



Commission for
Communications Regulation

Future of the 2.6 GHz radio spectrum band

Decision to extend the termination date of three MMDS licences in force in the 2.6 GHz band in Dublin, Galway and Waterford to April 2014

Response to Consultation and Decision

Reference: ComReg 12/09

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Content

Section	Page
1 Introduction and Background	5
2 Co-terminating existing MMDS licences	7
2.1 Introduction	7
2.2 Overview of respondents' views	8
2.3 ComReg's assessment and response to views	10
2.4 ComReg's position	12
3 Decision Instrument.....	14
3.1 Statutory and legal powers.....	14
3.2 Decision	15
3.3 Statutory powers not affected.....	15
4 Next Steps.....	16

Annex

Section	Page
Annex: 1 Non-confidential submissions to Consultation 11/80 ("Document 11/80s")	17

1 Introduction and Background

- 1 In November 2011 the Commission for Communications Regulation ("ComReg") issued Document 11/80¹, which progressed the review of the 2.6 GHz radio spectrum band, a review commenced in May 2010.
- 2 Document 11/80 set out two main consultation issues:
 - Firstly, it gave notice of ComReg's intention to amend the licence conditions of three Microwave Multipoint Distribution Systems ("MMDS") licences in the 2.6 GHz band in force in Dublin, Galway and Waterford so that they would terminate in April 2014;
 - Secondly, ComReg invited respondents to comment on an independent report (Document 11/80a, the "Report") prepared by consultants Aegis Systems Limited assisted by Plum Consulting Limited ("Aegis and Plum") on the technical feasibility of the 2.6 GHz band being shared by MMDS and Next Generation Mobile Broadband ("NGMB") systems.
- 3 In relation to these issues, there is currently one licensee, UPC Communications (Ireland) Ltd. ("UPC Ireland"), which holds ten licences in the 2.6 GHz band for the distribution of licensed programme television services by means of an MMDS. These licences cover most of the State outside of the areas covered by cable.
- 4 As a result of a regulatory compliance action taken by ComReg in 2001 against the then licensee, three MMDS licences in Dublin, Galway and Waterford expire earlier than the other seven licences in the band. These three licences expire in April 2012 while the remaining seven licences expire in April 2014.
- 5 In Document 11/80 ComReg outlined why it considered it appropriate, proportionate and justified to co-ordinate the termination of all ten licences by extending the termination of the three licences in force in Dublin, Galway and Waterford. ComReg set out amongst other things its concerns that, without the proposed extension to the date of expiry of the three licences in question, the spectrum freed up by the earlier expiry date would effectively remain encumbered given the reasons set out in the Report. The reasoning for this is the large separation distances required to protect co-channel and adjacent channel spectrum use as set out in Document 11/80a.

¹ Consultation Paper, Future of the 2.6 GHz radio spectrum band (hereafter Document 11/80). This document should be read in conjunction with Document 11/80.

- 6 ComReg considered that such limitation on spectrum use would prevent it achieving its objectives and functions in relation to the efficient management of spectrum and noted the relatively short period between the expiry of the three licences in April 2012 and the expiry of the other licences in April 2014.
- 7 ComReg invited comments from interested parties, including users and consumers on the proposed amendment to the expiry date of the three licences so that they would terminate in April 2014 along with the other seven licences in the spectrum band.
- 8 Secondly, Document 11/80 invited interested parties to comment on the Report. The Report was published alongside the main consultation in Document 11/80a. The Report contains a high level technical assessment of the potential for the 2.6 GHz band being shared by MMDS and NGMB systems and an economic review of the allocation of the band solely for either MMDS or NGMB.²
- 9 This paper sets out ComReg's response and decision on the first consultation issue outlined above, namely amending the licence conditions of the three licences in force in Dublin, Galway and Waterford with termination in April 2014.
- 10 ComReg received extensive comments in relation to the second consultation issue. It will have regard to the comments received on this issue when it returns, over the coming months, to consult on the future use of the band from April 2014 and whether or not the existing licences should be extended beyond April 2014.

