



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Spectrum Transfer and Lease Framework in Ireland

Procedures and Guidelines, and Notification Form(s)

Procedures and guidelines

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1 Introduction

1. This document sets out the Commission for Communications Regulation's (the "Commission") framework for the transfer¹ or lease² of rights of use of spectrum in
 - the bands designated by Decision No. 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual Radio Spectrum Policy Programme (the "RSPP Decision") (the "Framework"); and
 - the 694-790 MHz.
2. The Framework consists of:
 - procedures specified by the Commission concerning how undertakings must notify their intention to transfer or lease, or both, individual rights of use to radio frequencies to the Commission (the "Procedures"); and
 - guidance on how the Commission will determine whether or not a transfer or lease, or both, would distort competition (the "Guidelines").
3. For the avoidance of doubt, the Procedures detailed in Chapter 2 are the procedures specified by the Commission pursuant to Regulation 3(4) of the Wireless Telegraphy (Transfer Spectrum Rights of Use) (Amendment) Regulations 2017 (the "Regulations") (Statutory Instrument **No. __ of 2017**).

¹ A transfer means:

- the assignment by a licensee (the "Transferor") of some or all of a right of use granted under a licence to another party (the "Transferee") (Regulation 2 of the Spectrum Transfer Regulations); where
- the Transferor must divest itself of all rights of use transferred (Regulation 3(3) of the Spectrum Transfer Regulations).

² "lease" means the lease by a Licensee (the "lessor") of some or all of a right of use granted under a licence for a period less than the remaining duration of the right of use to another party (the "lessee"), after which the right of use reverts to the lessor;

4. Chapter 3 offers guidance on how the Commission will determine whether or not a transfer or lease, or both, would distort competition. These Guidelines reflect the Commission's analytical approach at the time of publication and should provide an enhanced level of predictability and certainty to notifying parties, their advisers, the business community and the public. However, it is not possible for the Guidelines to cover every issue or circumstance that may arise in a review of a notification. In practice, individual notifications involve a great variety of facts and situations, and the analysis of particular issues may need to be tailored to the specific circumstances at notification or deal with competition issues not specifically considered in these guidelines. Therefore, the Guidelines are interpreted in a flexible manner, and the Commission reserves the right to deviate from the Guidelines if it forms the view that it would be appropriate to do so in the specific circumstances of any particular case.
5. A notification form is attached at Annex 1 (the "Notification Form") which sets out the information which must be provided to the Commission in accordance with Regulation 3, or 4, of the Regulations. Interested parties are reminded that under Regulation 5(2) of the Regulations every notification of a spectrum transfer or lease, or both must be accompanied by an administrative fee of €5,000.
6. Interested parties will note that the Commission may update the Procedures and Guidelines from time to time following public consultation as appropriate.

2 Spectrum transfer and lease procedures

Notification and Publication

7. In accordance with Regulation 3 (*“Transfer of a spectrum right of use”*) and Regulation 4 (*“Lease of a spectrum right of use”*) of the Regulations, a notification of an intention to transfer or lease, or both, rights of use to radio frequencies between undertakings must be made on the Notification Form made available by the Commission for that purpose.³
8. Undertakings may make a joint notification, though they are not obliged to do so.⁴
9. Notification Forms must be delivered to the below address between the hours of 09.00 and 17.00, Monday – Friday (excluding public holidays). Where a Notification Form is received later than 17.00 it shall be deemed to have been received on the next working day. In addition to the hard copy, the Notification Form and as many of the associated supporting documents as are capable of being supplied electronically should be so supplied. All Notification Forms and associated supporting documents should be addressed to:

Spectrum Licensing Manager
Commission for Communications Regulation
One Dockland Central
Guild Street
Dublin 1
Ireland
D01 E4 XO email: licensing@comreg.ie

³ Annex 1 sets out the details of the Notification Form.

⁴ Interested parties should note that prior to making any formal notification of a proposed spectrum transfer or lease, the parties thereto may request a ‘pre-notification meeting’ with the Commission in order to discuss the information that they shall be required to provide as part of their formal notification.

