



Commission for
Communications Regulation

Hutchison 3G Ireland Limited's request for an amendment to its Liberalised Use Licence Spectrum

Response to Consultation and Decision

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**An Coimisiún um Rialáil Cumarsáide
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Chapter 1

1 Introduction

- 1.1 The purpose of this document is to set out the Commission for Communications Regulation's (ComReg) response to consultation and decision on Hutchison 3G Ireland Limited's (H3GI) request for an amendment to its Liberalised Use Licence (the "Proposed Amendment")¹.
- 1.2 Details of the Proposed Amendment are contained in correspondence from H3GI to ComReg - non-confidential versions of which were published by ComReg in Document 13/43.
- 1.3 Three interested parties submitted a response to Document 13/43, being:
 - eircom Group - comprising Meteor Mobile Communications Ltd (Meteor) and eircom Ltd (eircom);
 - Telefónica Ireland Ltd (Telefónica); and
 - Vodafone Ireland Ltd (Vodafone).
- 1.4 ComReg published these non-confidential responses in Document 13/57².
- 1.5 H3GI, by way of letter dated 26 June 2013, subsequently provided its views concerning various aspects of these responses and this letter was published by ComReg in Document 13/64r³.
- 1.6 On 22 July 2013, Vodafone submitted a letter highlighting that the proposed acquisition of Telefónica by H3GI came to light only after the deadline of 6 June 2013 for responding to Document 13/43. In light of the effect that the proposed acquisition is likely to have on what it considers to be the key factors relevant to consideration of the Proposed Amendment, Vodafone proposes that ComReg defer its final decision on the Proposed Amendment until after the conclusion of the merger control assessment of the proposed acquisition. Vodafone's letter is published alongside this document.
- 1.7 The remainder of this response to consultation and decision document is structured as follows:

¹ ComReg Document 13/43 - *Consultation on Hutchison 3G Ireland Limited's Request for an Amendment to its Liberalised Use Licence* – published 9 May 2013.

² ComReg Document 13/57- *Publication of non-confidential submissions to ComReg Document 13/43 – Consultation on Hutchison 3G Ireland Limited's request for an amendment to its Liberalised Use Licence* - published 14 June 2013.

³ ComReg Document 13/64r - *Publication of a non-confidential submission received in response to ComReg Document 13/57 – Submissions to ComReg Consultation 13/43 on Hutchison 3G Ireland Limited's request for an amendment to its Liberalised Use Licence* – published 5 July 2013.

- **Chapter 2:** sets out some background to ComReg's Multi-Band Spectrum Award (MBSA) Process, Liberalised Use Licences granted on foot of same, and the Proposed Amendment;
- **Chapter 3:** considers the Proposed Amendment and submissions received in respect of same in the context of ComReg's statutory functions, objectives and duties. Chapter 3 also sets out ComReg's decision on this matter and its position on the other issues raised by interested parties;
- **Chapter 4:** considers other issues raised by interested parties not directly related to the Proposed Amendment and sets out ComReg's position on same;
- **Annex 1** – which contains a glossary of terms used in this document;
- **Annex 2** – which summarises ComReg's statutory functions, objectives and duties relevant to the management of the radio frequency spectrum; and
- **Annex 3** - a further response to consultation received from Vodafone on 22 July 2013.

Chapter 2

2 Background

2.1 ComReg's Multi-Band Spectrum Award Process and Liberalised Use Licences

- 2.1 On 5 December 2012, and following the outcome of the Negotiation Phase of ComReg's MBSA process, ComReg set out, in Document 12/131⁴, the final frequency assignments for the four Winning Bidders (being H3GI, Meteor, Telefónica and Vodafone).
- 2.2 On 31 January 2013, ComReg issued a Liberalised Use Licence to each of the Winning Bidders, all of which had a commencement date of 1 February 2013. Within each Licence, the commencement date of a Spectrum Block was set in line with the outcome of the MBSA process, in light of the fact that the availability of certain Spectrum Blocks was dependent upon the prior completion of the relevant Transition Activities.
- 2.3 On 25 February 2013, ComReg issued an update on the MBSA process (Document 13/20) and published its finalised Transition Project Plan (Document 13/19) which set out the time periods for Meteor and Telefónica to complete their respective 900 MHz and 1800 MHz transition activities for Time Slice 1.
- 2.4 On 12 June 2013, ComReg issued a further update on the MBSA process (Document 13/55) which identified that:
- the relevant Transition activities for Time Slice 1 had been completed;
 - the Liberalised Use Licences of the Winning Bidders had been amended to reflect that all liberalised spectrum rights of use awarded are now licensed in accordance with the outcome of the MBSA process⁵;
 - all of the remaining GSM licences had been amended to operate on the new frequency assignments determined by the MBSA process; and
 - details regarding Liberalised Use Licences and GSM Licences are available on ComReg's website.⁶

⁴ ComReg Document 12/131 - *Frequency Arrangements and Results of the Multi-Band Spectrum Award Process* - published 5 December 2012.

⁵ See ComReg Document 12/131.

⁶ See:

- http://www.comreg.ie/radio_spectrum/search.541.874.10031.0.rslicensing.html (Liberalised Use Licences); and

2.2 The Proposed Amendment

- 2.5 Details of the Proposed Amendment are contained in H3GI's letters of 15 November 2012, 28 November 2012, 18 January 2013, 26 March 2013 and 26 April 2013, non-confidential versions of which were published by ComReg in Document 13/29d and Annex 1 to Document 13/43.
- 2.6 Non-confidential versions of ComReg's correspondence relating to these letters, being its letters of 21 November 2012, 4 December 2012, 27 February 2013 and 9 April 2013, can also be found in Document 13/29d and Annex 1 to Document 13/43.
- 2.7 In addition, ComReg notes that H3GI, in its letter of 26 June 2013, provided its views concerning various aspects of the responses to Document 13/43. The non-confidential version of this letter was published by ComReg in Document 13/64r.

2.3 Regulation 15 of the Authorisation Regulations

- 2.8 The key statutory provision for the assessment of the Proposed Amendment is Regulation 15 of the Authorisation Regulations.
- 2.9 Regulation 15 provides that ComReg may amend the rights, conditions and procedures concerning rights of use for radio frequencies provided that any such amendment may only be made in objectively justified cases and in a proportionate manner, taking into consideration, where appropriate, the specific conditions applicable to transferable rights of use for radio frequencies.
- 2.10 The applicability of Regulation 15 in present circumstances is reflected in the Liberalised Use Regulations, under which all Liberalised Use Licences are issued. See, in particular, Regulation 7(2), which enables ComReg to amend a Liberalised Use Licence or a Preparatory Licence (as the case may be) in accordance with the Authorisation Regulations.
- 2.11 Whilst H3GI and other interested parties⁷ have referred to Regulation 7(3) of the Liberalised Use Regulations⁸, ComReg observes that Regulation 7(3) is

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- http://www.comreg.ie/radio_spectrum/search.541.874.10003.0.rslicensing.html (GSM Licences)

⁷ For instance, Vodafone submitted that "ComReg cannot consider H3GI's licence amendment application on the basis of Regulation 7(3) of the Wireless Telegraphy Regulations (S.I. 251 of 2012) in isolation from the recently concluded MBSA process and its outcome, particularly when acceptance of the application would conflict with the provisions of the MBSA Decision and Information Memorandum."

⁸ Specifically: "Without prejudice to paragraph (2), at the request of the Licensee, the Commission may, if it considers it appropriate to do so, amend a Licence by adding to, deleting from, or altering the radio frequencies specified in the Licence, on which the Apparatus may be used. Any such amendment shall be effected by notice in writing from the Commission specifying the amendment and given to the Licensee or sent to the Licensee at the address specified in the Licence or notified to the Commission pursuant to the Licence and these Regulations."

without prejudice to Regulation 7(2). It therefore follows that any proposed amendment under Regulation 7(3) must not be inconsistent with the application and requirements of the Authorisation Regulations and, in particular, Regulation 15 of same.

- 2.12 Furthermore, any proposed amendment must not be inconsistent with ComReg's general statutory functions, objectives and duties. A summary of ComReg's statutory functions, objectives and duties relevant to the management of the radio frequency spectrum is set out in **Annex 2** to this document.

Chapter 3

3 Consideration of the Proposed Amendment

- 3.1 This chapter sets out ComReg's consideration of the Proposed Amendment. In particular, it summarises and addresses the various submissions received which are supportive of the Proposed Amendment (which, ComReg notes are exclusively submissions received from H3GI). Although ComReg has paid due regard to submissions received from other interested parties in response to Document 13/43, ComReg does not provide a summary of these submissions but, rather, refers to and considers such views as appropriate in its assessment of the submissions received which are supportive of the Proposed Amendment. In that regard, ComReg notes that all submissions received other than H3GI's were generally unsupportive of the Proposed Amendment.
- 3.2 Interested parties are referred to Documents 13/29d, 13/43, 13/57 and 13/64r for the entire text of submissions relating to the Proposed Amendment.
- 3.3 ComReg does, however, summarise other issues, not directly related to the Proposed Amendment, which were raised by these interested parties and sets out its position on same at the end of this chapter.
- 3.4 The structure of this chapter is as follows:
- general observation on the information and reasoning put forward by H3GI to support the Proposed Amendment;
 - summary of submissions supportive of the Proposed Amendment;
 - ComReg's consideration of and position on same;
 - summary of views on other issues raised; and
 - ComReg's consideration of and position on same.

3.1 General observation on the information and reasoning put forward by H3GI

- 3.5 Before summarising and addressing the various submissions received which are supportive of the Proposed Amendment, ComReg considers it appropriate to highlight the level of substantive engagement received from H3GI in relation to the Proposed Amendment. In particular, ComReg wishes to highlight for any future applications under Regulation 15 of the Authorisation Regulations that it

considers the level of substantive engagement received from H3GI was not constructive in terms of what would reasonably be expected of a Liberalised Use Licensee wishing to have its licence amended.

- 3.6 In its letter of 27 February 2013 to Mr. David Hennessy of H3GI, ComReg pointed out that ComReg could grant H3GI's Licence Amendment Request, only in accordance with the Liberalised Use Regulations, the Authorisation Regulations and with law generally. In particular, an amendment would be granted "*only, inter alia, in objectively-justified cases and in a proportionate manner*". In that light, ComReg noted that H3GI had, to date, only "*to a limited extent*" sought to justify and rationalise the Licence Amendment Request. ComReg therefore requested H3GI to do so "*squarely and in a focused way, in order that ComReg might properly consider it*". In that regard, ComReg asked H3GI to "*set out all facts, circumstances and representations of relevance....as well as submissions of law that H3GI feels would properly justify ComReg in acceding to H3GI's request*". Finally, ComReg asked H3GI to address in its re-submitted request, "*the possible questions of discrimination, competition-distortion, proportionality and State aid that might be raised in relation to granting the request*".
- 3.7 ComReg would note that, despite its clear request for H3GI to do so, H3GI provided very little additional information and reasoning in its subsequent letters of 26 March and 26 April 2013. In particular, H3GI's analysis of the possible questions that might be raised was, in ComReg's view, quite inadequate. It is reasonable to expect that the onus should be on the applicant to persuade ComReg that a licence amendment application accords with its statutory functions, objectives and duties. However, and despite repeated requests, H3GI has provided ComReg with very little information and reasoning to assist it in properly considering the Proposed Amendment.
- 3.8 ComReg notes that, in its letter of 26 April 2013, H3GI stated that, "*in the absence of any further specific requests for information from ComReg, Three believes that it has provided ComReg with all facts, circumstances, points of law and representations of relevance*" which it considers would properly justify ComReg acceding to the request. However, in its response of 8 May and in the absence of additional material information and reasoning having been provided by H3GI, ComReg reiterated its reservations about the extent to which H3GI had substantively addressed the matters previously raised by it and considered it appropriate to proceed to a public consultation In order to further inform its consideration of the matter.
- 3.9 Finally, ComReg notes that H3GI's letter of 26 June 2013 (its only further submission on the Proposed Amendment) merely attempts to address, in a quite limited way, the arguments raised by other respondents to the

consultation without providing any additional information or reasoning justifying its request.