² Please also see ComReg Document 11/58s which includes a report on the potential uses and future licensing options for the 2.6 GHz band submitted by UPC Ireland.

2 Co-terminating existing MMDS licences

2.1 Introduction

- 11 In Document 11/80 ComReg gave notice of its intention to amend the licence conditions of three MMDS licences in force in Dublin, Galway and Waterford to extend their duration so that they terminate in April 2014. ComReg's proposal was based on the considerations set out in Section 4.1 of Document 11/80, which, in summary³, included the following:
- The extent to which the different expiry dates for the MMDS licences would affect ComReg's ability to achieve its objectives and exercise its functions in relation to the efficient use and management of spectrum;
 - The findings of the Report, which sets out difficulties in utilising the spectrum potentially freed up by the expiry of the three licences in question for services other than MMDS while the remaining MMDS licences continued to operate;
 - ComReg's belief that it would not be an efficient use of spectrum to allow this band lie fallow in those licence areas for 2 years when it could be used to continue the existing MMDS service; and
 - The potential that different expiry dates could lead to unwarranted confusion. The overlap of coverage between transmitters in different MMDS franchise areas gives potential for uncertainty and confusion for consumers as to which consumers would in fact suffer loss of service if some licences expired in 2012 while others expired in 2014.
- 12 ComReg also considered allowing the three licences expire in April 2012. It believed that the main benefit of this course of action would be that the principle of regulatory predictability would be upheld.
- 13 Further, ComReg noted that its proposal to co-terminate the MMDS licences in April 2014 could be argued to be unfairly providing an existing licensee with spectrum rights of use for two years, in respect of the three licences, for which it did not have to compete to acquire.

³ Where summary observations are set out in this paper, whether of previous ComReg proposals, respondents' submissions or expert reports on same, reference should be made to the original documents for the definitive version thereof.

- 14 On balance however, and given the prevailing circumstances, ComReg considered the proposal to amend the licence conditions to be appropriate, proportionate and objectively justifiable.
- 15 ComReg received eleven responses from the following interested parties⁴:
- Consumer - Kathleen Millar;
 - Consumer - Louis Fisher;
 - Consumer - Shane Daly;
 - eircom Ltd. and Meteor Communications Ltd. ("eircom Group");
 - Hutchinson 3G Ireland Limited ("H3GI")
 - L.A. Services;
 - Setanta Sports;
 - Telefónica O2 Ireland Ltd. ("Telefónica");
 - Ulster Television Plc;
 - UPC Communications (Ireland) Ltd ("UPC Ireland"); and
 - Vodafone Ireland Ltd.;
- 16 Nine of the eleven respondents to Document 11/80 provided views on the potential extension of the MMDS licences in Dublin, Galway and Waterford to April 2014 and these are discussed below. All respondents provided views in relation to the future use of the band post April 2014 addressing, among other things, whether or not the MMDS licences should be extended beyond 2014 up to 2019.
- 17 As set out earlier, ComReg will return to the latter matter in due course when it consults in relation to the future use of the band and whether or not the existing licences should be renewed beyond April 2014.

2.2 Overview of respondents' views

- 18 In summary, the majority of respondents agree with or do not object to ComReg's proposal to amend the licence conditions of the three MMDS licences to extend the termination date to April 2014.

⁴ Non-confidential versions of these are set out at Annex 1.0.