10. Every notification of a spectrum transfer or lease, or both, must be accompanied by an administrative fee of €5,000 made payable to the Commission. A notification unaccompanied by the administrative fee of €5,000 is invalid.
11. Notifying parties should clearly identify information provided on the Notification Form and in any other associated supporting documents which should be treated as confidential.⁴

PHASE 1 ASSESSMENT

(a) Preliminary assessment

12. Upon its receipt by the Commission, the notification will be assessed as follows: (i) to ensure that it is a transfer or lease, or both, to which the Regulations apply; and (ii) to confirm that all requisite information and the administrative fee have been furnished.
13. Where the Commission considers that the transfer or lease, or both, are not ones to which the Regulations apply, it will so inform the notifying parties as soon as possible. In such an event, the Notification Form and associated supporting documents and the administrative fee paid will be returned to the notifying parties involved.
14. If, a notified transfer or lease would involve an amendment to a licence condition, the time period within which the Commission will assess the notification and issue a determination will be suspended until after it has completed its review of the amendment. In carrying out its review, the Commission will consult with the notifying parties and may publicly consult on the matter. Where, following its preliminary review of the amendment, the Commission considers that the amendment should not be permitted, the Commission will inform the notifying parties of its preliminary view and the reasons for same. The notifying parties will then be given the opportunity to amend the notified transfer or lease to address the Commission's concerns. For the avoidance of doubt, the time period will remain suspended until the Commission's concerns regarding the amendment have been addressed to the Commission's satisfaction.

⁴ Guidance on the treatment of confidential information by the Commission is set out in its published Guidelines on the treatment of confidential Information (Document 05/24).

(b) Publication

15. Within 5 working days from the receipt of a valid notification, the Commission will publish a notice on its website, which will contain the following information:
- the names of the notifying parties (and trading names);
 - the reference number of the notification (which will be assigned by the Commission);
 - the name and contact details of the Commission's officer(s) assigned to the transfer or lease notification;
 - the technical details of the transfer or lease notification;
 - the business activities of the undertakings involved in the transfer or lease notification; and
 - notice to third parties wishing to make submissions about the transfer or lease notification that they must do so within 10 working days from the Commencement Date.
16. The above mentioned notice will indicate whether the Commission's assessment has been suspended in order to carry out a review of any proposed amendments to licence conditions (see paragraph 14 above). Upon receipt of a valid notification and Notification Form, and subject to paragraph 14 above, the Commission's assessment of the notification will commence. The date on which the assessment commences is referred to herein as the 'Commencement Date'.

(c) Submissions

17. A closing date for submissions will be clearly set out in the above mentioned notice. The Commission will consider all submissions made within the specified deadline. The Commission may by notice on its website change the time limit for receipt of submissions, if it considers that circumstances so require. Submissions from third parties should clearly indicate any information which they consider should be treated as confidential, and that material should be set out in a separate annex.

(d) Requirement to provide further information

18. The Commission may request further information from the notifying parties and from other sources to aid in its assessment of the notification.⁵

⁵ Where information requested from the notifying parties, pursuant to Regulation 5(2) of the Regulations, is not provided to it within the timeframe specified in such a request, the Commission will suspend the time period within which the assessment of a notification must be completed and a determination made.

(e) Proposals

19. In the course of its assessment of a notification, the Commission may enter into discussions with the notifying parties with a view to identifying measures which would ameliorate any effects of the notified transfer or lease on competition (as referred to in paragraphs 4, 5 and 6 of Regulation 6 of the Regulations). In the course of any such discussions entered into, any of the notifying parties may submit proposals to the Commission with a view to the proposals becoming binding on it or them if the Commission takes the proposals into account and states in writing that they form the basis or part of the basis of its determination pursuant to the Regulations.

(f) Determination that the Spectrum Transfer or Lease may be put into effect

20. Having considered the information provided and all submissions received, the Commission, if it forms the opinion that the result of the transfer or lease will not be to distort competition, will determine that the transfer or lease may be put into effect. The Commission will, within 35 working days after the Commencement Date inform the notifying parties and any other undertakings or third parties who have made submissions, that it has so determined. On the date of the determination, the Commission, in addition to informing the notifying parties, will publish notice of the making of the determination on its website. The Commission will publish a non-confidential version of the text of its determination on its website at the earliest possible date thereafter (and in any event, no later than two months from the date of the determination).

PHASE 2 (FULL INVESTIGATIONS)**(a) Determination to carry out a full investigation**

21. Where having considered the information provided and all submissions received, the Commission is unable on the basis of the information before it to form a view that the result of a transfer or lease will not be to distort competition, the Commission will make a determination to carry out a full investigation, i.e. to proceed to phase 2.