3.10 In light of the above, ComReg does not believe that H3GI has been as helpful as it could have been in providing detailed reasoning to support the Proposed Amendment. Notwithstanding this, ComReg fully assesses any supportive reasoning put forward by H3GI in the following sections.

3.2 Summary of submissions received in support of the Proposed Amendment

3.11 As noted above, only H3GI provided submissions supportive of its Proposed Amendment.

3.12 In summary, the reasons put forward by H3GI supportive of the Proposed Amendment include that:

- i. it would accord with the position taken by ComReg in its letter to H3GI (and all Winning Bidders in the MBSA process), dated 20 November 2012, regarding the Negotiation Phase⁹;
- ii. it would accord with paragraph 4.15¹⁰ of Document 12/25 (which paragraph was replicated in paragraph 3.4¹¹ of Decision 04/12 as set out in Chapter 8 of Document 12/25) because:
 - a. paragraph 4.15 of Decision 04/12 does not prevent any change in the current status of lots I, J and K in Time Slice 1;

⁹ Specifically: "In the IM (see for example paragraph 4.211) ComReg stated that any unallocated lots would be located contiguously in the presentation of assignment options in the Assignment Round. Winning Bidders will note that there are three unallocated Lots in a contiguous block (Lots I, J, K) in Time Slice 1 in the 1800 MHz band. Noting ComReg's position in Decision D04/12 that unsold lots will not be allocated for a reasonable period after the process, and in any event will not be allocated for a period of at least 1 year, ComReg considers that it would be appropriate, in terms of ensuring the effective management and encouraging the efficient use of radio frequencies and in the circumstances of avoiding the requirement for Transition Activities between Time Slice 1 and Time Slice 2, to permit assignment outcomes where the location of one o[r] more of these unallocated Lots would vary from its current location in Lots I,J or K. Winning Bidders should therefore consider the above when considering and suggesting alternative assignment outcomes in the Negotiation Phase[.]" (on page 2)

¹⁰ Being to: "...retain its discretion regarding how it might treat any unsold spectrum lots depending on the factual circumstances arising from the award process, save for the decision that unsold lots will not be allocated for a reasonable period after the process, and, in any event, will not be allocated for a period of at least 1 year."

¹¹ It should be noted that there was an error in the numbering in Section 3 of Decision D04/12 which resulted in the production of two paragraphs numbered 3.4. The paragraph in Decision 04/12 which replicated paragraph 4.15 of Document 12/52 is at the bottom of page 316 of that document and should, in fact, have been numbered 3.6.

- b. the Proposed Amendment would be in accordance with ComReg's decision to retain discretion regarding how it might treat unsold lots *"depending on the factual circumstances arising from the award process, save for the decision that unsold lots will not be allocated for a reasonable period after the process and, in any event, will not be allocated for a period of at least 1 year"*;
 - c. rather than looking for the unsold 1800 MHz lots in Time Slice 1 to be allocated to it in addition to its current lots, H3GI is asking ComReg to remove the contiguity rule in respect of unallocated spectrum (the "Contiguity Rule") and amend its licence in accordance with its Proposed Amendment;
 - d. in that regard, it submits that the rationale for the Contiguity Rule no longer exists because although the Contiguity Rule was intended to ensure the attractiveness of unallocated spectrum, given that Blocks I-K will not be allocated for at least a year (in accordance with Decision 04/12), and are assigned to H3GI in respect of Time Slice 2, it is "highly unlikely that an interested party would apply for these blocks";
 - e. if the Contiguity Rule had not applied, ComReg would have had a discretion as to whether it awarded H3GI blocks in D-E, I-J or J-K and H3GI submits that ComReg should now exercise that discretion in its favour;
- iii. it is not (a) relevant that other Winning Bidders bid for and paid an additional price for their MBSA frequency assignments (see ComReg Document 12/131) and (b) correct that it was within H3GI's power to have avoided the situation in which it now finds itself (including that in the Assignment Round, H3GI opted to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] because:
- a. the rationale for the Contiguity Rule for unsold lots no longer exists and there are benefits (in terms of ComReg's statutory objectives) to be gained from granting application(s) for amendment of Winning Bidders' assignments;
 - b. without prejudice to this position, H3GI submits that it did not have an effective opportunity to avoid the situation in which it now finds itself

¹² and “does not believe that this is a situation in which it has failed to take the opportunities presented during the MBSA process”;

c. in response to various submissions made by respondents to Document 13/43:

- it rejects any suggestion that it has deliberately tried to manipulate the MBSA process or circumvent the MBSA framework and outcome and this is clear from the confidential bidding history available to ComReg. In that regard, it (a) rejects the assertion that it did not bid according to its preferences during the Assignment Round and (b) states that “[as] ComReg is aware, Three's bidding behaviour during the MBSA process was in fact consistent with full expression of its value differences” and [REDACTED]
[REDACTED]
[REDACTED];

- it rejects the assertion that its participation in the Negotiation Phase was “lukewarm at best” and “indifferent” because it initiated the Negotiation Phase and sought to agree the subject matter of its application, to no avail; and

d. H3GI reasserts that the circumstances of its application warrant the grant to it of its licence amendment;

iv. it does not believe that issues of competition-distortion, discrimination, State Aids and proportionality arise because:

a. the rationale for the contiguity rule for unsold lots no longer exists and, as a result, Winning Bidders have an opportunity to apply for

¹² Specifically, H3GI submitted that:

- There were only 8 possible solutions for H3GI in Time Slice 1 and 6 in Time Slice 2. This leads to only 8 combinations where H3GI win the same spectrum in TS1 as in TS2. In other words, for each possible solution in TS1, there is only 1 possible solution in TS2 (see the second table on page 2 in H3GI's letter of 26 April 2013);
- making the assumption that in bidding differently in the assignment round H3GI would only have been able to change our allocation in one or other time slice, the key combinations become (see the first table on page 3 in H3GI's letter of 26 April 2013);
- It is only the first case where all operators have the same lots in TS 1 and TS2. As a result, the other operators were likely to bid considerable amounts for these combinations and make it prohibitively expensive for H3GI to win them in the auction. Given that Vodafone had 3 and 5 blocks in TS 1 and TS2 compared to Three's 2 and 4 blocks, H3GI would have to bid a total amount greater than Vodafone to achieve this result and H3GI's cost would have been [REDACTED] greater per lot than Vodafone's. Finally, there was only one round in the assignment phase of the auction and limited information in respect of competitor's bids. In these circumstances, it would have been irrational for H3GI to incur such a liability. H3GI could not have reasonably predicted these circumstances when the auction rules were being drafted and as a result, applied for an amendment to the rules.

amendment of their assignments and ComReg can determine those applications based on objective criteria;

- b. in the context of this equal opportunity, the Proposed Amendment would not confer any advantage on H3GI (that could not be similarly conferred on any of the Winning Bidders if they successfully applied to ComReg);
- c. the Proposed Amendment “*would not prejudicially affect any other interested party*”; and
- d. “*there is a high degree of likelihood that no new market entrant would invest in the unassigned blocks for a period of approximately eighteen months*”;
- v. it would accord with the regulatory principle of promoting efficient investment and innovation in new and enhanced infrastructures by avoiding an investment of [REDACTED]¹³ in combiners, claimed to be required by H3GI as a result of its network sharing arrangement with Vodafone and the present location of its 1800 MHz assignments, which would be made “redundant in two years time”.¹⁴ In addition, H3GI claims that [REDACTED]
[REDACTED]
[REDACTED];
- vi. by providing H3GI continuous spectrum assignments across Time Slice 1 and 2 and avoiding the abovementioned “redundant” expenditure, the Proposed Amendment accords with the objective of the promotion of competition and the promotion of the interests of users by enabling H3GI to provide [REDACTED] advanced data

¹³ As per its submission of 26 April 2013. ComReg also notes the figure of [REDACTED] claimed by H3GI in its submission of 18 January.

¹⁴ More specifically, in its letter of 26 April H3GI submits that:

“As part of the Netshare project, Three and Vodafone are combining their networks and sharing site infrastructure. [REDACTED] In order to do this, the signals from each operator must be combined. The cost of these combiners is [REDACTED]. [REDACTED] produces a figure of [REDACTED]. The cost of these combiners is high due to the fact that they are made specifically to combine signals that are adjacent to each other, which is the case for TS1 and TS2. The problem is that these combiners are manufactured for specific frequencies. Therefore, they will need to be replaced with new frequency specific combiners in TS2, due to the fact that we will have different frequencies in TS2. At this point, there is a cost of swapping out the combiners which will cost on average [REDACTED]. [REDACTED] produces a figure of [REDACTED], which gives a combined cost of [REDACTED]. In the event that Three is permitted to move frequencies, Three will be able to have the combiners manufactured to allow for the expansion from 10 to 20 MHz and they will not need to be replaced.]”

services later this year, with all the attendant benefits that these services bring¹⁵;

- vii. it would accord with the efficient management and use of spectrum by avoiding "...both the requirement for transition activities between Time Slice 1 and 2 (including the administrative burden of determining and monitoring a transition plan) and the potential delay to availability of spectrum rights"; and
- viii. H3GI believes that the Proposed Amendment is proportionate to remedy the detriments identified by it and that in the "*unique circumstances of its application, ComReg should grant its request for an amendment of its liberalised use licence*".

3.3 ComReg's assessment of submissions received in support of the Proposed Amendment

3.13 ComReg has carefully considered the submissions made by H3GI in support of the Proposed Amendment and sets out its analysis below.

3.14 As noted previously, three responses were received from interested parties who were not supportive of the Proposed Amendment - being from eircom Group, Telefónica and Vodafone¹⁶. These views are referred to and considered as appropriate in the following assessment of H3GI's submissions.

3.3.1 Bullet point (i) of section 3.2

3.15 In relation to the matters set out in **bullet point (i) of section 3.2** above, ComReg would note that it already addressed this matter in its letter to H3GI of 27 February 2013 concerning H3GI's request for a rebate and does not propose to reiterate the points raised again here. In any case, and as will be seen from the following discussion on bullet point (ii) of section 3.2, the Contiguity Rule does not form part of the basis upon which ComReg has evaluated the Proposed Amendment. Furthermore, and contrary to H3GI's suggestion, the mere disapplication of the Contiguity Rule does not of itself form a basis upon which the granting of the Proposed Amendment would be justified.

