each subscriber “requests” the cable IPTV/operator in advance to copy and store entire channels on their behalf based on a time shifting exception.

In such circumstances, the time shifting exception allowed for in Section 101 potentially permits a cable operator to provide what is in essence a comprehensive VOD service to its subscribers by recording and storing in the cloud the entirety of a broadcaster’s channels. This allows a cable operator to provide a commercially valuable service that, because of the extensive rights clearances and associated licence fees that would be involved, no broadcaster is in a position to do in respect of all of the television programmes in its channels.

The amendment inserted above that would require that the recording to take place in domestic premises goes at least some way to address this. In terms of completeness, RTÉ submits that the ability of the Minister to make an order permitting this potential loophole be removed. RTÉ is also proposing the deletion of the words “*or place*” to make it clear the recording should only be viewed within the residence.

Finally, the Information Society Directive¹ which permits the time shifting exemption leaves it open to each Member State to decide that rights holders receive “fair compensation”. The decision was taken by Ireland not to include such a requirement for compensation in the case of the time shifting exception. RTÉ submits that a review of that decision would be timely in view of the very significant technical developments since the enactment of the Copyright and Related Rights Act 2000.

¹ Directive 2001/29/EC