(b) Publication of the determination to carry out a full investigation

22. The Commission will publish a notice on its website that it has decided to conduct a full investigation. The Commission will also engage with the notifying parties as to the basis for its determination to conduct a full investigation.

(c) Submissions

23. The notifying parties and any other undertakings or other third party is entitled to make submissions in writing no later than 15 working days from the date of publication of the above mentioned notice to conduct a full investigation. The Commission will consider all submissions made within the specified deadline. The Commission may by notice on its website change the time limit for receipt of submissions, if it considers that circumstances so require. Submissions should clearly indicate any information which should be treated as confidential which should be set out in a separate annex.

(d) Early determination to transfer or lease

24. If the Commission, within the provisional time period (as referred to in Regulation 7(1) of the Regulations), is satisfied that in its opinion the result of the transfer or lease (without or subject to conditions as the case may be) will not be to distort competition, it will, without proceeding to make an Assessment of the proposed transfer or lease, determine that the transfer or lease may be put into effect, or may be put into effect subject to conditions. The Commission will inform the notifying parties on the same date of its determination.

(e) Assessment

25. If, having considered all submissions, the Commission is not satisfied that the result of the transfer or lease will not be to distort competition, it will, within 40 working days of the date of the determination⁶ to conduct a full investigation, furnish its assessment (the "Assessment") to the notifying parties. This time period may be adjusted following discussion and agreement between the notifying parties and the Commission. The Assessment will set out clearly the Commission's concerns regarding the effect of the proposed transfer or lease on competition.

(f) Response to Assessment

26. Within 15 working days from the delivery of the Assessment, the notifying parties may respond thereto in writing.

(g) Consequences of failure to respond

27. Failure by any one of the notifying parties to respond within the time provided may be deemed to constitute a waiver of that party's right to contest the issues set out in the Assessment. Failure of all notifying parties to so respond may authorise the Commission, without further notice, to find the facts to be as set out in the Assessment and to adopt a final determination on the basis of such findings.

⁶ Subject to any suspension of the time period within which the Commission must complete its assessment and make a determination.

(h) Discussions and Proposals

28. Within 15 working days from the furnishing of the Assessment, the Commission may enter into discussions with the notifying parties and the notifying parties may make proposals to the Commission with regard to the manner in which the transfer or lease may be put into effect, or to the adoption of measures which would ameliorate any effects of the notified transfer or lease on competition.

FINAL DETERMINATION

(a) Phase 2 Final Determination

29. On completion of the phase 2 review period, the Commission shall make one of the following determinations:
 - That the transfer or lease may be put into effect;
 - That the transfer or lease may not be put into effect; or
 - That the transfer or lease may be put into effect subject to conditions specified by the Commission being complied with.

(b) Publication of Commission's determination

30. The Commission will publish notice of its determination on its website on the same day as the determination is made.

(c) Contents of the Commission's written determination

31. In every case, the Commission's final written determination in regard to the transfer or lease will include a statement of the facts, a summary of the information, evidence and submissions considered by the Commission and the reasons grounding that determination. The Commission will publish the written determination on its website, within 2 months after the making of that determination, after allowing the notifying parties an appropriate period to indicate whether certain information in the written determination should be redacted on the grounds of constituting a business secret. Such requests will be assessed in accordance with the Commission's procedures on the treatment of confidential information (Document 05/24) as may be amended from time to time.

3 Guidelines for assessment

3.1 Introduction

32. This chapter offers guidance on how the Commission will determine whether or not a transfer or lease would distort competition.
33. Circumstances may arise that are not clearly envisaged in these guidelines, and the Commission shall consider such circumstances on a case-by-case basis. These guidelines are interpreted in a flexible manner, and the Commission reserves the right to deviate from the Guidelines if it forms the view that it would be appropriate to do so given the specific circumstances of any particular case. Statements relating to distortive effects of the spectrum transfer or lease in this document should be interpreted as referring to the views of the Commission based on the information available to it.
34. To assist readers, explanations are set out below of a number of technical terms that are used in these guidelines, as follows:
 - a) The term **coordinated effects** refers to engagement between competitors in coordinated interaction, such as agreeing amongst themselves, either tacitly or expressly, to raise their prices or reduce their output;
 - b) The term **non-horizontal transfer or lease** refers to a situation where there is no overlap in terms of the products or services provided on the transferors or lessors' spectrum rights and products or services to be provided by the transferee or lessee on current (if any) and acquired spectrum rights of use;
 - c) The term **notification** means a notification of a proposed transfer or lease made to the Commission under Regulation 3(1) or 4(1) of the Regulations;
 - d) The term **notifying party** means the transferor or lessor and the transferee or lessee as the context so requires;
 - e) The term **transfer or lease** is set out in the Regulations; and