¹⁵ It also submits that [REDACTED]

¹⁶ As noted previously, Vodafone also submitted a letter on 22 July 2013 proposing that ComReg defer any final decision on the Proposed Amendment until after the conclusion of the merger control assessment of the proposed acquisition of Telefónica by H3GI.

3.3.2 Bullet point (ii) of section 3.2

3.16 In relation to the matters set out in **bullet point (ii) of section 3.2** above, ComReg:

- acknowledges that H3GI is not requesting that ComReg assign unsold 1800 MHz Lots to it *in addition* to those 1800 MHz Lots assigned to it under the MBSA process;
- notes, however, that the grant of the Proposed Amendment would change the location of the unsold 1800 MHz lots in Time Slice 1 and that this might affect the attractiveness of these unsold lots to the remaining Winning Bidders. For instance, Lots I, J and K could be seen to be more attractive to Vodafone and/or Meteor, relative to Telefónica, given that these lots are adjacent to those held by the former in Time Slice 1. In contrast, Blocks D and E (which would be vacated by H3GI as a result of the Proposed Amendment) could be seen to be more attractive to Telefónica and Vodafone, relative to Meteor, for the same reason;
- notes H3GI's view that the rationale for the Contiguity Rule no longer exists because it considers it "*highly unlikely that an interested party would apply for these blocks*". Whilst ComReg acknowledges that such a view is arguable, ComReg is not in a position to conclusively determine the validity of this view at this remove because, amongst other things:
 - Winning Bidders have not indicated to ComReg that they would not be interested in acquiring rights to these Lots if they were made available by ComReg in accordance with Decision 04/12; and
 - in ComReg's experience one cannot be absolutely certain about the actual level of demand for spectrum rights of use in advance of an award process for same;
- notes, in any event, that the applicability of the Contiguity Rule does not form part of the basis upon which ComReg has evaluated the Proposed Amendment; and
- in light of the foregoing, notes that it is, in fact, exercising its discretion described in paragraph 4.15 of Decision 04/12 by considering the Proposed Amendment in the context of ComReg's statutory functions, objectives and duties.

3.3.3 Bullet point (iii) of section 3.2

3.17 In relation to the matters set out in **bullet point (iii) of section 3.2** above, ComReg would respond as follows:

- In relation to point (a) ComReg's view in relation to the Contiguity Rule is set out above.
- In relation to point (b) a number of issues arise, as discussed below.

3.18 H3GI's bidding in the Main Stage of the Auction was such that it won a different number of lots in each Time Slice in the 1800 MHz band. The location of these lots was determined by the Assignment Stage which consisted of an Assignment Round and a Negotiation Stage.

3.19 In the Assignment Round a number of assignment options were presented to the Winning Bidders and the Existing GSM Licensees (if applicable) in accordance with the specific constraints as detailed in the Information Memorandum (see sections 4.5.4 and 4.5.5). As noted in paragraph 4.214, one such constraint related to the provision of assignment options which would only contain spectrum assignments that are continuous across both Time Slices, and it was noted that this constraint would only apply for "any Winning Bidders that have been allocated the same number of Lots in a band in both Time Slices (including any Party-Specific Lots retained under an Existing GSM Licence held by this Winning Bidder)".

3.20 As H3GI, by its bidding in the Main Stage of the Auction, won a different number of lots in each Time Slice in the 1800 MHz band, it elected to take the risk that it could obtain different frequency assignments in both Time Slices in this band.

3.21 From the 42 assignment options in the 1800 MHz band that were presented to H3GI, H3GI bid on [REDACTED] of the 10 assignment options which would have provided it with continuity across both time slices. Accordingly, this suggests to ComReg that H3GI's bidding reflected a preference for [REDACTED] and indifference as to which of the other permutations it might win.

3.22 H3GI did not win [REDACTED]. ComReg notes that H3GI's opportunity cost arising from not having continuous spectrum across time slices, [REDACTED], as revealed in its correspondence to ComReg after the completion of the Auction process, [REDACTED].

3.23 ComReg notes that Paragraph 2.62 of the Information Memorandum provides:

- "The Additional Price for a Winning Bidder, if any, is the price associated with the assignment of Specific Lots to this Winning Bidder as determined in the Assignment Stage of this Award Process. As discussed in Chapter 4, this price will be determined using a second

price rule, and will be no greater than the amount Bid by the Winning Bidder for these Specific Lots in the Assignment Stage.”

- 3.24 The rational approach to a second price auction of this nature is to submit bids for each assignment option available that are reflective of the net financial benefits that would accrue from winning such an option. H3GI did not do this in the Assignment Round.
- 3.25 Had H3GI expressed its full value (which ComReg equates to the costs H3GI put forward in its letter of 26 April 2013) for the [REDACTED] assignment option/s that it bid for [REDACTED]
- 3.26 Moreover, had H3GI submitted bids across all 10 of the continuous assignment options available to it, [REDACTED] it would have won one of those assignment options.
- 3.27 Given the above, ComReg is of the view that H3GI behaved in a manner and made certain choices not to avail of opportunities to obtain continuous spectrum across the two Time Slices:
- by deploying a bidding strategy in the Main Stage of the Auction which resulted in it winning a different number of lots in the 1800 MHz band across Time Slices;
 - by [REDACTED] and [REDACTED]
 - by [REDACTED] of the assignment options that would have provided it with continuous spectrum across both Time Slices.
- 3.28 Furthermore, in its letter to ComReg of 26 April 2013, H3GI essentially acknowledges that it made a commercial decision not to compete for certain lots in the Assignment Round which would have achieved temporal continuity because, in its view, it would have been “*prohibitively expensive*” to do so and therefore “*irrational*”.
- 3.29 Accordingly, and noting the further opportunity provided by ComReg within the Negotiation Phase to obtain continuous spectrum across the two Time Slices (as discussed further below), ComReg is of the view that H3GI had effective opportunities to avoid the situation in which it now finds itself.
- 3.30 In relation to point (c), on the basis of the material set out above, a number of matters arise:

- first, on the basis of the material set out above, ComReg is of the view that H3GI's bidding in the MBSA process was not consistent with the value that it now appears to attribute to continuous spectrum across Time Slices, and ComReg would not agree with H3GI's statement that "[as] ComReg is aware, Three's bidding behaviour was in fact consistent with full expression of its value differences"; and
- secondly, from the material set out above, it appears that H3GI had a preference only for [REDACTED] assignment option(s). ComReg considers this to be indicative of H3GI having no preference between the other assignments that might result from the Assignment Round.

3.31 In relation to bullet point (d), it appears to ComReg from submissions made by other parties that H3GI did not make any proposal in the Negotiation Phase that would be reflective of its now expressed value for obtaining continuous spectrum across both Time Slices.

3.32 Finally in relation to bullet point (e), ComReg is of the view that the outcome of the Assignment Round should not have been unexpected by H3GI, in light of choices made by H3GI during the MBSA process. Therefore, ComReg is of the view that the Proposed Amendment could, to some extent, reward H3GI for bidding in a manner which was not reflective of the full value it placed on lots in the Assignment Round and in a manner which was not consistent with the process decided on by ComReg in this context.

3.3.4 Bullet point (iv) of section 3.2

3.33 In relation to the matters set out in **bullet point (iv) of section 3.2** above, ComReg sets out its assessment of each of the possible issues that might be raised in turn below. However, before doing so, ComReg considers it appropriate to make some further observations regarding the level of engagement by H3GI on these issues.

3.34 In its letter to H3GI of 27 February 2013, ComReg asked H3GI to address "the possible questions of discrimination, competition-distortion, proportionality and State aid that might be raised in **principle in relation to granting the request**". [emphasis added] In its response of 26 March 2013, H3GI merely stated that it does not believe that such issues arise because "it is open to any other winning bidder to similarly apply to ComReg". As pointed out to H3GI by ComReg in its subsequent letter of 9 April 2013, this statement merely concerns the right of a licensee to make an amendment request, and does not, as requested by ComReg, address issues that might arise in the context of actually granting the request. The right to apply for a licence amendment request is clearly provided for in the Liberalised Use Regulations. However, when considering any such amendment request, ComReg must clearly have

regard to its obligations under Irish and EU law including, inter alia, the above substantive issues.

- 3.35 ComReg therefore reiterated its request that H3GI address the above issues in the context of granting the request, noting that it required more detailed information and reasoning to assist in properly considering the Licence Amendment Request. Despite this further request, H3GI, in its response of 26 April 2013, merely stated that “*the rationale for the contiguity rule for unsold lots no longer exists and, as a result, Winning Bidders have an opportunity to apply for amendment of their assignments and ComReg can determinate those applications based on objective criteria*”. ComReg notes that this statement, again, merely addresses the right of a licensee to make an amendment request (which is not in question) rather than any of the above substantive issues that might arise in relation to the actual grant of the request.
- 3.36 Furthermore, H3GI does not explain how the mere right to apply would in any way mitigate the risk of discrimination, competition-distortion, proportionality and State aid that might arise in the context of actually granting the request.
- 3.37 In ComReg’s view, this is a further illustration that H3GI was not as helpful as it could have been in providing detailed reasoning to support the Proposed Amendment, despite repeated requests to do so.
- 3.38 Notwithstanding this, ComReg has carried out a full assessment of the above substantive issues that might be raised in the context of granting the Proposed Amendment.

Discrimination

- 3.39 As H3GI is aware, ComReg has a general duty of non-discrimination under Irish and EU law and, in particular, under the Regulatory Framework.
- 3.40 ComReg considers that any discrimination assessment cannot be undertaken in isolation from the effect of granting H3GI’s request on other participants in the Auction.
- 3.41 Discrimination can arise through the application of different rules to comparable situations or the application of the same rule to different situations. It is clear that the provisions in the Information Memorandum were applicable to all four Winning Bidders and that the three other Winning Bidders (Meteor, Telefónica and Vodafone) all faced the possibility of not obtaining spectrum continuous across the Time Slices.
- 3.42 Telefónica avoided the need to bid for continuous spectrum across Time Slices in the 1800 MHz band in the Assignment Round by winning an equal amount of Lots in both Time Slices. However, two of the other Winning Bidders (Vodafone and Meteor), like H3GI, obtained a different number of 1800 MHz Lots across

Time Slices and thus were required to bid in the Assignment Round to ensure temporal continuity across Time Slices in their 1800 MHz allocations, with a view to avoiding or reducing transition and other costs (including, for example, inefficient investment in combiners). Vodafone and Meteor are therefore directly appropriate comparators for the purposes of any discrimination assessment.