- 19 The reasons provided by the seven respondents that agree with ComReg's proposal are in the main the same as those set out in Section 4 of Document 11/80 and relate to the fulfilment by ComReg of its objectives and functions in relation to the efficient management of spectrum⁵. The summary reasons are set out in paragraph [11] above.
- 20 Respondents also express other views as follows⁶:
- H3GI claims that ComReg does not have powers to foreshorten licences;
 - Telefónica suggests an alternative method of addressing the issues identified namely, that ComReg extend the three licences in question and at the same time reduce the duration of the seven other licences by a weighted proportionate amount of time. It suggested that this would result in a common expiry date in August or September 2013 for all ten licences; and
 - eircom Group disagrees with ComReg's proposal for the reasons set out below.
- 21 eircom Group's concerns with ComReg's proposal include the following:
- *"The situation of different expiry dates is a direct consequence of ComReg exercising its functions in relation to the efficient use and management of spectrum. The termination dates of the three MMDS licences were set, in accordance with the provisions of SI 73 of 1999, following a material and sustained period of non-compliance by the licensee. ComReg now appears to be saying that a policy objective of co-terminus licences in the 2.6GHz should take precedence over promoting an effective compliance culture";*
 - *"It is a natural outcome of the regulators compliance action that the spectrum may lie fallow for two years following licence expiry. We assume that the regulator took this into account when determining the proportionality of its compliance action";*
 - *"The principle of regulatory predictability is an important principle which should not be summarily dismissed without objective justification";*

⁵ Other reasons were set out that amending the licence conditions would ensure plurality of broadcasting (given that the current MMDS operator provides an outlet for Irish indigenous channels and programming and that this would be maintained through the proposed amended licence conditions). ComReg does not have statutory powers to ensure plurality of broadcasting and therefore, these reasons are not considered in forming its position on the matter.

⁶ LA Services and Setanta Sports provide views on the second consultation issue and do not make submissions on the current proposal.

- *"ComReg offers no quantifiable evidence to substantiate its view". In particular "ComReg does not provide details of the number of customers potentially impacted by the expiry of the three licences. It would be instructive to consider the number of consumers potentially impacted in order to form a view on the materiality";*
- *eircom Group does not accept that there could be uncertainty in some areas as to which customers would suffer a lack of service, it states "we find it hard to believe that the licensee is not aware of the coverage area of its transmitters. It is possible that it may be difficult to predict service availability close to the edge of a transmitter coverage area in a precise manner. This would only be relevant to a very small number of subscribers and is something the licensee could address through manual inspection. As such we do not accept this as a valid reason for ComReg's proposed action.";* and
- *eircom Group also claims that in the expiry of other licences, affected licensees had to actively seek alternative arrangements and in all cases had to accept alternative licence fees.*

2.3 ComReg's assessment and response to views

22 ComReg has considered all the views expressed by respondents. This response to consultation summarises elements of submissions provided and ComReg's views in relation to these. All responses were fully considered and account taken of the views expressed in them. It would not be practical for ComReg to respond in detail to each aspect of every response.

23 First, ComReg rejects the point made by H3GI that ComReg does not have 'powers to foreshorten licences' and refers the respondent to Regulation 18 (2) (b)(i) of the Wireless Telegraphy (Programme Services Distribution) Regulations 1999⁷, which explicitly provided for a sanction of:

"(ii) reduc[tion] of the licence term by a period not exceeding 2 years;"

⁷ MMDS Licences for this band were first issued by the Office of Director of Telecommunications Regulation (ComReg's predecessor) in 1999 under the Wireless Telegraphy (Programme Service Distribution) Regulations 1999, and subsequently updated and re-issued by ComReg under the 2003 Regulations taking account of transitional arrangements at Regulation 22 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003 (SI.I. 306 of 2003). In the present matter, Regulation 18 (2) (b) allowed the Director who became ComReg to reduce the term by a period not exceeding 2 years.

24 Second, in relation to Telefónica's proposal that the expiration date of the seven other licences could be reduced by a weighted proportionate amount of time, ComReg does not consider that approach to be appropriate for the following main reasons:

- The proposal broadens the original penalty and proposes to reduce the duration of the other seven licences even though the initial regulatory compliance action related to three licences only. Therefore, the proposal does not seem to ComReg to be proportionate; and
- The proposal also introduces regulatory uncertainty, which could undermine regulatory predictability associated with licence duration generally and not just in the present matter. Readers are reminded of ComReg's stated position as regards licence duration as set out in ComReg Document 11/89 on "*Strategy for Managing the Radio Spectrum: 2011 - 2013*". In particular ComReg states that "*licence duration is set appropriate for the service concerned and the objective pursued taking due account of the need to allow for an appropriate period for investment amortisation*".