- f) The term **unilateral effects** refers to a situation where a transfer or lease would strengthen any undertaking's position in a market to such an extent as to allow it to act more independently, to an appreciable extent, of its competitors than it could otherwise do. For example, increasing the undertaking's market power to such an extent that it could largely ignore the reactions of its competitors and/or customers to actions on its part such as (but not limited to) profitably increasing its prices.
35. Transfers or leases are considered by assessing a number of factors, including amongst others:
- a) The effect of the transfer or lease on market structure (both wholesale and retail)⁷;
 - b) Whether the transfer or lease would likely have an effect on the level of competition among existing competitors in the market. In this regard, both unilateral and coordinated effects are examined; and
 - c) Whether the transfer or lease would likely have an effect of leading directly to efficiency gains⁸ that cannot be realised by any means other than the transfer or lease.
36. All lists of factors in these guidelines are considered to be non-exhaustive unless otherwise stated.

⁷ This can, for example, involve reviewing whether the spectrum transfer or lease would give rise to changes in the number of market participants, their capacity to provide wireless electronic communications services or other services, their market shares for different services (data, voice, etc) and other factors.

⁸ A spectrum transfer or a spectrum lease may lead to potential benefits to customers in terms of higher quality services and/or at lower prices (translated from the lower costs enjoyed by the undertaking), which may outweigh any potential distortions to competition (see also, paragraph 71 in relation to efficiencies).

3.2 Market definition

37. Having regard to established economic principles, relevant European Commission guidance⁹ and Irish and EU statutes and case law, the Commission will, where appropriate, seek to define the product and geographic scope of the relevant market(s) which may be impacted by all proposed spectrum transfer or lease which are notified to it. This provides a basis for deciding whether or not a transfer or lease would distort competition. In defining the relevant product and geographic scope of the market, the Commission may also distinguish between wholesale and retail markets (i.e. “upstream” and “downstream” markets) that are directly and indirectly relevant to a spectrum transfer or lease.
38. However, it should also be noted that in some circumstances the Commission may assess the effects upon competition directly, without having first defined the relevant market(s). For example, the distortion to competition test can be applied by identifying the competitors of the parties to the proposed spectrum transfer or lease. This may include competitors who are outside the relevant market(s) but are nevertheless potentially impacted by the proposed spectrum transfer or lease. Such additional factors may be relevant for the assessment of a proposed spectrum transfer or lease and therefore may be taken into consideration by the Commission when deciding whether or not a transfer or lease distorts competition.
39. Market definition, where utilised, provides a conceptual framework within which the impact of a proposed spectrum transfer or lease can be assessed. It is not always necessary to reach a firm conclusion on market definition - for example, where it is clear that the proposed spectrum transfer or lease is not likely to raise competition concerns on any reasonable definition of the market.

⁹ European Commission (1997), ‘Commission Notice on the definition of relevant market for the purposes of Community competition law’, Official Journal C 372, 09/12/1997 P. 0005 – 0013.

40. Market definition recognises that a spectrum right of use is a factor of production that combines with other intermediate inputs to provide a product to end-users. The Commission's approach is generally to be technologically neutral (unless specific circumstances dictate otherwise) and to focus on the actual use of spectrum, rather than on the technology employed. This general approach is based on the assumption that end-users of a particular electronic communications service, provided over a wireless network, generally have no preference as to the technological means of delivering that service (subject to considerations regarding quality, price and relevant product parameters, and speed of services). In this context, technologies and spectrum rights of use are both factors of production which enable undertakings to provide electronic communications networks and services.
41. In defining any relevant market(s), the Commission will consider whether any effective demand-side or supply-side substitutes exist such as would directly or indirectly constrain the price setting behaviour of a hypothetical monopolist supplier of the product being sold by the firm in question. To the extent that such effective substitutes may exist, and may constrain pricing behaviour, a broader product market definition may be appropriate.
42. A geographic market, is an area in which the parties to a proposed spectrum transfer or lease are involved in the supply of the relevant products or services, and in which the conditions of competition are sufficiently similar or homogeneous as to distinguish that area from other geographic areas in which the conditions of competition are appreciably different.
43. Overall, in order that the Commission may decide whether or not a transfer or lease would distort competition in any market(s), the parties thereto are encouraged to identify all relevant markets which may be affected (in the Notification Form attached at Annex 1), even though a firm conclusion on market definition may not be necessary in every case.