3.43 ComReg considers that granting H3GI's Proposed Amendment would discriminate against the other Winning Bidders and, in particular, Vodafone and Meteor, for the following reasons:

Design of the Auction

- ComReg is satisfied that the Auction was designed in a fair, reasonable and non-discriminatory manner;
- The market-based approach taken in the Auction was aimed at producing an efficient allocation and assignment of spectrum. ComReg has no reason to believe that the Auction failed to achieve that objective given the bids made by Participants. Indeed, ComReg notes that all participants, including H3GI¹⁷, publicly expressed general satisfaction with the Auction outcome;
- In particular, ComReg is satisfied that all participants had sufficient and equal opportunity to obtain their preferred frequency assignments in the Auction. All participants were afforded two clear opportunities to obtain their preferred frequency assignments, the Assignment Round and the Negotiation Phase;
- ComReg is satisfied that H3GI was not prejudiced in any way by the design of the Auction and, in particular, the design of the Assignment Stage. Indeed, H3GI has never expressed such a view since the outcome of the Auction;
- H3GI was entitled to seek clarification from ComReg on this particular issue in advance of the Auction but chose not to do so;

The situation in which H3GI now finds itself

- H3GI's decision to enter into a network sharing agreement is a decision within H3GI's own commercial discretion¹⁸ and which ComReg is not required to take into account in coming to its decision. Furthermore, H3GI was (i) fully aware of the rules of the Auction at the time of entering into this agreement and (ii) had entered into this agreement in advance

¹⁷ See: http://www.hutchison-whampoa.com/en/media/press_each.php?id=2550

¹⁸ See: http://www.hutchison-whampoa.com/en/media/press_each.php?id=2514

of bidding in the Auction. It therefore had full transparency of all relevant matters and should have devised its bidding strategy accordingly;

- ComReg is satisfied that both Vodafone and Meteor, in accordance with the Auction design and rules, bid in a manner consistent with their desire for temporal continuity and, as result, achieved same. However, and as noted previously, the same cannot be said for H3GI;
- Indeed, on 15 November 2012, in the aftermath of the Assignment Round, H3GI stated in its media release¹⁹ that it was “*delighted with the outcome of the auction – it gives us the best of both worlds, a strong portfolio at the best price*”. Yet, on the same day, H3GI sought an amendment to its frequency assignment in the 1800 MHz band. This would suggest that (a) H3GI made an error in its bidding strategy in the Auction, (b) contrary to the spirit and design of the Auction, H3GI did not reveal its true preferences in the Assignment Round, or (c) H3GI obtained new information between the completion of the Assignment Round on 14 November 2012 and its application for an amendment to its frequency assignment in the 1800 MHz band submitted the following day which caused its valuation to change, none of which would justify the Proposed Amendment;
 - In relation to (a), H3GI has never suggested that its failure to obtain its preferred frequency assignments was due to an erroneous bidding strategy;
 - In relation to (b), based on evidence of H3GI’s bidding behaviour in the Assignment Round and subsequent information provided by H3GI with regard to the need for, and cost of, cavity combiners, ComReg cannot say with any certainty that H3GI did reveal its true preferences in the Assignment Round; and
 - in relation to (c), ComReg notes that H3GI has not identified that there was a change in its valuation and, indeed, has submitted that its “bidding behaviour was in fact consistent with full expression of its value differences”.
- the Assignment Round and Negotiation Phase together were designed to provide participants with sufficient opportunity within the Auction mechanism to obtain their desired location without the need for regulatory intervention. H3GI chose not to avail of these opportunities. Consequently, the “unique circumstances” that H3GI refer to in its letter of 26 June 2013, including the “wasteful allocation of resources” to which

¹⁹ See: http://www.hutchison-whampoa.com/en/media/press_each.php?id=2550

H3GI has previously referred are a direct result of H3GI's own decision making and behaviour in the Auction;

The Proposed Amendment

- ComReg agrees with Vodafone's observation that the Proposed Amendment would effectively circumvent the Assignment Stage in which other bidders had fully participated, paying additional amounts of money in order to ensure temporal continuity in the 1800 MHz band;
- As a result of H3GI's own bidding strategy in the Assignment Round, it did not achieve temporal continuity in the 1800 MHz band. The upside of failing to achieve such continuity was that it did not have to pay any Additional Price in the Auction. The downside is, apparently, that it must now invest in combiners to the value of [REDACTED] which it believes will become obsolete at the end of Time Slice 1. Granting the Proposed Amendment would effectively mean that there was no downside to H3GI's failed bidding strategy and behaviour as H3GI would avoid both Assignment Round and the aforementioned relocation costs;
- It is not, therefore, correct to say, as H3GI has asserted, that a decision to grant the Proposed Amendment "*would not prejudicially affect any other interested party*". Whilst such an argument may be plausible on a forward-looking basis, a grant of the request would, however, equate to granting its specific frequency locations on more favourable terms than those applied to other participants in the Auction who successfully competed to achieve their preferred frequency assignments in a manner that was consistent with the process decided on by ComReg. A similar point is made by Vodafone in its submission. Indeed, H3GI has been able to identify and calculate the direct financial advantage (or more favourable terms) that it would receive as a result of the Proposed Amendment;
- Further to the above point and contrary to H3GI's suggestion, it is not in reality open to other Auction participants to make a similar licence amendment application. This is because Vodafone and Meteor, in accordance with the Auction design and rules, bid in a manner consistent with their desire for temporal continuity and, as a result, achieved same by paying the amount determined in the Assignment Round. Had they known that ComReg would allow amendments to the Assignment Stage so soon after its completion, it is entirely possible that they would have bid differently in the Auction. A similar point is made by Meteor in its submission;

- There are no clear objective reasons for treating H3GI differently to, and indeed more favourably than, other participants in the Auction; and
- H3GI has failed to demonstrate what has changed, if anything, since the conclusion of the Auction which might cause ComReg to permit the requested move at this juncture, and, outside of the process determined by ComReg for the allocation or preferred frequency assignments.

3.44 For the above reasons, ComReg is of the view that the Proposed Amendment would discriminate against the other Winning Bidders in the MBSA process and, in particular, Vodafone and Meteor, and would be contrary to ComReg's statutory obligations.

Competition-distortion and State aid

3.45 In the present case, ComReg is of the view that there is a direct link between the discriminatory aspects of the Proposed Amendment and risks of competition-distortion. As noted previously, H3GI's assertion that a decision to grant the relocation request "*would not prejudicially affect any other interested party*" is, in ComReg's view, incorrect. A grant of the request would equate to granting the spectrum on more favourable terms than those applied to other participants in the Auction. Indeed, H3GI has been able to identify and calculate the not insignificant direct financial advantage (or more favourable terms) that it would receive as a result of the Proposed Amendment.

3.46 It cannot therefore be ruled out that the grant of the Proposed Amendment would distort competition in the mobile sector. Similarly, it cannot be ruled out that the grant of the Proposed Amendment would involve the grant of unlawful State aid.

3.47 Please note that ComReg considers the proportionality of the Proposed Amendment under its consideration of bullet point (viii) of section 3.2 below.

3.3.5 Bullet point (v) of section 3.2

3.48 In relation to matters set out in **bullet point (v) of section 3.2** above, ComReg would firstly clarify that in applying the regulatory principle of "promoting efficient investment and innovation in new and enhanced infrastructures..." in pursuit of the objectives under Regulation 16(1) of the Framework Regulations and Section 12 of the 2002 Act, it is required to also ensure "that competition in the market and the principle of non-discrimination are preserved".²⁰

²⁰ Regulation 16(2)(d) of the Framework Regulations.

3.49 Given this context, ComReg does not consider that the Proposed Amendment would represent a reasonable application of this regulatory principle. Factors informing this conclusion include that²¹:

- as H3GI appears to be presently assessing the future of its network sharing arrangement with Vodafone²² in light of its recent bid to acquire Telefónica, there would appear to be uncertainty over whether H3GI would, as a matter of fact, incur its claimed investment cost going forward if the Proposed Amendment was not granted;
- H3GI's claims that [REDACTED] lacks credibility in light of its recent bid of €780+ million to acquire Telefónica²³;
- H3GI's decision to enter into a network sharing agreement with Vodafone is a decision within H3GI's own commercial discretion and which ComReg is not reasonably required to take into account in coming to its decision on the Proposed Amendment;
- as H3GI was (i) fully aware of the rules of the MBSA process at the time of entering into this network sharing agreement and (ii) had entered into this agreement in advance of bidding in the MBSA process, it had full transparency of all relevant matters and should have devised its bidding strategy accordingly;
- the Assignment Round and Negotiation Phase together were designed to provide Bidders with sufficient opportunity within the MBSA process to obtain their desired location without the need for regulatory intervention. Based on the preceding analysis, it is reasonable for ComReg to conclude that H3GI chose not to fully avail of these opportunities and, therefore, any wasteful allocation of resources by H3GI is a direct result of its own decision making and behaviour in the MBSA process; and
- in light of the above, ComReg has serious concerns that the Proposed Amendment would accord with its statutory objective of the promotion of competition (in particular, ensuring that there are no distortions or restrictions of competition in the electronic communications sector) and the regulatory principle of ensuring that, in similar circumstances, there

²¹ ComReg assumes, for the purposes of the following analysis, that H3GI's claimed cost of investment in combiners is reasonable and correct.

²² See for example: <http://www.bloomberg.com/news/2013-06-24/telefonica-sells-irish-unit-to-hutchison-whampoa-to-reduce-debt.html> where H3GI CEO, Robert Finnegan, is reported to state that Three Ireland will consider whether its network-sharing agreement with Vodafone Group Plc or 02's network partnership with Eircom is best for the combined Three-02 Ireland business.

²³ Including in light of the reported statement by Mr Finnegan that the proposed acquisition will give Three Ireland "the financial strength to be more aggressively competitive in the Irish marketplace". Ibid.

is no discrimination in the treatment of undertakings providing electronic communications networks and services.

3.50 Given the above, ComReg does not consider, on balance, that the Proposed Amendment would represent a reasonable application of the regulatory principle of promoting efficient investment and innovation in new and enhanced infrastructures in a manner which would also ensure “that competition in the market and the principle of non-discrimination are preserved”.

3.3.6 Bullet point (vi) of section 3.2

3.51 In relation to matters set out in **bullet point (vi) of section 3.2** above, ComReg does not consider that the Proposed Amendment would represent a reasonable application of the statutory objectives of the promotion of competition and/or the promotion of the interests of users. Factors informing this conclusion include that:

- as set out above, the Proposed Amendment would, in ComReg’s view, discriminate against Vodafone and Meteor and ComReg cannot rule out that it would in fact distort competition or involve the grant of unlawful State aid;
- H3GI’s claimed inability to provide advanced data services to [REDACTED] is a direct consequence of its own commercial decisions and, in ComReg’s opinion, choosing to not fully avail of the opportunities provided in the MBSA process to avoid the claimed investment costs;
- whilst it is apparent that the Proposed Amendment would directly benefit H3GI and possibly its customers, H3GI incorrectly equates its well-being with the achievement of all of ComReg’s relevant statutory objectives. In that regard, ComReg considers that it is obliged to assess the achievement of its statutory objectives in the round in a balanced manner and not vis-à-vis the well-being of a single undertaking. This view is reinforced by the requirement that ComReg’s decision making must comply with the principle of non-discrimination; and
- it is wholly within H3GI’s power to remedy the consequences of its commercial decision making so as to provide advanced data services using its existing 1800 MHz assignments.