25 In relation to the points made by eircom Group and summarised in paragraph 21 above, ComReg believes that circumstances have changed considerably since the time when the term of the licences, then held by *ntl*, were shortened. In particular, ComReg notes the difference circumstances. For example at the time of the shortening of the licences there were a number of different licensees holding MMDS licences in different geographic areas of the State.⁸ Therefore the possibility of spectrum lying fallow following the termination of the licences in the Dublin, Galway and Waterford areas was at the time substantially less than it is at present. This was because of the possibility of competing licensees applying for MMDS licences and leveraging their MMDS operations so as to use the spectrum in the areas in question. Now, as all of the licences are held by UPC Ireland such possibilities are eroded, as it would be highly unlikely that a new undertaking could set up a new MMDS network and make a return on investment in the two year period up to the expiry date of April 2014.

26 ComReg agrees that the principle of regulatory predictability is important and considers that this is being upheld in the present process. ComReg Document 11/80 clearly set out the particular circumstances relating to its proposal and therefore ComReg rejects the claim that it is acting in an unpredictable manner, indeed the fact that it consulted on its proposal to amend the licences supports this fact. The decision to extend the duration of the three licences is an important matter and ComReg has given due consideration to all relevant views received.

⁸ The following licences were in operation at that time Chorus cells no. 10,11, 14 15 (and 7,8,9 and 12); Horizon cells no. 18, 19, 24; IWC Cork Communications cells no. 17, 22, 23; Suire nore cell no. 20, 21; Cable Management Ireland cell no 1,2,3,6.

- 27 In relation to eircom Group's claim that the number of consumers potentially impacted would be instructive in order to form a view on the so called 'materiality' of the proposal. ComReg notes that the licensee has met the requirement to pass some 73,500 homes in the three areas in question⁹. ComReg notes its statutory obligation when it considers that the duration of existing rights of use for radio frequencies should be extended to *"give due weight to the need to maximise benefits for users in circumstances where it is extending the duration of existing rights for use for radio frequencies"*¹⁰.
- 28 ComReg believes that while the issue of creating unnecessary consumer confusion is not as critical as some of the other rationale for making all ten licences co-terminus, it is nevertheless a relevant factor in making its decision in this matter, in circumstances where spectrum efficiency suggests that the three licences in question should be extended.
- 29 In relation to eircom Group's concern that in the case of expiry of other licence types, affected licensees had to actively seek alternative arrangements and in all cases had to accept alternative licence fees, ComReg notes:
- First, the respondent does not seem to take account of the particular circumstances associated with the licence expiry of the three MMDS licences, which is set out in Documents 10/38 and 11/80, and which differentiates ComReg's present proposal vis a vis the 'other licences' cited by the respondent; and
 - Second, if ComReg, having finalised its review of the band including its review of the operation of the MMDS licences, decides to extend the licences from April 2014 to a later date, it may later consult on the licence conditions for any renewal, such as the duration or the fee for renewing licences and could include indexation of licence fees as suggested by eircom Group. The current proposal is however, specific to amending the existing licences so that they co-terminate with the expiry of other licences in the band and return to the original licence duration.

2.4 ComReg's position

- 30 This section sets out ComReg's position having carefully considered respondents' views on the proposal. ComReg considers that it should amend the licence conditions of the three MMDS licences in force in Dublin, Galway and Waterford to extend the termination date to April 2014 for the following main reasons:

⁹ Part 5 of the MMDS licences on "Digital Rollout Plan" sets out obligations on the numbers of homes to be passed and the milestones for achieving same.