3.3 Market concentration

44. Assessment of market concentration takes into account the number of competitors in a market and their shares in that market. High concentration means a market containing a relatively small number of large firms. Any assessment of the effects of a proposed spectrum trade on market concentration, pre and post transfer or lease, should include an assessment of the extent to which different spectrum bands can be employed to provide substitutable services to end-users, or to other undertakings in the context of wholesale arrangements, while comparing the differing costs of providing the same service using different spectrum bands.

45. The Commission may assess the concentration of spectrum holdings across substitutable bands (rather than market shares or turnover which are unlikely to immediately change as a result of a transfer or lease). Any assessment would need to ensure that the bands being compared are in fact comparable. Assessments would be carried out in a flexible manner and on a case-by-case basis and also consider the extent to which pre and post transfer or lease that the two parties are able to provide specific services across their entire spectrum holdings.
46. The Commission will assess the potential effects of any proposed spectrum transfer or lease on the concentration of spectrum holdings having regard to a number of considerations, including:
 - Cost advantages for undertakings with larger (or more suitable) spectrum holdings and cost disadvantages for undertakings with smaller (or less suitable) spectrum holdings;
 - Increased capacity for undertakings with larger spectrum holdings and relative capacity constraints for undertakings with smaller holdings;
 - Ability of holders of larger quantity of spectrum rights to provide specific services (e.g. with faster speeds) verses holders of smaller quantify of spectrum rights; and
 - Whether any relevant spectrum right of use is being used efficiently.

3.4 Analysis of competitive effects

47. This section outlines the Commission's approach to analysing the effects of a spectrum transfer or lease on rivalry between existing competitors. It includes analysis of the effects on the behaviour of the parties to a transfer or lease and on the reactions of other market participants, particularly competitors and customers. The Commission's focus is on identifying the immediate constraints on the exercise of market power.
48. Spectrum transfer or lease do not affect undertakings' competitive positions directly. Without a corresponding sale of the hardware assets and customer base, undertakings' actual market shares in any upstream or downstream markets are generally unaffected in the direct aftermath of transfer or lease. The Commission's assessments of the likely competitive effects of spectrum transfer or lease recognise that allocated spectrum rights of use influence undertakings' ability to compete.

49. While spectrum transfer or lease will in many instances be expected to have positive results, some such transfer or lease could increase unilateral market power or increase the likelihood of collusion among existing competitors (known as coordinated effects). In both cases, only an increase in market power that is sustainable over time may be problematic.
50. Any assessment of potential unilateral and coordinated effects must cover a sufficiently long time horizon over which spectrum holdings can affect undertakings' cost structures and capacity (as opposed to focusing on immediate market shares and pricing which most likely would not change in the immediate aftermath of a spectrum transfer or lease).
51. The factors which the Commission may consider include all or any of the following:
 - Wholesale and retail market shares;
 - Concentration of spectrum holdings;
 - Incentives to increase prices post-transfer or post-lease owing to unilateral effects;
 - Incentives to coordinate;
 - Barriers to entry;
 - changes in potential service quality (e.g. speeds) post transfer or lease that could be replicated by competitors, absent increased costs to competitors; and
 - Efficiencies arising from the transfer or lease.

Unilateral effects

52. The Commission shall consider whether a proposed spectrum transfer or lease would strengthen any undertaking's position in a market to such extent as to allow it to act more independently of its competitors than it could otherwise do. For example, if a spectrum transfer or lease resulted in such significant cost advantages or quality of service advantages for one undertaking or in such a concentration of spectrum held by one undertaking, which increased the undertaking's market power to such extent that it could largely ignore the reactions of its competitors and/or customers to actions on its part such as profitability increasing its prices by a small but significant amount, then that would constitute a unilateral effect of the spectrum transfer or lease.