3.3.7 Bullet point (vii) of section 3.2

3.52 In relation to matters set out in **bullet point (vii) of section 3.2** above, ComReg does not consider that the Proposed Amendment would represent a reasonable application of the statutory objective of ensuring the effective

management and encouraging the efficient use of spectrum. Factors informing this conclusion include that:

- the MBSA process was the process decided on by ComReg to decide how spectrum use rights and their assignments would be allocated in the relevant frequency bands;
- the MBSA process was designed to provide opportunities for Bidders to efficiently avoid the requirement for transition activities between Time Slice 1 and 2 in, amongst other things, an objective and non-discriminatory manner;
- in that regard, it can be reasonably assumed that the MBSA process produced, in accordance with ComReg's statutory objectives, an efficient outcome for the allocation of the relevant spectrum rights given the Bids submitted, particularly for the period immediately following the Auction. For instance, ComReg notes that H3GI does not claim that there was any flaw in either the Auction mechanism, or in its execution – so it seems that there is no question that the assignments determined by the MBSA process are correct according to rules and the bids placed;
- H3GI alone is responsible for the situation in which it now finds itself;
- granting the application arguably alters the terms under which Applicants entered into and participated in the MBSA process and could undermine the integrity of the MBSA process and outcome, and arguably contribute to regulatory uncertainty vis-à-vis future spectrum awards²⁴;
- whilst the Proposed Amendment would avoid the need for H3GI to undertake transition activities between Time Slice 1 and 2, ComReg notes that other Winning Bidders will be required to undertake such Transition activities in any event. As such, the Proposed Amendment does not remove the requirement for all such Transition activities²⁵;
- whilst ComReg acknowledges the potential for transition activities between Time Slice 1 and 2 to delay the availability of certain spectrum rights in Time Slice 2, ComReg is confident that it has put in place

²⁴ For instance, particularly those involving an assignment round where Bidders would be afforded the opportunity to bid additional amounts to seek to secure preferred frequency locations. ComReg notes and agrees with Vodafone's submission in this regard.

²⁵ In addition, ComReg notes that the MBSA process could not guarantee that all Winning Bidders would not have transition activities between Time Slice 1 and 2 because of the consequences of Winning Bidders obtaining different quantities of Lots within a band in each time slice. The possibility of such activities was explicitly noted by ComReg in its substantive decision documents and in the Information Memorandum. See for, example, footnote 20 of the Information Memorandum.

appropriate measures which should minimise this potential (e.g a process for the formulation and implementation of a Transition Project Plan, the prospect of Liquidated Damages, etc). This is evidenced by, amongst other things, the effective implementation of Transition activities in Time Slice 1. ComReg also notes that Liberalised Use Licensees requiring to undertake such Transition activities will have a lengthy period during which to plan and effectively and efficiently implement same; and

- to the extent that H3GI submits that the Proposed Amendment would accord with this statutory objective as it might not otherwise make use of its 1800 MHz assignments because of its present location in the band, ComReg notes and agrees with Telefonica's view that this does not seem credible.

3.3.8 Bullet point (viii) of section 3.2

3.53 In relation to the matters set out in **bullet point (viii) of section 3.2** above, ComReg would make the following observations.

- as noted previously, both the Liberalised Use Regulations and the Authorisation Regulations provide that licences may only be amended in a proportionate manner. It is reasonable to expect that the burden should be on the applicant to persuade ComReg that a licence amendment application accords with its statutory functions, objectives and duties. However, despite ComReg's repeated request for further information and reasoning on the issue of proportionality, H3GI's sole submission on this issue is the statement that it "*believes that the Licence Amendment Request is proportionate to remedy the detriments identified*" by it. The material and analysis put before ComReg by H3GI regarding satisfaction of the principle of proportionality was, in ComReg's view, quite inadequate, and ComReg is unable to find the principle satisfied in the current circumstances;
- a core requirement of the principle of proportionality is that any amendment must be suitable and necessary for the realisation of a legitimate objective. As noted previously, it was entirely within H3GI's power to have avoided the situation in which it now finds itself. The Auction was designed in such a manner that would facilitate an efficient allocation and assignment of spectrum. Any wasteful allocation of resources is a direct result of H3GI's own decision making in the Auction. The introduction of a measure aimed at relieving H3GI of a financial burden that it would otherwise have to bear following a fair, transparent and non-discriminatory Auction process, would not only be

discriminatory but is clearly not a legitimate objective under the Regulatory Framework;

- ComReg is therefore of the view that the grant of the Licence Amendment Request is neither suitable nor necessary for the realisation of a legitimate objective and would therefore breach the principle of proportionality.

3.4 ComReg's decision in respect of the Proposed Amendment

3.54 ComReg notes that, in its letter of 22 July 2013, Vodafone proposes that ComReg defer its final decision on the Proposed Amendment until after the conclusion of the merger control assessment of the proposed acquisition of Telefónica by H3GI. However, ComReg notes that the assessment carried out in this Chapter 3 would, on balance, favour the declining of the grant irrespective of the outcome of the merger control assessment, For example, ComReg notes that its concerns regarding:

- H3GI's conduct in the Assignment Round;
- discrimination and competition-distortion;
- compliance with its statutory objectives and regulatory principles; and
- the proportionality of the Proposed Amendment,

would remain regardless of the outcome of the merger control assessment. ComReg does not therefore consider it necessary to defer a decision on this matter,

3.55 Based on the assessment carried out in this Chapter 3above, ComReg has therefore decided to decline to grant the Proposed Amendment.

Chapter 4

4 Other Issues – ComReg’s position

4.1 Other issues raised by interested parties– “gap in continuity” of 1800 MHz rights of use for Telefónica from January 2015 to July 2015

4.1 In its response to Document 13/43 Telefónica urged ComReg to resolve the issues raised by the “gap” in its 1800 MHz rights of use – being from the end of its GSM 1800 MHz rights of use in December 2014 and the commencement of its liberalised 1800 MHz rights in July 2015. In that regard, it submitted, amongst other things:

- this “gap” emerged as a result of the choices made by ComReg regarding time slices. This issue was highlighted by Telefónica during the consultations and in advance of the Auction. Telefónica specifically stated in advance of the Auction that if this gap emerged from the process, then it would expect ComReg to take action necessary to remedy the situation;
- it regards this issue as the most significant unresolved issue to emerge from the MBSA and, further, it would be wrong for ComReg to proceed to make a decision on H3GI’s post-Auction application to amend the outcome of the MBSA without first resolving this matter which was brought to ComReg’s attention in advance of the Auction, and which it believes would be contrary to ComReg’s non-discrimination obligation; and
- rather than proceed to a decision on H3GI’s application, Telefónica proposes that ComReg should now re-issue this consultation covering all outstanding issues. This would necessarily include ComReg’s proposal to remedy the 1800MHz gap in Telefónica’s licence, and any other outstanding issues should also be included in this revised consultation. The issues surrounding H3GI’s application to amend the assignments could also be addressed in this revised consultation, and ComReg’s decision could be published to provide certainty to H3GI as early as is possible.

4.2 ComReg notes Telefónica’s submission on this issue and would respond as follows:

- as Telefónica would be aware, ComReg's most recent position on this issue was set out in section 2.3.4 of Document 13/05, where it was stated, amongst other things, that:
 - ComReg did not accept that the existence of a 6½ month temporal gap in Telefónica's 1800MHz spectrum assignments is solely a result of the decisions made by ComReg. Rather it is a result of a combination of factors²⁶;
 - there then remained approximately 2 years until the expiry of Telefónica's GSM 1800 MHz licence, and thus ComReg was of the view that there was sufficient time for Telefónica to submit a substantiated request to ComReg on this issue, or for ComReg to initiate a process without such a request, and for ComReg to carry out consultation and assessment on same as appropriate;
 - the situation in relation to the 900 MHz band, where the existing GSM licences were then due to expire within the next month was materially different and clearly an urgent matter necessitating ComReg's focus;
 - in light of the above, ComReg proposed to deal with the issue of potential Interim GSM Rights of use in the 1800 MHz band in due course; and
 - for the avoidance of doubt and in the interests of regulatory certainty, ComReg will continue to review the situation and, if necessary, will issue a consultation on proposals aimed at addressing material issues arising from this temporal gap in sufficient time prior to Telefónica's 1800 MHz licence expiry;
- ComReg does not believe there has been any material change of circumstances since the publication of Document 13/05 to warrant a departure from that stated position. For the avoidance of doubt, ComReg considers that the substantive points made by it above remain valid. As such, ComReg does not accept Telefónica's claim that it would be discriminatory for it to address the matter of the Proposed Amendment in advance of the 1800 MHz "gap in continuity" issue; and

²⁶ ComReg further stated: "In particular, and as Telefónica is aware, ComReg provided an early liberalisation option in the MBSA process, thereby allowing an Existing GSM Licensee to win an equivalent amount of Lots in a Liberalised Use Licence (i.e. the Party-Specific Lots) provided that these Lots were won in open competition with other eligible Bidders. Given this, ComReg is of the view that Telefónica's commercial decision not to bid a sufficient amount to win these Party Specific Lots played a significant role in the existence of this gap. ComReg notes that the other party which was potentially affected by this issue, Vodafone, won 1800 MHz Lots for a Liberalised Use Licence via the early liberalisation option."

- ComReg observes that if Telefónica did have genuine timing concerns about this issue then it could have submitted a substantiated request following the publication of Document 13/05.

4.3 Given the above, ComReg does not believe it is obliged to further address this issue at this remove. This, of course, does not prevent Telefónica from submitting a substantiated request to ComReg on this issue as indicated in Document 13/05.

4.2 Future consultation on unallocated 1800 MHz lots

4.4 ComReg notes that it is presently developing proposals for an award process for the three unallocated 1800 MHz lots in time slice 1. It looks forward to consulting in relation to this proposed process over the next few months.