¹⁰ Regulation 11(1)(a) of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011)

- To ensure efficient use of radio spectrum and management of same;
- To assist it to carry out its objectives and exercise its functions in relation to spectrum (particularly as regards the ongoing review of the 2.6 GHz band);
and
- To take account of the desirability and requirements to have regard to the needs of specific social groups.

3 Decision Instrument

3.1 Statutory and legal powers

This decision is made by the Commission for Communications Regulation ("ComReg"):

- Pursuant to Regulation 18 of the Wireless Telegraphy (Multipoint Microwave Distribution System) Regulations 2003¹¹; and
- Pursuant to Regulations 11 and 15 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2011; and
- Having had regard to the analysis and reasoning set out in ComReg Document 11/80, which shall, where necessary be construed together with this Decision Instrument; and
- Pursuant to the functions and objectives of ComReg as set out in sections 10 and 12 respectively of the Communications Regulation Acts 2002 to 2011 and Regulation 16 of the European Communities (Electronic Networks and Services) (Framework) Regulations 2011;
- Having, where appropriate, complied with policy directions made by the Minister for Communications, Marine and Natural Resources under Section 13 of the Communications Regulation Act 2002¹²;
- Having, where appropriate, complied with its obligations under Regulation 17 of the European Communities (Electronic Networks and Services)(Framework) Regulations 2011; and
- Having regard to sections 5 and 6 of the Wireless Telegraphy Acts 1926 to 2009; and
- Having by way of public consultation given all interested parties the opportunity to express their views¹³ and having taken into account the view of interested parties who responded;

¹¹ S.I. No. 529/2003

¹² Dated 21 February 2003 and 26 March 2004.

¹³ Pursuant to its obligations under Regulation 12 of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2011 (S.I. No. 333 of 2011) and Regulation 11 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2011 (S.I. No. 335 of 2011)

3.2 Decision

ComReg hereby decides:

- To amend the termination date of the MMDS licences held by UPC (Ireland) Ltd for Dublin, Galway and Waterford in cells 4, 5, 13, 16, 27 to 19 April 2014. Details of these cells are as follows:

Cell number	Irish Grid Reference (centre point of cell)	Range (miles)
4	IF815117	20
5	IG282027	20
13	IM260272	30
16	IO283377	20
27	IS681128	20

3.3 Statutory powers not affected

If any section, clause or provision (or portion thereof) contained in this decision instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision (or portion thereof) shall, to the extent required be severed from this decision instrument and rendered ineffective as far as possible without modifying the remaining section(s), clauses(s) or provision(s) (or portion thereof) of this decision instrument, and shall not in any way affect the validity or enforcement of this decision instrument.

Nothing in this decision shall operate to limit ComReg in the exercise of discretions or powers, or the performance of functions or duties, or the attainment of objectives under any primary or secondary legislation applicable to ComReg from time to time.

This decision instrument will be effective from 14 March 2012

ALEX CHISHOLM

CHAIRPERSON

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE 15 DAY OF FEBRUARY 2012

¹⁴ Cells are used to define particular geographic areas, defined by a centre point, given in Irish Grid Reference format, and extending for a radius/range, given in miles.

4 Next Steps

- 31 ComReg will amend the expiry date of the three MMDS licences in force in the 2.6 GHz band in Dublin, Galway and Waterford to terminate in April 2014 (so that they co-terminate with the remaining seven licences in the band).
- 32 ComReg will review the future of the 2.6 GHz band including a review of the operation of the existing licences within the band. ComReg will, in accordance with Regulations 7 and 8 of the Wireless Telegraphy (Multipoint Microwave Distribution System) Regulations 2003, determine whether existing licences in that band should be extended for a further period of up to 5 years from 19 April 2014. ComReg will issue a consultation in relation to this matter prior to making any decision.

Annex: 1 Non-confidential submissions to Consultation 11/80 (“Document 11/80s”)