53. The Commission will assess whether any increased spectrum holding, post-transfer or lease, would likely give an undertaking the ability and incentive to increase its prices (or reduce its output) without concern as to the reactions of its competitors and/or customers. The Commission will consider both the short-term and the long-term effects of a proposed transfer or lease. The long-term horizon is relevant, in particular, if spectrum acquired through a transfer or lease is likely to lead to a significant long-term cost advantage for the acquiring undertaking over its competitors.
54. The Commission's assessment of an undertaking's ability and incentive to increase its prices will take into account a range of factors including the following:
- The ability of the undertaking's competitors to compete effectively with it, post-transfer or post-lease;
 - The likelihood of new market entry;
 - The likelihood of new spectrum bands becoming available;
 - The ability of the undertaking's customers to react to a price increase by switching to a competitor; and
 - whether there are any strong customers or groups of customers that can constrain the pricing behaviour of the undertaking (countervailing buyer power).

Coordinated Effects

55. A spectrum transfer or lease may negatively distort competition if it facilitates competitors engaging in coordinated interaction (tacitly or expressly), such as agreeing amongst themselves to raise their prices or reduce their output. Such behaviour is known as coordinated effects.
56. The Commission's assessment of the coordinated effects of any proposed spectrum transfer or lease would consider whether the transfer or lease would increase the ability and/or incentivise undertakings to engage in tacit or explicit collusion. The factors which the Commission shall consider include:
- Whether the transfer or lease has an impact on transparency in the market;
 - The availability of a punishment mechanism; and
 - Barriers to entry.

57. Concentration of spectrum may feed into further concentration in upstream and/or downstream market(s), and could create a situation whereby two or more undertakings could collude, in any market or markets.
58. The Commission's assessment would focus on whether the spectrum transfer or lease may result in more symmetric cost structures and capacities among competitors and/or a reduction in product differentiation, which may be conducive to tacit or explicit collusion.
59. Collusive behaviour need not be equivalent to monopolist behaviour to be harmful to consumers, and collusion may harm consumers even where some competitors are not party to the collusive arrangements or where there are occasional lapses into price wars.
60. The Commission also recognises that there are dynamic factors such as new technologies which may make it difficult to sustain collusive behaviour even if the spectrum transfer or lease were to result in a more concentrated and/or symmetric market structure.
61. If a spectrum transfer or lease was likely to increase cost heterogeneity then the likelihood of resulting coordinated effects should reduce. Where appropriate, the Commission may choose to consider dynamic factors in its analysis of competitive effects.

Spectrum transfer or lease with an entrant

62. Spectrum transfer or leases do not necessarily increase market concentration. A spectrum right of use may be transferred or leased to a smaller competitor by a larger competitor, or to a new entrant without any existing spectrum rights of use.
63. While each notified spectrum transfer or lease shall be assessed on its own merits, the Commission is unlikely to prohibit a transfer or lease from being put into effect where a new entrant without any existing spectrum right of use acquires such a right of use. Such a transfer or lease leading to the entry of an additional competitor would generally result in a more fragmented market and is accordingly less likely to result in competition concerns.

3.5 Other competitive effects considered by the Commission

Entry

64. If entry into a market is relatively easy, such that the behaviour of competitors in the market is constrained by the threat of potential entry, then the impact of a spectrum transfer or lease on competition in such a market may be minimal as the threat of potential entry may prevent both unilateral and coordinated effects.
65. The Commission would note, however, that in some markets for electronic communications services, there is a scarcity of spectrum and so market entry is difficult (although some barriers to entry may be lowered by liberalisation of the usage of spectrum in certain bands which may allow for the provision of substitutable services utilising alternative technologies).

Closeness of competition between parties

66. The extent to which the notifying parties were competitors before the transfer or lease may affect the impact on competition, and therefore the distortion to the competitive dynamic in the market. In particular, the impact on or reduction of competition would be greater the closer competitors the undertakings were before the transfer or lease (e.g. two undertakings targeting similar customer profiles and/or offering similar tariffs and bundles, which are perceived by consumers to be close substitutes).