Annex 1: Glossary

A1.1 Definitions

- A 1.1 The definitions in this glossary shall apply to this Response to Consultation and decision Document as a whole save that they shall not apply to the decision set out in chapter 5 or the draft amending SI in Annex 3.
- A 1.2 Where a term in this glossary is defined by reference to a definition in a section or paragraph and an explanation of that term is provided in this glossary, the latter explanation is for convenience only and reference should be made to the appropriate part of the document for the definitive meaning of that term in its appropriate context.
- A 1.3 Any reference to any provision of any legislation shall include any modification re-enactment or extension thereof.
- A 1.4 The headings contained in this document are inserted for convenience of reference only and shall not in any way form part of or affect or be taken into account in the construction or interpretation of any provision of this Response to Consultation and decision Document or the Annexes or Schedules hereto.
- A 1.5 Capitalised terms used in this document and not otherwise defined shall, unless the context otherwise requires or admits, bear the meaning ascribed to them in the Information Memorandum as amended.
- A 1.6 The singular shall include the plural and the plural shall include the singular.
- A 1.7 Terms defined in this document shall, unless the context otherwise requires or admits, have the meaning set out below and cognate terms shall be construed accordingly:

800MHz band	The frequency range 791 – 821 MHz paired with 832 – 862 MHz
900MHz band	The frequency range 880 – 915 MHz paired with 925 – 960 MHz
1800MHz band	The frequency range 1710 – 1785 MHz paired with 1805 – 1880 MHz
2100 MHz Band	1920 – 1980 MHz paired with 2110 – 2170 MHz, and 1900 – 1920 MHz

Assignment Round	The single round of bidding in the Assignment Stage, scheduled simultaneously but run independently for each band, during which Winning Bidders (and Existing GSM Licensees if applicable) were entitled to submit one or more Bids to be assigned Specific Lots within the bands in which they have won Lots (or retain Lots for which they hold Existing GSM Licences).
Assignment Stage	The stage of the Auction where Winning Bidders (and Existing GSM Licensees if applicable) are allocated Specific Lots in accordance with the number of Lots they have been allocated.
Auction	The mechanism within the MBSA Process used to determine Winning Bidders and Winning Prices in the event a Main Stage or Assignment Stage is required.
Document 12/25	Multi-Band Spectrum Release - Release of the 800 MHz, 900 MHz and 1800 MHz radio spectrum bands." Response to Consultation and Decision, Published 16 March 2012
Information Memorandum / IM	Document 12/52 as amended.
Liberalised Use Licence (or a Liberalised Licence)	A Licence issued under Schedule 1 of SI 251 of 2012 which entitles the holder to use certain Specific Lots of spectrum in the Bands, subject to the terms and conditions set out therein.
Licence	A Liberalised Use Licence, a Preparatory Licence, an Existing GSM Licence or an Interim Licence as the case may be and "Existing Licensee" and "Licensee" shall be construed accordingly.
Lot / Block	A 2 x 5 MHz block of spectrum in a specified band (the 800MHz, 900MHz or 1800MHz band).
Multi-Band Spectrum Award Process (MBSA)	The process to award spectrum in the 800 MHz, 900 MHz and 1800 MHz bands in accordance with the substantive decisions set out in Document 12/25 and the processes and procedures set out in the Information Memorandum (Document 12/52) as amended.

Negotiation Phase	The two week period allowed after the Assignment Stage where successful Bidders can attempt to agree alternative assignment for spectrum rights of use won in the MBSA Process.
Notification and Grant Stage	The stage of the MBSA process as defined in Document 12/52
Relocation	The activities required of an Existing GSM 900 MHz Licensees to relocate to a different spectrum assignment within the 900 MHz band compared to its existing spectrum assignment.
Retuning	An Existing GSM Licensee reducing its existing spectrum assignments to a smaller assignment as a result of the MBSA Process.
Specific Frequencies	The frequency ranges associated with Specific Lots.
Time Slice	<p>A time period for which licences are being allocated within the MBSA Process. There are two distinct Time Slices for which Lots in all bands (800 MHz, 900 MHz, 1800 MHz) are being allocated, and each Licence shall be in respect of one Time Slice:</p> <ul style="list-style-type: none"> • 1 February 2013 – 12 July 2015; and • 13 July 2015 – 12 July 2030.
Time Slice 1	A time period from 1 February 2013 to 12 July 2015 (as may be amended by ComReg).
Time Slice 2	A time period from 13 July 2015 – 12 July 2030 (as may be amended by ComReg).
Transition	Relocating or Retuning of existing spectrum assignments
Transition Phase	The phase required to facilitate the network adjustments required by the Existing GSM Licensees (and potentially Winning Bidders in Time Slice 1 in advance of the commencement date of Time Slice 2) to retune or relocate parts of their networks to the new spectrum assignments determined by the MBSA process (the “Transition Phase”).

Transition Project Plan	The plan which sets out the Transition activities, milestones and timeframes for completing the Transition Phase associated with the MBSA process.
Transition Rules	Rules regarding transition, as set out in section 3.8 of the IM
Winning Bidder	A Bidder which won at least one Lot in the MBSA Process.

A1.2 European and Governmental Bodies, Regulatory and Standardisation Organisations

ComReg	Commission for Communications Regulation
EC	European Commission
EU	European Union

A1.3 Primary and Secondary Legislation

SI	Statutory Instrument
2002 Act	The Communications Regulation Act 2002 (No. 20 of 2002), as amended ²⁷
Act of 1926	The Wireless Telegraphy Act 1926 (No. 45 of 1926) as amended
Authorisation Regulations	European Communities (Electronic Communication Networks and Services) (Authorisation) Regulations 2011 (S.I. No 335 of 2011)

²⁷ Includes the Communications Regulation (Amendment) Act 2007 and the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010.

EC Decision 2009/766/EC	European Commission Decision on the harmonisation of the 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community
EC Decision 2011/251/EU	European Commission Decision, amending Decision 2009/766/EC, on the harmonisation of the 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community
Framework Directive	Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended
Framework Regulations	European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No 333 of 2011)
Liberalised Use Regulations	Wireless Telegraphy (Liberalised Use and Preparatory Licences in the 800 MHz, 900 MHz and 1800 MHz Bands) Regulations (S.I. No. 251 of 2012)
Specific Regulations	Specific Regulations has the same meaning as set out in Regulation 2 of Framework Regulations 2011 (S.I. No. 333 of 2011)

A1.4 Glossary of Technical Terms

3G	Third Generation Mobile System (e.g. UMTS)
2G	Second generation mobile services (e.g. GSM)
ECN	Electronic Communications Network as defined under the Framework Regulations
ECS	Electronic Communications Service as defined under the Framework Regulations

eircom Group	Eircom, Meteor Mobile Communications or Meteor
GHz	Gigahertz (1,000,000,000 Hertz)
GSM	Global System for Mobile Communications
Hertz or Hz	Unit of Frequency
H3GI	Hutchison 3G Ireland
kHz	Kilo Hertz (1,000 Hertz)
LTE	Long Term Evolution of 3G
MHz	Megahertz (1,000,000 Hertz)
MNO	Mobile Network Operator
SUF	Spectrum Usage Fee
Telefónica	Telefónica O2 Communications (Ireland) Ltd
UMTS	Universal Mobile Telecommunications System.
Vodafone	Vodafone Ireland Limited

Annex 2: Legal Framework and Statutory Objectives

- A 2.1 The Communications Regulation Acts 2002-2010²⁸ (the “2002 Act”), the Common Regulatory Framework (including the Framework and Authorisation Directives²⁹ as transposed into Irish law by the corresponding Framework and Authorisation Regulations³⁰), and the Wireless Telegraphy Acts³¹ set out, amongst other things, powers, functions, duties and objectives of ComReg that are relevant to this response to consultation and draft decision.
- A 2.2 Apart from licensing and making regulations in relation to licences, ComReg’s functions include the management of Ireland’s radio frequency spectrum in accordance with ministerial Policy Directions under Section 13 of the 2002 Act, having regard to its objectives under Section 12 of the 2002 Act, Regulation 16 of the Framework Regulations and the provisions of Article 8a of the Framework Directive. ComReg is to carry out its functions effectively, and in a manner serving to ensure that the allocation and assignment of radio frequencies is based on objective, transparent, non-discriminatory and proportionate criteria.
- A 2.3 This annex is intended as a general guide as to ComReg’s role in this area, and not as a definitive or exhaustive legal exposition of that role. Further, this annex restricts itself to consideration of those powers, functions, duties and objectives of ComReg that appear most relevant to the matters at hand and by way of example excludes those in relation to premium rate services or market analysis.
- A 2.4 All references in this annex to enactments are to the enactment as amended at the date hereof, unless the context otherwise requires.

²⁸ The Communications Regulation Act 2002, the Communications Regulation (Amendment) Act 2007 and the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010.

²⁹ Directive No. 2002/21/EC of the European Parliament and of the Council of 7 March 2002 (as amended by Regulation (EC) No. 717/2007 of 27 June 2007, Regulation (EC) No. 544/2009 of 18 June 2009 and Directive 2009/140/EC of the European Parliament and Council of 25 November 2009) (the “Framework Directive”) and Directive No. 2002/20/EC of the European Parliament and of the Council of 7 March 2002 (as amended by Directive 2009/140/EC) (the “Authorisation Directive”)

³⁰ The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) and the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011) respectively which revoked and replaced S.I.307 of 2003 and S.I. 306 of 2003 respectively.

³¹ The Wireless Telegraphy Acts, 1926 and 1956, the Broadcasting Authority Acts, 1960 to 1971, in so far as they amend those Acts, the Wireless Telegraphy Act 1972, Sections 2, 9, 10,11,12,14,15,16,17 and 19 of the Broadcasting and Wireless Telegraphy Act 1988 and Sections 181 (1) to (7) and (9) and Section 182 of the Broadcasting Act 2009.

A2.1 Primary Objectives and Regulatory Principles Under the 2002 Act and Common Regulatory Framework

A 2.5 ComReg's primary objectives in carrying out its statutory functions in the context of electronic communications are to:

- promote competition;³²
- contribute to the development of the internal market;³³
- promote the interests of users within the Community;³⁴
- ensure the efficient management and use of the radio frequency spectrum in Ireland in accordance with a direction under Section 13 of the 2002 Act;³⁵ and
- unless otherwise provided for in Regulation 17 of the Framework Regulations, take the utmost account of the desirability of technological neutrality in complying with the requirements of the Specific Regulations³⁶ in particular, those designed to ensure effective competition.³⁷

A2.1.1 Promotion of Competition

A 2.6 Section 12(2)(a) of the 2002 Act requires ComReg to take all reasonable measures which are aimed at the promotion of competition, including:

- ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;
- ensuring that there is no distortion or restriction of competition in the electronic communications sector; and

³² Section 12 (1)(a)(i) of the 2002 Act.

³³ Section 12 (1)(a)(ii) of the 2002 Act.

³⁴ Section 12(1)(a)(iii) of the 2002 Act.

³⁵ Section 12(1)(b) of the 2002 Act. Whilst this objective would appear to be a separate and distinct objective in the 2002 Act, it is noted that, for the purposes of ComReg's activities in relation to ECS and ECN, Article 8 of the Framework Directive identifies "*encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources*" as a sub-objective of the broader objective of the promotion of competition.

³⁶ The 'Specific Regulations' comprise collectively the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011), the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. 337 of 2011) and the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011).

³⁷ Regulation 16(1)(a) of the Framework Regulations.

- encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

A 2.7 In so far as the promotion of competition is concerned, Regulation 16(1)(b) of the Framework Regulations also requires ComReg to:

- ensure that elderly users and users with special social needs derive maximum benefit in terms of choice, price and quality, and
- ensure that, in the transmission of content, there is no distortion or restriction of competition in the electronic communications sector.

A 2.8 Regulation 9(11) of the Authorisation Regulations also provides that ComReg must ensure that radio frequencies are efficiently and effectively used having regard to Section 12(2)(a) of the 2002 Act and Regulations 16(1) and 17(1) of the Framework Regulations. Regulation 9(11) further provides that ComReg must ensure that competition is not distorted by any transfer or accumulation of rights of use for radio frequencies, and, for this purpose, ComReg may take appropriate measures such as mandating the sale or the lease of rights of use for radio frequencies.

A2.1.2 Contributing to the Development of the Internal Market

A 2.9 Section 12(2)(b) of the 2002 Act requires ComReg to take all reasonable measures which are aimed at contributing to the development of the internal market, including:

- removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level;
- encouraging the establishment and development of trans-European networks and the interoperability of transnational services and end-to-end connectivity; and
- co-operating with electronic communications national regulatory authorities in other Member States of the Community and with the Commission of the Community in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of Community law in this field.

A 2.10 In so far as contributing to the development of the internal market is concerned, Regulation 16(1)(c) of the Framework Regulations also requires ComReg to co-operate with the Body of European Regulators for Electronic Communications (BEREC) in a transparent manner to ensure the

development of consistent regulatory practice and the consistent application of EU law in the field of electronic communications.

A2.1.3 Promotion of Interests of Users

A 2.11 Section 12(2)(c) of the 2002 Act requires ComReg, when exercising its functions in relation to the provision of electronic communications networks and services, to take all reasonable measures which are aimed at the promotion of the interests of users within the Community, including:

- ensuring that all users have access to a universal service;
- ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;
- contributing to ensuring a high level of protection of personal data and privacy;
- promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services;
- encouraging access to the internet at reasonable cost to users;
- addressing the needs of specific social groups, in particular disabled users; and
- ensuring that the integrity and security of public communications networks are maintained.

A 2.12 In so far as promotion of the interests of users within the EU is concerned, Regulation 16(1)(d) of the Framework Regulations also requires ComReg to:

- address the needs of specific social groups, in particular, elderly users and users with special social needs, and
- promote the ability of end-users to access and distribute information or use applications and services of their choice.

A2.1.4 Regulatory Principles

A 2.13 In pursuit of its objectives under Regulation 16(1) of the Framework Regulations and Section 12 of the 2002 Act, ComReg must³⁸ apply objective, transparent, non-discriminatory and proportionate regulatory principles by, amongst other things:

³⁸ Pursuant to Regulation 16(2) of the Framework Regulations.

- promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods;
- ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;
- safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition;
- promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, while ensuring that competition in the market and the principle of non-discrimination are preserved;
- taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State; and
- imposing ex-ante regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled.

A2.1.5 BEREC

A 2.14 Under Regulation 16(1)(3) of the Framework Regulations, ComReg must:

- having regard to its objectives under Section 12 of the 2002 Act and its functions under the Specific Regulations, actively support the goals of BEREC of promoting greater regulatory co-ordination and coherence; and
- take the utmost account of opinions and common positions adopted by BEREC when adopting decisions for the national market.

A2.1.6 Other Obligations under the 2002 Act

A 2.15 In carrying out its functions, ComReg is required, amongst other things, to:

- seek to ensure that any measures taken by it are proportionate having regard to the objectives set out in Section 12 of the 2002 Act;³⁹

³⁹ Section 12(3) of the 2002 Act.

- have regard to international developments with regard to electronic communications networks and electronic communications services, associated facilities, postal services, the radio frequency spectrum and numbering;⁴⁰ and
- take the utmost account of the desirability that the exercise of its functions aimed at achieving its radio frequency management objectives does not result in discrimination in favour of or against particular types of technology for the provision of ECS.⁴¹

A2.1.7 Policy Directions⁴²

A 2.16 Section 12(4) of the 2002 Act provides that, in carrying out its functions, ComReg must have appropriate regard to policy statements, published by or on behalf of the Government or a Minister of the Government and notified to the Commission, in relation to the economic and social development of the State. Section 13(1) of the 2002 Act requires ComReg to comply with any policy direction given to ComReg by the Minister for Communications, Energy and Natural Resources (“the Minister”) as he or she considers appropriate, in the interests of the proper and effective regulation of the electronic communications market, the management of the radio frequency spectrum in the State and the formulation of policy applicable to such proper and effective regulation and management, to be followed by ComReg in the exercise of its functions. Section 10(1)(b) of the 2002 Act also requires ComReg, in managing the radio frequency spectrum, to do so in accordance with a direction of the Minister under Section 13 of the 2002 Act, while Section 12(1)(b) requires ComReg to ensure the efficient management and use of the radio frequency spectrum in accordance with a direction under Section 13.

A 2.17 The Policy Directions which are most relevant in this regard include the following:

Policy Direction No.3 on Broadband Electronic Communication Networks

A 2.18 ComReg shall in the exercise of its functions, take into account the national objective regarding broadband rollout, viz, the Government wishes to ensure the widespread availability of open-access, affordable, always-on broadband infrastructure and services for businesses and citizens on a balanced regional basis within three years, on the basis of utilisation of a range of

⁴⁰ Section 12(5) of the 2002 Act.

⁴¹ Section 12(6) of the 2002 Act.

⁴² ComReg also notes, and takes due account of, the Spectrum Policy Statement issued by the DCENR in September 2010.

existing and emerging technologies and broadband speeds appropriate to specific categories of service and customers.

A 2.19 ComReg is conscious that the three year objective described in this policy direction has now expired making this direction less relevant currently.

Policy Direction No.4 on Industry Sustainability

A 2.20 ComReg shall ensure that in making regulatory decisions in relation to the electronic communications market, it takes account of the state of the industry and in particular the industry's position in the business cycle and the impact of such decisions on the sustainability of the business of undertakings affected.

Policy Direction No.5 on Regulation only where Necessary

A 2.21 Where ComReg has discretion as to whether to impose regulatory obligations, it shall, before deciding to impose such regulatory obligations on undertakings, examine whether the objectives of such regulatory obligations would be better achieved by forbearance from imposition of such obligations and reliance instead on market forces.

Policy Direction No.6 on Regulatory Impact Assessment

A 2.22 ComReg, before deciding to impose regulatory obligations on undertakings in the market for electronic communications or for the purposes of the management and use of the radio frequency spectrum or for the purposes of the regulation of the postal sector, shall conduct a Regulatory Impact Assessment in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme.

Policy Direction No.7 on Consistency with other Member States

A 2.23 ComReg shall ensure that, where market circumstances are equivalent, the regulatory obligations imposed on undertakings in the electronic communications market in Ireland should be equivalent to those imposed on undertakings in equivalent positions in other Member States of the European Community.

Policy Direction No.11 on the Management of the Radio Frequency Spectrum

A 2.24 ComReg shall ensure that, in its management of the radio frequency spectrum, it takes account of the interests of all users of the radio frequency spectrum.

General Policy Direction No.1 on Competition (2004)

A 2.25 ComReg shall focus on the promotion of competition as a key objective. Where necessary, ComReg shall implement remedies which counteract or remove barriers to market entry and shall support entry by new players to the market and entry into new sectors by existing players. ComReg shall have a particular focus on:

- market share of new entrants;
- ensuring that the applicable margin attributable to a product at the wholesale level is sufficient to promote and sustain competition;
- price level to the end user;
- competition in the fixed and mobile markets;
- the potential of alternative technology delivery platforms to support competition.

A2.2 Other Relevant Obligations under the Framework and Authorisation Regulations

A2.2.1 Framework Regulations

A 2.26 Regulation 17 of the Framework Regulations governs the management of radio frequencies for electronic communications services. Regulation 17(1) requires that ComReg, subject to any directions issued by the Minister pursuant to Section 13 of the 2002 Act and having regard to its objectives under Section 12 of the 2002 Act and Regulation 16 of the Framework Regulations and the provisions of Article 8a of the Framework Directive, ensure:

- the effective management of radio frequencies for electronic communications services;
- that spectrum allocation used for electronic communications services and issuing of general authorisations or individual rights of use for such radio frequencies are based on objective, transparent, non-discriminatory and proportionate criteria; and
- ensure that harmonisation of the use of radio frequency spectrum across the EU is promoted, consistent with the need to ensure its effective and efficient use and in pursuit of benefits for the consumer such as economies of scale and interoperability of services, having regard to all decisions and measures adopted by the European Commission in accordance with Decision No. 676/2002/EC of the European Parliament

and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the EU.

A 2.27 Regulation 17(2) provides that, unless otherwise provided in Regulation 17(3), ComReg must ensure that all types of technology used for electronic communications services may be used in the radio frequency bands that are declared available for electronic communications services in the Radio Frequency Plan published under section 35 of the 2002 Act in accordance with EU law.

A 2.28 Regulation 17(3) provides that, notwithstanding Regulation 17(2), ComReg may, through licence conditions or otherwise, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to—

- avoid harmful interference,
- protect public health against electromagnetic fields,
- ensure technical quality of service,
- ensure maximisation of radio frequency sharing,
- safeguard the efficient use of spectrum, or
- ensure the fulfilment of a general interest objective as defined by or on behalf of the Government or a Minister of the Government in accordance with Regulation 17(6).

A 2.29 Regulation 17(4) requires that, unless otherwise provided in Regulation 17(5), ComReg must ensure that all types of electronic communications services may be provided in the radio frequency bands, declared available for electronic communications services in the Radio Frequency Plan published under section 35 of the Act of 2002 in accordance with EU law.

A 2.30 Regulation 17(5) provides that, notwithstanding Regulation 17(4), ComReg may provide for proportionate and non-discriminatory restrictions to the types of electronic communications services to be provided, including where necessary, to fulfil a requirement under the International Telecommunication Union Radio Regulations.

A 2.31 Regulation 17(6) requires that measures that require an electronic communications service to be provided in a specific band available for electronic communications services must be justified in order to ensure the fulfilment of a general interest objective as defined by or on behalf of the Government or a Minister of the Government in conformity with EU law such as, but not limited to—

- safety of life,

- the promotion of social, regional or territorial cohesion,
- the avoidance of inefficient use of radio frequencies, or
- the promotion of cultural and linguistic diversity and media pluralism, for example, by the provision of radio and television broadcasting services.

A 2.32 Regulation 17(7) provides that ComReg may only prohibit the provision of any other electronic communications service in a specific radio spectrum frequency band where such a prohibition is justified by the need to protect safety of life services. ComReg may, on an exceptional basis, extend such a measure in order to fulfil other general interest objectives as defined by or on behalf of the Government or a Minister of the Government.

A 2.33 Regulation 17(8) provides that ComReg must, in accordance with Regulation 18, regularly review the necessity of the restrictions referred to in Regulations 17(3) and 17(5) and must make the results of such reviews publicly available.

A 2.34 Regulation 17(9) provides that Regulations 17(2) to (7) only apply to spectrum allocated to be used for electronic communications services, general authorisations issued and individual rights of use for radio frequencies granted after the 1 July 2011. Spectrum allocations, general authorisations and individual rights of use which already existed on the 1 July 2011 Framework Regulations are subject to Regulation 18.

A 2.35 Regulation 17(10) provides that ComReg may, having regard to its objectives under Section 12 of the 2002 Act and Regulation 16 and its functions under the Specific Regulations, lay down rules in order to prevent spectrum hoarding, in particular by setting out strict deadlines for the effective exploitation of the rights of use by the holder of rights and by withdrawing the rights of use in cases of non-compliance with the deadlines. Any rules laid down under this Regulation must be applied in a proportionate, non-discriminatory and transparent manner.

A 2.36 Regulation 17(11) requires ComReg to, in the fulfilment of its obligations under that Regulation, respect relevant international agreements, including the ITU Radio Regulations and any public policy considerations brought to its attention by the Minister.

A2.2.2 Authorisation Regulations

Decision to limit rights of use for radio frequencies

A 2.37 Regulation 9(2) of the Authorisation Regulations provides that ComReg may grant individual rights of use for radio frequencies by way of a licence where it considers that one or more of the following criteria are applicable:

- it is necessary to avoid harmful interference,

- it is necessary to ensure technical quality of service,
- it is necessary to safeguard the efficient use of spectrum, or
- it is necessary to fulfil other objectives of general interest as defined by or on behalf of the Government or a Minister of the Government in conformity with EU law.

A 2.38 Regulation 9(10) of the Authorisation Regulations provides that ComReg must not limit the number of rights of use for radio frequencies to be granted except where this is necessary to ensure the efficient use of radio frequencies in accordance with Regulation 11.

A 2.39 Regulation 9(7) also provides that:

- where individual rights of use for radio frequencies are granted for a period of 10 years or more and such rights may not be transferred or leased between undertakings in accordance with Regulation 19 of the Framework Regulations, ComReg must ensure that criteria set out in Regulation 9(2) apply for the duration of the rights of use, in particular upon a justified request from the holder of the right.
- where ComReg determines that the criteria referred to in Regulation 9(2) are no longer applicable to a right of use for radio frequencies, ComReg must, after a reasonable period and having notified the holder of the individual rights of use, change the individual rights of use into a general authorisation or must ensure that the individual rights of use are made transferable or leasable between undertakings in accordance with Regulation 19 of the Framework Regulations.

Publication of procedures

A 2.40 Regulation 9(4)(a) of the Authorisation Regulations requires that ComReg, having regard to the provisions of Regulation 17 of the Framework Regulations, establish open, objective, transparent, non-discriminatory and proportionate procedures for the granting of rights of use for radio frequencies and cause any such procedures to be made publicly available.

Duration of rights of use for radio frequencies

A 2.41 Regulation 9(6) of the Authorisation Regulations provides that rights of use for radio frequencies must be in force for such period as ComReg considers appropriate having regard to the network or service concerned in view of the objective pursued taking due account of the need to allow for an appropriate period for investment amortisation.

Conditions attached to rights of use for radio frequencies

A 2.42 Regulation 9(5) of the Authorisation Regulations provides that, when granting rights of use for radio frequencies, ComReg must, having regard to the

provisions of Regulations 17 and 19 of the Framework Regulations, specify whether such rights may be transferred by the holder of the rights and under what conditions such a transfer may take place.

A 2.43 Regulation 10(1) of the Authorisation Regulations provides that, notwithstanding Section 5 of the 1926 Act, but subject to any regulations under Section 6 of the 1926 Act, ComReg may only attach those conditions listed in Part B of the Schedule to the Authorisation Regulations. Part B lists the following conditions which may be attached to licences:

- Obligation to provide a service or to use a type of technology for which the rights of use for the frequency has been granted including, where appropriate, coverage and quality requirements.
- Effective and efficient use of frequencies in conformity with the Framework Directive and Framework Regulations.
- Technical and operational conditions necessary for the avoidance of harmful interference and for the limitation of exposure of the general public to electromagnetic fields, where such conditions are different from those included in the general authorisation.
- Maximum duration in conformity with Regulation 9, subject to any changes in the national frequency plan.
- Transfer of rights at the initiative of the rights holder and conditions of such transfer in conformity with the Framework Directive.
- Usage fees in accordance with Regulation 19.
- Any commitments which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure.
- Obligations under relevant international agreements relating to the use of frequencies.
- Obligations specific to an experimental use of radio frequencies.

A 2.44 Regulation 10(2) also requires that any attachment of conditions under Regulation 10(1) to rights of use for radio frequencies must be non-discriminatory, proportionate and transparent and in accordance with Regulation 17 of the Framework Regulations.

Procedures for limiting the number of rights of use to be granted for radio frequencies

A 2.45 Regulation 11(1) of the Authorisation Regulations provides that, where ComReg considers that the number of rights of use to be granted for radio frequencies should be limited or that the duration of existing rights of use for radio frequencies should be extended other than in accordance with the

terms specified in the rights of use, it must, without prejudice to Sections 13 and 37 of the 2002 Act:

- give due weight to the need to maximise benefits for users and to facilitate the development of competition, and
- give all interested parties, including users and consumers, the opportunity to express their views in accordance with Regulation 12 of the Framework Regulations.

A 2.46 Regulation 11(2) of the Authorisation Regulations requires that, when granting the limited number of rights of use for radio frequencies it has decided upon, ComReg does so “...on the basis of selection criteria which are objective, transparent, non-discriminatory and proportionate and which give due weight to the achievement of the objectives set out in Section 12 of the 2002 Act and Regulations 16 and 17 of the Framework Regulations.”

A 2.47 Regulation 11(4) requires ComReg to publish any decision to limit the granting of rights of use for radio frequencies or to extend the duration of existing rights of use and to include the reasons for that decision.

A 2.48 Regulation 11(4) provides that where it decides to use competitive or comparative selection procedures, ComReg must, inter alia, ensure that such procedures are fair, reasonable, open and transparent to all interested parties.

Fees for spectrum rights of use/licences

A 2.49 Regulation 19 of the Authorisation Regulations permits ComReg to impose fees for a licence which reflect the need to ensure the optimal use of the radio frequency spectrum.

A 2.50 ComReg is required to ensure that any such fees are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives of ComReg as set out in Section 12 of the 2002 Act and Regulation 16 of the Framework Regulations.

Amendment of rights and obligations

A 2.51 Regulation 15 of the Authorisation Regulations permits ComReg to amend rights and conditions concerning licences, provided that any such amendments may only be made in objectively justified cases and in a proportionate manner, following the process set down in Regulation 15(4).

A2.3 Other Relevant Provisions

Wireless Telegraphy Acts

A 2.52 Under Section 5 of the Wireless Telegraphy Acts, ComReg may, subject to those Acts, and on payment of the prescribed fees (if any), grant to persons

licences to keep and have possession of apparatus for wireless telegraphy in any specified place in the State.

A 2.53 Such licences are to be in such form, continue in force for such period and be subject to such conditions and restrictions (including conditions as to suspension and revocation) as might be prescribed in regard to them by regulations made by ComReg under Section 6.

A 2.54 Section 5(3) also provides that, where it appears appropriate to ComReg, it may, in the interests of the efficient and orderly use of wireless telegraphy, limit the number of licences for any particular class or classes of apparatus for wireless telegraphy granted under Section 5.

A 2.55 Section 6 provides that ComReg may make regulations prescribing in relation to all licences granted by it under section 5, or any particular class or classes of such licences, all or any of the matters following that is to say:

- the form of such licences,
- the period during which such licences continue in force,
- the manner in which, the terms on which, and the period or periods for which such licences may be renewed,
- the circumstances in which or the terms under which such licences are granted,
- the circumstances and manner in which such licences may be suspended or revoked by ComReg,
- the terms and conditions to be observed by the holders of such licences and subject to which such licences are deemed to be granted,
- the fees to be paid on the application, grant or renewal of such licences or classes of such licences, subject to such exceptions as ComReg may prescribe, and the time and manner at and in which such fees are to be paid, and
- matters which such licences do not entitle or authorise the holder to do.

A 2.56 Section 6(2) provides that ComReg may make regulations authorising and providing for the granting of licences under section 5 subject to special terms, conditions, and restrictions to persons who satisfy it that they require the licences solely for the purpose of conducting experiments in wireless telegraphy.

Wireless Telegraphy Act Regulations

A 2.57 In the context of Liberalised Use Licences in the 800 MHz, 900 MHz and 1800 MHz bands, the relevant licensing regulations are the Wireless Telegraphy (Liberalised Use and Preparatory Licences in the 800 MHz, 900

MHz and 1800 MHz Bands) Regulations⁴³, under which all Liberalised Use Licences are issued.

GSM Directive (as amended)

A 2.58 In light of the rights of use of spectrum under consideration in this document, ComReg notes that the GSM Directive 87/372/EEC as transposed by S.I. 416 of 1994 and the Amending GSM Directive 2009/114/EC as transposed by S.I. 195 of 2010 are also of relevance.

A 2.59 In particular regulation 3(2) of S.I. 195 of 2010 provides that: “*The Commission for Communications Regulation shall examine whether the existing assignment of spectrum in the 900 MHz band to competing mobile operators is likely to distort competition in the mobile markets in the State and, where justified and proportionate, it shall address such distortions in accordance with Regulation 15 of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003 (S.I. No. 306 of 2003)*”⁴⁴.

Commission Decision 2009/766/EC on Harmonisation of the 900 MHz and 1800 MHz bands

A 2.60 ComReg must comply with the provisions of the above Commission Decision which is aimed at harmonising the technical conditions for the availability and efficient use of the 900 MHz band, in accordance with Directive 87/372/EEC, and of the 1800 MHz band for terrestrial systems capable of providing electronic communications services. This decision was recently amended by Commission Decision 2011/251/EU.

Commission Decision 2010/267/EU on Harmonisation of 800 MHz band

A 2.61 ComReg must comply with the provisions of the above Commission Decision which is aimed at harmonising the technical conditions for the availability and efficient use of the 800 MHz band for terrestrial systems capable of providing electronic communications services.

Article 4 of Directive 2002/77/EC (Competition Directive)

A 2.62 Article 4 of the Competition Directive provides that: “*Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law:*

⁴³ S.I No. 251 of 2012.

⁴⁴ Now in accordance with Regulation 15 of the 2011 Authorisation Regulations.

- *Member States shall not grant exclusive or special rights of use of radio frequencies for the provision of electronic communications services.*
- *The assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria.”*

Radio Spectrum Policy Programme

A 2.63 On 14 March 2012, the European Parliament and the Council adopted Decision 243/2012/EU establishing the first Radio Spectrum Policy Programme.

Annex 3: Letter from Vodafone of 22 July 2013



22 July 2013

Donal Leavy
Deputy Commissioner
The Commission for Communications Regulation,
Block DEF
Irish Life Centre
Lower Abbey St.
Dublin 1

Dear Donal

RE: H3GI's request for an amendment to its Liberalised Use Licence

As you are aware, on 9 May ComReg (in document 13/43) initiated a consultation process in relation to Hutchison 3G Ireland Limited's (H3GI) request for an amendment to its Liberalised Use Licence. Vodafone provided its response to this consultation by the close of the consultation period on 6 June.

On 24 June, it was publicly announced that H3GI had concluded a deal to acquire Telefonica O2 Ireland. This transaction, which needs to secure necessary competition and regulatory approval to be finalised, in Vodafone's view fundamentally changes the context in which H3GI's licence amendment request must be considered.

Following the conclusion of the competition and regulatory review process for this deal, the situation in respect of key factors relevant to consideration of H3GI's licence amendment application, such as the allocation of spectrum between 1800 MHz licensees, are likely to be entirely different to those in effect at the time that the consultation process occurred. Any final ComReg decision on H3GI's application prior to the conclusion of the competition review of the proposed acquisition therefore risks being inappropriate to future market conditions and failing to meet ComReg's statutory objectives as regards the management of spectrum.

In light of the above Vodafone believes that the correct course is for ComReg to defer any final decision on H3GI's licence amendment application until after the conclusion of the competition review of the H3GI and O2 deal. This would allow a well founded decision to be made which could take proper account of the market conditions that will apply during the currency of the licence which H3GI is seeking to have amended.

Yours Sincerely

A handwritten signature in blue ink, appearing to read 'Eileen Maher'.

Eileen Maher

Strategy Director

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