Implications on adjacent markets (non-horizontal transfer or lease)

67. A spectrum transfer or lease could take place as a 'non-horizontal' transfer or lease where there is no overlap in terms of the services provided on the transferee's or lessee's current (if any) and acquired spectrum. Such a transfer or lease does not produce any change in the level of concentration in the relevant market. However, while non-horizontal transfer or lease are less likely than horizontal transfer or lease to create competitive concerns, distortions to competition are still possible in certain circumstances.
68. For an example, an undertaking with a strong position with respect to certain services provided using spectrum could enter a new market and leverage its market power to the detriment of competition in the long term. In considering the likelihood of anti-competitive leveraging, the Commission will consider, in particular:

- if the services are unrelated (i.e. neither substitutes nor complements), in which case it is unlikely that the undertaking could engage in anti-competitive leveraging;
- whether the transfer or lease may be efficiency-enhancing, in particular if the downstream services are complements, which may offset any detriment to competition;
- whether the acquiring undertaking may provide greater variety of services post-transfer or lease and achieve economies of scope which may offset any detriment to competition;
- the market position of the acquiring undertaking pre-transfer or pre-lease, in particular whether that undertaking already holds a position of market power one of the markets.

Efficiencies

69. If a spectrum transfer or lease gives rise to anti-competitive effects, it is possible that these could be compensated for/outweighed by improvements in efficiencies resulting directly from the spectrum transfer or lease. A transfer or lease of spectrum may lead to potential benefits to customers in terms of higher quality and lower prices (translated from the lower costs enjoyed by the undertaking), which may outweigh any potential distortions to competition. This depends on the spectrum band in question, as the marginal benefits of holding spectrum, and the ability to aggregate spectrum across bands, or holding contingent blocks of spectrum, differ across bands. It will be important to assess the likely magnitude of these benefits and to ensure that any benefits are passed on to customers.
70. The burden of proof for demonstrating that any efficiency benefits outweigh any negative effects would lie with the notifying parties, who may also need to demonstrate that the efficiencies would emerge with a sufficient likelihood.
71. The spectrum transfer or lease could also result in demand-side efficiencies that result in either an increase in the demand for one or more of the products provided over a certain spectrum band or bands in the spectrum trade, or that result in the creation of a new product or set of products (for example, a new wireless service).
72. Factors which the notifying parties may label as “efficiencies” but which the Commission would not consider to be relevant as part of its assessment include:
 - savings due to the integration of administration or head office functions;

- input price reductions related to buyer power;
- efficiencies related to economies of scale and scope that do not involve marginal cost reductions; and
- efficiencies that may reduce prices in one market but cannot compensate for price increases in another.

Annex: 1 Notification Form

Undertakings involved in a transfer or lease of spectrum rights of use to which the Wireless Telegraphy (Transfer or Lease of Spectrum Right of Use) Regulations 2014 (**S.I. No. 34 of 2014**) apply, must provide the following information set out below.

Undertakings may make a joint notification, though they are not obliged to do so.

List of required information:

1. General information¹

- i. Please specify the undertakings intending to transfer or lease individual rights of use to spectrum i.e. the 'Transferor or lessor'. Please also specify the other party to the proposed transaction i.e. the 'Transferee or lessee' (the transferor, lessor, transferee and lessee shall together be referred to as the "notifying parties").
- ii. Please provide the legal name, business address, telephone number, fax number, and web site of each notifying party and state the jurisdiction in which each is incorporated and their respectively geographical area of activity.
- iii. Please provide a description of the notifying parties (including their respective corporate groups, if relevant) in the proposed transfer or lease.
- iv. Please provide the name and contact details of the authorised legal representative, for each notifying party and an address for service of correspondence. Indicate to whom acknowledgement of receipt of the administrative fee paid should be sent.
- v. Please indicate whether the notifying parties are providing information separately or together as part of making a joint notification of the intention to transfer or lease.
- vi. Please provide the turnover of each of the notifying parties (including that of their respective corporate groups), both worldwide and in the State for the last financial year for which such information is available and for any available interim period in the current year.
- vii. Please provide details of the spectrum holdings of each notifying party and details of the spectrum holdings that the parties' subsidiaries hold in Ireland.

¹ Interested parties should note that prior to making any formal notification of a proposed spectrum transfer or lease, the parties thereto may request a 'pre-notification meeting' with the Commission in order to discuss the information that they shall be required to provide as part of their formal notification. At such a meeting, parties may request to submit less information than is set out in the Notification Form (because, for example, it is very clear that the proposed transfer or lease would not distort competition) and the Commission will consider any such request and may adjust its information requirements accordingly – i.e. the Commission may inform the parties that they may omit certain information from their notification (while reserving its right to require this information at a later stage).

2. Description of proposed transfer or lease

- i. Please specify the licence number of the licence involved in the transfer or lease, the specific spectrum blocks, or parts thereof, to be transferred or leased and the intended usage of the spectrum after the transfer or lease.
- ii. Please provide an explanation about the current and post-transfer or post-lease capacity utilisation with the appropriate technical information.
- iii. Please provide information on the options considered as strategic alternatives to the transfer or lease such as equipment upgrades, spectrum re-farming and change of technology.
- iv. Please outline a proposal for the division of spectrum usage fees between the licence holder and the transferee so that there is no net reduction in the spectrum usage fees payable to the Commission as a result of the transfer. In the case of a lease, the lessor shall continue to remain responsible for paying the licence fees.
- v. Please outline network investment plans in relation to the spectrum bands associated with the transfer or lease.
- vi. Please outline any contractual arrangements made in relation to the transfer or lease.

3. Market information

- i. Please provide a description and definition of what the notifying party/parties consider to be the relevant upstream and downstream markets that may be affected by the usage of the spectrum which it is proposed to be transfer or lease.²
- ii. Please provide an estimate of the size of the markets described above, information on recent entry, any potential entry, cost of entry, comment on the minimum efficient scale and minimum spectrum requirements for a viable business.

4. Views of notifying parties

- i. Please provide your views as to why you consider that the transfer or lease will not be to distort competition in markets described by you above in the State.
- ii. Please provide estimates of the shares of each of the transferee or lessee (including aggregated market share of any relevant group companies) and of the transferor or lessor in the market(s) described by you above. Provide also estimates of the shares of competitors in these markets and explain the basis of these estimates.
- iii. Please provide your views as to possible efficiencies which may occur as a result of the transfer or lease. Quantify these efficiencies and the extent to which consumers would benefit from them.

² This should include wholesale markets such as any MVNO arrangements

- iv. Please provide your views as to why the notifying parties believe the transfer or lease does not create a risk of radio interference.

5. Supporting Documentation

- i. Provide a copy of the most recent audited annual report for each of the notifying parties.
- ii. Provide a copy of any reports or other documentation relating to any analysis undertaken on the competitive effect of the transfer or lease on any market.

6. Licence Conditions

- i. Where the notifying parties consider that an amendment to a condition in the original licence may be necessary, or desirable, as a result of the transfer or lease (see also paragraph 7 iii below) please describe same in detail and the reasons why. In addition please provide detailed reasoning as to why in your view such an amendment with accord with ComReg’s statutory functions, objectives and duties.

7. Notifying Parties Declarations

- ii. Declaration by the transferor in a partial transfer³ (i.e. the current holder of the right of use of spectrum to be transferred): The transferor is and will continue to comply with all the licence conditions attaching to the rights of use to spectrum to be transferred following a partial transfer.
- iii. Declaration by the lessor: The lessor is and will continue to comply with all the licence conditions attaching to the rights of use to spectrum to be leased.
- iv. Declaration by the transferee: The transferee will comply with all licence conditions attaching to the original rights of use of radio frequencies that are to be transferred.
- v. Declaration by the lessee: The Lessee will comply with the licence conditions to be inserted into the Lessee’s licence as determined by ComReg.⁴

Transferor

Lessor

Transferee

Lessee

³ In the case of a transfer where all the rights and obligations transfer (i.e. a full transfer), as the transferor would divest itself of the rights it does not have to continue to comply with the licence conditions attaching to the transferred spectrum. This would be different in a partial transfer or lease where the transferor or lessor would have to commit to meeting all the relevant licence obligations

⁴ Please note that the Lessee’s licence conditions would be considered on a case by case basis, noting that it may only be necessary and appropriate to insert some of the Lessor’s licence conditions into the Lessee’s licence.

- vi. Declaration by both the transferor or lessor and transferee or lessee: The notifying parties confirm that they have considered whether an amendment to a condition in the original licence may be necessary, or desirable, as a result of the transfer or lease, and where this is the case have provided details of same pursuant to paragraph 6 above.

Transferor or Lessor	<input type="checkbox"/>
Transferee or Lessee	<input type="checkbox"/>

8. Declaration and Signature

	Transferor or Lessor	Transferee or Lessee
Signed:
Name (Print):
Position:
Company:
Date: