



An Coimisiún um  
**Rialáil Cumarsáide**  
Commission for  
**Communications Regulation**

# 400 MHz Band Spectrum Award

## Response to Draft Information Memorandum

### Response to Consultation

**Reference:** ComReg 19/81

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**An Coimisiún um Rialáil Cumarsáide**  
**Commission for Communications Regulation**

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## Chapter 1

# 1 Introduction

- 1.1 In June 2019, the Commission for Communications Regulation (“ComReg”) published a draft Information Memorandum (“IM”) (ComReg Document 19/56<sup>1</sup>), wherein ComReg set out its proposals on the processes and procedures for the implementation of the future award of the 410 – 414 MHz / 420 – 424 MHz band (“the 400 MHz Band”). Document 19/56 also included draft Regulations for the granting of licences for individual rights of use for frequencies in the 400 MHz Band.
- 1.2 Four interested parties responded to Document 19/56 (non-confidential versions of which are published alongside this document – ComReg Document 19/81s):
- Electricity Supply Board Networks Limited (“ESBN”);
  - European Utilities Telecom Council (“EUTC”);
  - Joint Radio Company Limited (“JRC”); and
  - The Critical Communications Association (“TCCA”).
- 1.3 The purpose of this document is to set out ComReg’s response to those submissions and its final position on the processes and procedures for the implementation of the future award of the 400 MHz Band.
- 1.4 ComReg has carefully considered all the material submitted by Interested Parties in response to Document 19/56, as well as to all other relevant information before it. ComReg has, alongside this Document, published the Final Information Memorandum for the 400 MHz Band Spectrum Award (Document 19/80<sup>2</sup>).
- 1.5 While ComReg has formed its own views in arriving at its final positions as set out in this document, ComReg points out that it has also carefully considered the expert external advice provided to it throughout this process.
- 1.6 Following publication of Document 19/56 (“the draft IM”), ComReg also published its Response to Consultation and Final Decision on the 400 MHz Band Spectrum Award (Document 19/69 and Decision D12/19<sup>3</sup>). A number of the issues raised by respondents to Document 19/56 have already been considered and decided upon in Document 19/69 and, where this has occurred, this document will refer readers to the relevant sections of Document 19/69. ComReg considers and addresses any remaining issues raised by respondents in Chapter 2 below.

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<sup>1</sup> ComReg Document 19/56 – Proposed 400 MHz Band Spectrum Award – Draft Information Memorandum and Draft Regulations – Published June 2019.

<sup>2</sup> ComReg Document 19/80 – 400 MHz Band Spectrum Award Information Memorandum – Published 30 August 2019.

<sup>3</sup> ComReg Document 19/69 – Response to Consultation and Decision on the 400 MHz Band Spectrum Award – Published June 2019.

- 1.7 Throughout this consultation process, ComReg has been guided by the statutory functions, objectives and duties relevant to its management of Ireland's radio frequency spectrum (which are set out in Annex 1 of this Document) and the findings of its regulatory impact assessments (which are set out in Chapter 3 of Document 19/69).
- 1.8 This document is structured as follows:
- **Chapter 2** sets out ComReg's response to issues raised by respondents to Document 19/56;
  - **Chapter 3** summarises other updates and changes to the draft IM;
  - **Chapter 4** details the Next Steps in the award process;
  - **Annex 1: Legal Basis**; and
  - **Annex 2: Qualification Stage Details**.
- 1.9 Capitalised terms not defined in this document shall have the meaning ascribed to them in the Information Memorandum.

## Chapter 2

# 2 Response to Submissions Received to Document 19/56

## 2.1 Introduction

2.1 This chapter sets out ComReg's position on issues raised by respondents in response to Document 19/56 concerning the following topics:

- Discount Rate;
- Interest on Late Fees;
- Facilitation of Questions throughout the Award Process;
- Deposit Submission;
- NUO Network Template;
- Commencement Date;
- Bidder Training;
- Fax Requirement;
- Submission of Softcopy Documents;
- Return of Spectrum to ComReg and Licence Suspension;
- Protection of Radio Astronomy; and
- Memorandum of Understanding.

2.2 ComReg also provides further clarifications on:

- Extension rights;
- Clause 8(6) of Annex 2 of Document 19/56; and
- Joint Bidding.

2.3 As stated in Chapter 1, ComReg notes that a number of other issues were raised by respondents. These relate to:

- the use of opportunity cost pricing in the Simple Clock Auction (SCA) (ESBN). See paragraphs 4.18 to 4.21 of Document 19/23<sup>4</sup> and paragraphs 2.34 to 2.42 of Document 19/69; and

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<sup>4</sup> ComReg Document 19/23 - Response to Consultation and Draft Decision on the Release of the 400 MHz Sub-band – Published 15 March 2019.

- the duration of a 400 MHz Band Licence (ESBN). See Section 2.8 of Document 19/69.

## 2.2 Discount Rate

### Summary of ComReg's view in Document 19/56

- 2.4 As set out in Section 2.2.4 of Document 19/56, the Spectrum Usage Fees (SUFs) for the Part A Lot and Part B Lots were calculated using a discount rate of 8.63%, representing the existing Weighted Average Cost of Capital (WACC) for Mobile Telecommunications<sup>5</sup>.

### Views of respondents

- 2.5 ESNB notes that ComReg is currently conducting a review of the Weighted Average Cost of Capital (WACC)<sup>6</sup> and that this review has proposed a mobile WACC of 6.53%. ESNB contends that if the proposed new WACC is finalised prior to the award of the 400 MHz Band, ComReg should adopt the new mobile telecommunications WACC as the discount rate for the 400 MHz Award Process.

### ComReg's assessment and position

- 2.6 ComReg's current consultation on its 'Review of Weighted Average Cost of Capital (WACC)' proposes a preliminary WACC of 6.53% for Mobile Telecommunications. However, before making any final decision on the WACC for Mobile Communications, ComReg is required to carefully consider the submissions received during the consultation process and consult on any draft Decision with the European Commission, BEREC and NRAs in other Member States, pursuant to Regulation 13 of the Framework Regulations. As per ComReg's Action Plan<sup>7</sup> this will not be completed until Q4 2019 which is after the planned commencement of the Award Process.
- 2.7 Therefore, the SUFs in the final Information Memorandum will be based on the existing WACC of 8.63% as set out in its Decision 12/19.

## 2.3 Interest on late fees

### Summary of ComReg's view in Document 19/56

- 2.8 ComReg, at paragraph 2.46 of Document 19/56, states that:

*"A Licensee shall pay interest on any fee or part thereof that has not been paid by its due date and is outstanding. The applicable interest rate shall be that*

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<sup>5</sup> ComReg Document 14/136 & D15/14.

<sup>6</sup> ComReg Document 19/54 – Review of the Weighted Average Cost of Capital – Published 31 May 2019.

<sup>7</sup> <https://www.comreg.ie/media/2019/07/Annual-Action-Plan-Ye-30-June-2020.pdf>



*which applies to late payments in commercial transactions under the European Communities (Late Payment in Commercial Transactions) Regulations 2012 (S.I. No. 580/2012), as amended. The applicable time period for any interest payment shall run from the date on which the full / partial fee fell due to the date on which the full / partial fee is paid.”*

2.9 Also, regulation 8(10) of Annex: 2 Draft Regulations of Document 19/56 states that:

*“Where a fee or part of a fee is not paid in time, the Licensee concerned shall pay to the Commission interest on the fee or part thereof that was or is outstanding. Interest shall accrue from the date when such fee or part thereof fell due until the date of payment of such fee or part thereof and shall be calculated at the same rate payable in respect of late payments in commercial transactions pursuant to the European Communities (Late Payment in Commercial Transactions) Regulations 2012, as amended (S.I. No. 580 of 2012).”*

## Views of respondents

2.10 ESNB suggests that:

- ComReg should evaluate the reasoning for late payment before applying such interest charges, giving an example whereby a Licensee may submit payment on time but for other reasons (e.g. banking issues) the fees may arrive late in ComReg’s Nominated Bank Account; and
- ComReg should liaise with the Licensee to ensure it made all reasonable attempts to pay fees on time and that the Licensee is not penalised if late payment arrives with ComReg due to issues external to the Licensee.

## ComReg’s assessment and position

2.11 As described in the IM, ComReg will be adopting the approach laid out in the European Communities (Late Payment in Commercial Transactions) Regulations 2012 (S.I. No. 580/2012), as amended, in relation to late payments. Under these regulations, it is an implied term of every commercial transaction that where a purchaser does not pay for goods or services by the relevant payment date, the supplier shall be entitled to interest (“late payment interest”) on the amount outstanding. Further, the interest will apply until such time as payment is made by the purchaser.

2.12 For avoidance of doubt, as provided in the regulations, the interest rate will be the European Central Bank main refinancing rate (as at 1 January and 1 July in each year) plus 8 percentage points. Penalty interest due for late payments should be calculated at a daily rate.

2.13 It is the responsibility of all Bidders / Interested Parties to ensure that it has an appropriate payment process and procedure in place to ensure that its fee

payments will be received by ComReg by the due dates. Notwithstanding, the approach laid out in the European Communities (Late Payment in Commercial Transactions) Regulations 2012 (S.I. No. 580/2012), as amended, in relation to late payments provides for circumstances where the purchaser (i.e. Licensee) is not responsible for the late payment<sup>8</sup>. ComReg would consider such circumstances prior to determining late payment interest.

## 2.4 Facilitation of Questions throughout the Award Process

### Summary of ComReg's view in Document 19/56

2.14 Table 1 of Document 19/56 sets out that the deadline for submission of questions on the Award Process is two weeks after the publication of the IM. ComReg then has a further two weeks to publish its responses to questions regarding the Award Process on its website.

2.15 Paragraph 3.38 of the draft IM states:

*“ComReg requires that any questions containing confidential material be accompanied by a redacted, non-confidential version of the question. Should a question that is considered confidential by its submitter not be accompanied by a redacted, non-confidential version, ComReg will not accept the question as being validly submitted, nor will ComReg publish the question on its website or address the matters raised therein.”*

### Views of respondents

2.16 ESNB submits that:

- ComReg should facilitate questions throughout the Award Process, publishing answers to all questions submitted before the Application Date; and
- ComReg should facilitate questions past the Application Date, responding to all Applicants.

2.17 In ESNB's view, it is unfair that an Interested Party would not be able to get an answer to its questions which may arise past the two week deadline for submission of questions, as set out in Table 1 of the draft IM.

2.18 Separately, ESNB is of the view that, in relation to paragraph 3.38 of Document 19/56, a querist should be notified when its question is not valid in advance of the deadline in order to allow resubmission.

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<sup>8</sup> European Communities (Late Payment in Commercial Transactions) Regulations 2012 (S.I. No. 580/2012) Section 4.3 (b).

## ComReg's assessment and final position

- 2.19 ComReg has provided a four week consultation period on the draft IM to allow Interested Parties to raise any queries they may have on the Award Process. On foot of submission to this consultation process, ComReg extended this period by an additional week<sup>9</sup>. Further, ComReg notes that the differences between the draft IM and final IM are primarily for clarification purposes and there are no material differences to the Award Rules or the process for submitting Applications.
- 2.20 In that regard, Interested Parties may, for a period of two weeks following the publication of the final IM, submit questions to ComReg in order to facilitate the completion of its Application Form, or to seek clarification on the final IM. ComReg is of the view, noting its practice in previous awards, that this provides sufficient time for Interested Parties to consider the information on the Award Process<sup>10</sup> and associated rules so as to allow a full assessment of any further clarification points that may reasonably be required.
- 2.21 Separately, it is the responsibility of the Interested Party to submit a question in compliance with the IM. Should an Interested Party fail to comply with the IM when submitting a question, ComReg will not accept the question as being valid. ComReg will inform a querist in the event that their question is not valid and will explain its rationale. These clarifications will be sent via courier to protect the identity of the Interested Party.

## 2.5 Deposit Submission

### Summary of ComReg's view in Document 19/56

- 2.22 Paragraph 3.27 of Document 19/56, states that:

*"A submitted Application, in order to be deemed valid and complete, must include the following:*

- *Completed Application Form;*
- *Cleared monetary Deposit in the correct ComReg Bank Account<sup>11</sup>; and*
- *All required documentation annexed to the completed Application Form".*

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<sup>9</sup> In June 2019, ComReg published [Document 19/63](#), extending the time period to 17:00 on 17 July 2019 for submitting responses to its Draft Information Memorandum and Draft Regulations on the Release of the 400 MHz Band (Document 19/56).

<sup>10</sup> ComReg would note that the Auction and associated rules are substantially simpler in this Award Process than previous awards such as the 3.6 GHz award (2017) and the MBSA (2012).

<sup>11</sup> Readers should note that the term "ComReg's Bank Account" has been redefined as "ComReg's Nominated Bank Account in the final IM".

2.23 ComReg proposed a deadline of six weeks from publication of the IM for Applicants to submit a cleared monetary Deposit in the correct ComReg Nominated Bank Account.

2.24 In relation to Deposit Calls, paragraph 3.71 of Document 19/56 states:

*“If a Deposit Call is issued, ComReg will specify a time period of not less than three consecutive Working Days during which the notified Bidder’s additional Deposit funds must be received by ComReg as cleared funds in its bank account (as specified in Annex 3).”*

### Views of respondents

2.25 ESNB contends that a substantial amount of work is required to submit a completed Application Form, and suggests that ComReg could alleviate the logistical issues facing Applicants by allowing an additional two week period for the submission of Deposits. ESNB contends that:

- this change would be of significant benefit to Applicants;
- it would not affect ComReg’s timelines for the Award Process; and
- an Applicant can be bound by its Applications so the process and rules of the Award can proceed as otherwise proposed.

2.26 In relation to Deposit Calls, ESNB is of the view that it is more reasonable to allow five Working Days for cleared funds to arrive in ComReg’s Nominated Bank Account. ESNB states that:

- three Working Days raises the risk that Bidders would not be able to meet this deadline and perhaps be eliminated from the Award Process; and
- at a minimum ComReg should allow more time for larger Deposit Calls to be met, for example, any Deposit Call for 75% or more of the maximum Bid would give the Bidder up to 5 Working Days to have the cleared funds in ComReg’s Nominated Bank Account.

In ESNB’s opinion, it may be difficult administratively for some Bidders to have cleared funds in ComReg’s Bank Account within 3 days, especially as Round Prices can increase by up to 20%.

### ComReg’s assessment and final position

2.27 ComReg refers to paragraph 3.27 of the draft IM which states that a submitted Application, in order to be deemed complete and valid must include a cleared monetary Deposit into ComReg’s Nominated Bank Account. During an assessment of Applications, ComReg must ensure that all Applications are valid in accordance with paragraph 3.28 of the IM.

2.28 ComReg notes that Deposits are held to ensure that an Applicant or Bidder is committed to the Bids they make, and to facilitate the payment of the Spectrum

Access Fee. It would not be appropriate to allow Applicants to submit Applications during the Application Stage without an appropriate monetary Deposit as such Applications could not be deemed valid prior to assessing whether valid Applicants could become Bidders for the purpose of the Award Process.

- 2.29 Alternatively, extending the Application period to eight weeks would not be appropriate, noting that the six week period is already double the three weeks provided in the most recent spectrum award (i.e. the 26 GHz award<sup>12</sup>). ESBN can be assured that the timelines provided in previous awards has not given rise to any difficulties for Applicants submitting Deposits. ComReg has also made provision to accept calls for confirmation of Deposits as per paragraph 3.74 of the draft IM in an attempt to aid Applicants.
- 2.30 In relation to claims that the three Working Days requirement raises a risk that Bidders would not be able to meet this deadline, ComReg notes that this rule is a minimum, below which ComReg would **not require** funds to be received<sup>13</sup>. In that regard, at the time of making any Deposit Call, ComReg may provide a greater number of days for funds to be transferred by a Bidder and received by ComReg.
- 2.31 Finally, it is not clear why larger Deposits would require a longer time period to be received by ComReg. The Deposit Call is intended to provide sufficient time for cleared funds to be transferred to ComReg's Nominated Bank Account. As all Bids are binding, Bidders need to ensure that they have appropriate authorisations in place prior to placing a Bid and before Deposit Calls occurring. Accordingly, the only effect of a Deposit Call is to bring forward by a short period of time the transfer of funds that the Bidder has already committed to paying based on the Bids it has made. As the Auction progresses, Bidders will be able to assess if and when they are approaching a threshold at which point they may be asked to make a Deposit call.
- 2.32 Therefore, ComReg does not see any reason to allow additional time to submit a Deposit.
- 2.33 In relation to late Deposits that may arrive after the six week period, paragraph 3.133 of the draft IM notes that:

*"If an Applicant fails to ensure that ComReg receives the full Deposit for the Lots for which the Applicant has applied (in its Application Bid Form) by the specified deadline date and time, ComReg, at its discretion, may decide that the Applicant's Application is not valid and that the Applicant is not eligible to participate as a Bidder in the Award Process. Alternatively, ComReg may*

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<sup>12</sup> Eight weeks were provided in the 2012 MBSA and 2017 3.6 GHz award, however these awards were substantially more complex with multiple bands and regions.

<sup>13</sup> i.e. a period not less than three consecutive Working Days.

*provide a short additional period of time for the full amount of the required Deposit to be paid by the Applicant.”*

- 2.34 Therefore, ComReg will retain the timelines as set out in the draft IM for submission of Deposits.

## 2.6 NUO Network Template

### Summary of ComReg’s view in Document 19/56

- 2.35 Paragraph 3.51 of the draft IM notes that:

*“Part 4 of the Application Form, entitled “**Utility Network Details**”, must be completed and submitted by Network Utility Operators as part of its Application. A Network Utility Operator must submit four identical copies of its utility network details in a table format which clearly identifies the number, and type, of elements in the network, for example:*

- in the electricity sector this would include, but is not limited to, details of the numbers of transformers, substations, control points, sources of production, and points of transmission and distribution;*
- in the water sector this would include, but is not limited to, details of the sources of production, points of transmission and distribution, and control points; and*
- in the gas sector this would include, but is not limited to, details of the sources of production, points of transmission and distribution, storage points, control points, above ground installations, and district regulating installations.”*

### Views of respondents

- 2.36 ESNB requests that ComReg provide a template for presentation of the information asked for in paragraph 3.51 of the draft IM.

### ComReg’s assessment and final position

- 2.37 In order to provide clarification to Interested Parties the IM now includes Table 8, Table 9 and Table 10 which specifies the network elements the network utility operators for electricity, water and gas should provide details on as part of its Application to participate in the Award Process. Network Utility Operators must complete and submit the relevant network utility details in either Table 8 (electricity), Table 9 (gas) or Table 10 (water) in Part 4 of the Application Form.
- 2.38 The Application Form has been updated to provide this clarification and textual changes have been made to paragraph 3.51 of the final IM to reflect same.

## 2.7 Commencement Date

### Summary of ComReg's view in Document 19/56

2.39 In paragraph 2.12 of Document 19/56, ComReg stated that:

*“The Licences will be of fifteen years duration. All Licences will commence concurrently on such “Commencement Date” as ComReg may specify having regard to, amongst other things, the date of conclusion of this Award Process and all Licences will expire concurrently on the fifteenth anniversary of the Commencement Date. All associated rights of use for radio frequencies in the 400 MHz Band, as assigned under the Licences, will commence and expire on the same dates as the Licences.”*

### Views of respondents

2.40 ESNB refers to paragraph 2.12 of the draft IM and seeks clarification on what action ComReg would take in a situation where a Winning Bidder is late in submitting its first SUF, or if ComReg were to identify an issue with a Bidder that could delay the granting of a Licence. In these cases, ESNB is of the view that it would be unreasonable for a successful Bidder to suffer delays in having its Licence issued as a result of an issue with another Winning Bidder.

### ComReg's assessment and final position

2.41 ComReg does not envisage a scenario where a Winning Bidder would be late in the payment of its first SUF as the first SUF is paid upfront, and such funds would already have been received by ComReg as part of the Application or through one or more Deposit Calls during the Award Process. Notwithstanding, to the extent that any Winning Bidder was unable to commence its Licence through failure to comply with any terms and conditions, ComReg would grant Licences to those Winning Bidders who would have complied with the terms and conditions. Winning Bidders who have not complied with the terms and conditions for granting of a Licence, as set out by ComReg, would have failed to comply with a Licence condition and ComReg, in such circumstances, may take such actions, as it considers appropriate, including those set out in Section 2.2.4 of the IM.

2.42 In light of the above, ComReg considers that while all Licences would ordinarily commence at the same time, this is not a specific requirement and circumstances may require Winning Bidders Licences to commence on different dates. These changes are reflected in paragraph 2.9 of the IM.

## 2.8 Bidder Training

### Summary of ComReg's view in Document 19/56

- 2.43 Table 1 of Document 19/56 outlines that Bidder training would be provided, if required, and that each Bidder would be informed of the details of the training once the Qualification Stage is complete.

### Views of respondents

- 2.44 ESNB, in its submission to ComReg, believes that Bidder training is necessary as Bidders will likely have little or no exposure to utilising an Electronic Auction System, and that ComReg should facilitate a mock auction for each Bidder if requested.

### ComReg's assessment and final position

- 2.45 In the circumstances where there is more than one Bidder, ComReg will host mock auctions for Bidders using the Electronic Auction System (EAS). This allows Bidders to have access to the EAS and gain experience of how to use the system and familiarise themselves with it in advance of the Auction. Each Bidder would be notified of the scheduled start date for mock auctions at the same time as it would be informed as to whether or not it has become a Part A Bidder and/or a Part B Bidder.
- 2.46 In the circumstance where only one Bidder qualifies then no mock auction will be necessary.

## 2.9 Fax Requirement

### Summary of ComReg's view in Document 19/56

- 2.47 ComReg, in the Application Form of the draft IM, requires a fax number for the Interested Party and its Authorised Agents as an additional means of contact.

### Views of respondents

- 2.48 ESNB submits that Interested Parties should not be required to have access to fax machines in order to participate in the Award Process.

### ComReg's assessment and final position

- 2.49 ComReg is of the view that the need for fax machines has decreased, and there are other more effective means by which ComReg can contact Applicants and its Authorised Agents. Therefore, ComReg has removed the requirement for a fax number from the final version of the IM.



## 2.10 Submission of Softcopy Documents

### Summary of ComReg's view in Document 19/56

- 2.50 As part of the Application Stage, ComReg requires a softcopy of all Application Documentation. In the draft IM, ComReg specifies that this must be provided on a CD-ROM.

### Views of respondents

- 2.51 ESNB requests that ComReg also permits the submission of electronic media via other digital formats such as DVD-ROM and USB.

### ComReg's assessment and final position

- 2.52 The use of USB devices has proven to be unsatisfactory and it is ComReg's experience that external USBs are susceptible to encryption failures and so could lead to delays in the Award Process. Therefore, in the interests of preserving the integrity of the 400 MHz Award Process the use of external USB devices would not be appropriate.
- 2.53 ComReg further notes that the use of CD-ROMs and DVD-ROMs has declined in recent years, and that the requirement to provide a softcopy of all Application documents can be a burden on Applicants. ComReg has, in previous awards, also had difficulties in reading CD-ROMs and DVD-ROMs submitted by Applicants.
- 2.54 Therefore, ComReg is removing the requirement for submission of softcopy documents in this Award and will instead require Applicants to submit an additional hardcopy of all Application documentation (i.e. ComReg now requires 5 copies of all Application documentation). ComReg has reflected the above in the final IM.

## 2.11 Return of Spectrum to ComReg and Licence Suspension

### Summary of ComReg's view in Document 19/56

- 2.55 ComReg, during the course of this consultation process, has stated, in line with previous awards, that it would retain its discretion on what it would do with unsold Lots, and that any unsold Lots that may arise from the Award Process would be located in the upper section of the Part B Spectrum (i.e. 414 MHz / 424 MHz) subject to the requirements set out in paragraph 3.222 of the draft IM. ComReg

also states, in paragraph 2.51 of Document 19/56, that Licences may be suspended or withdrawn in accordance with the Authorisation Regulations<sup>14</sup>.

## Views of Respondents

- 2.56 ESNB requests clarity from ComReg about what it would do in a situation where spectrum is returned to it by a Licensee over the term of the Licence, or in an event where a Winning Bidder has its spectrum revoked.
- 2.57 ESNB further submits that, with regard to paragraph 2.51 of Document 19/56, it expects ComReg to be fair and proportionate in exercising its discretion, and that Licence suspension or withdrawal should only be applied where a Licensee has made a serious breach of its Licence conditions and is unlikely to remedy them within a reasonable time frame.

## ComReg's assessment and final position

- 2.58 If spectrum is revoked or returned to ComReg during the course of a Licence, ComReg would retain full discretion as to what it may do with the spectrum in line with the relevant statutory framework and depending on the circumstances pertaining at that time.
- 2.59 In this regard, ComReg would highlight:
- its function of the management of the radio frequency spectrum (section 10 of the Communications Regulation Act, 2002 (as amended) ("2002 Act");
  - its objectives as set out in section 12 of the 2002 Act and Regulation 16(1) of the of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 ("Framework Regulations") including:
    - to promote competition<sup>15</sup>; and
    - to ensure the efficient management and use of the radio frequency spectrum in accordance with Ministerial Policy Directions issued under section 13 of the 2002 Act.
  - the regulatory principles which it is obliged to apply in pursuit of the objectives set out in Regulation 16(2) of the Framework Regulations, including:

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<sup>14</sup> S.I. No. 335 of 2011.

<sup>15</sup> Including by way of: ensuring that users, including disabled users, derive maximum benefits in terms of choice, price and quality; ensuring that there is no distortion or restriction of competition in the electronic communications sector; and encouraging efficient use and ensuring the effective management of radio frequencies.

- ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks (“ECN”) and services (“ECS”);
  - safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure based competition; and
  - promoting efficient investment and innovation in new and enhanced infrastructures.
- its obligation to 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; and
  - its obligation to ensure that, in carrying out its functions, measures taken by it are proportionate having regard to its objectives set out in section 12 of the 2002 Act (section 12(3) of the 2002 Act).
- 2.60 In relation to licence suspension or withdrawal, as set out in Regulation 17(1) of the Authorisation Regulations, where ComReg considers that there is or has been serious or repeated breaches by an undertaking of the conditions attached to its rights of use for radio frequencies or of specific obligations, ComReg may decide, having considered any representations made by the undertaking within the period referred to in Regulation 17(2) of the Authorisation Regulations, to withdraw any rights of use for radio frequencies granted to the undertaking.

## 2.12 Protection of Radio Astronomy

### Summary of ComReg’s view in Document 19/56

- 2.61 Schedule 1, Part 4, Clause 5 of Annex 2 (i.e. the draft Regulations) states that:
- “A Licensee must take all practicable steps to avoid Harmful Interference to the radio astronomy service and any other adjacent licensees.”*
- 2.62 ComReg has, during the course of this consultation process, outlined that the 406.1 MHz – 410 MHz band is allocated to the radio astronomy service, and that there are provisions both within the ITU and radio regulations that administrations must take all practicable steps to avoid interference to the radio astronomy service. ComReg has also noted that radio astronomy is a passive service and so would not cause interference to any potential Licensee in the 410 – 414 MHz / 420 – 424 MHz range.

### Views of respondents

- 2.63 ESNB notes the above Clause and encourages ComReg to be fair and reasonable to any terrestrial Licensee in this regard. ESNB contends that although a 400 MHz Band Licensee may take a range of precautions in order to

not cause interference to radio astronomy, the issue may lie with the quality of the radio astronomy equipment. In this regard, ESNB believes that ComReg should require users of radio astronomy to also take preventative measures to ensure that it does not receive interference.

- 2.64 ESNB is of the opinion that there is potential for a person or operator to undermine 400 MHz Band Licensees by randomly deploying radio astronomy services with the intention of limiting the capabilities of 400 MHz Band Licensees from deploying successful networks. ESNB encourages ComReg to ensure that such perverse matters cannot arise.

### **ComReg's assessment and final position**

- 2.65 ComReg notes ESNB's concerns regarding radio astronomy and refers to "recommendation 1" of ITU Recommendation RA. 769-2:

*"that radio astronomers should be encouraged to choose sites as free as possible from interference"*

- 2.66 ComReg would encourage any potential users of the radio astronomy service to engage with existing licensees and to coordinate sites that are as free as possible from interference.

## **2.13 Memorandum of Understanding**

### **Summary of ComReg's View in Document 19/56**

- 2.67 Annex 2 of Document 19/56 states:

*"Readers should note that these draft Regulations are subject to a new or amended MoU with Ofcom on cross-border coordination for the 400 MHz Band."*

### **Views of respondents**

- 2.68 ESNB reiterates that a new MoU is required and should be consulted on. ESNB believes that it is important that a draft MoU is available at least by the Application Date so that Interested Parties are fully aware of the technical restrictions they will face at border regions.

### **ComReg's assessment and final position**

- 2.69 ComReg has outlined that a new MoU is under development, see:
- Section 5.8 of Document 18/92;
  - Section 5.8 of Document 19/23; and
  - Section 2.12 of Document 19/56.

ComReg again reminds respondents that MoUs are an agreement between national administrations and while generally reflecting ITU and CEPT decisions and recommendations, they also have aspects of national security, other sensitivities and reflect different circumstances in each jurisdiction. Hence, the negotiation and policy formulation of MoUs are not subject to consultation.

## 2.14 Clarifications

### Extension Rights

#### ComReg's View in Document 19/56

- 2.70 ComReg, in Document 19/56, outlined that Extension rights would be available to Bidders during the Auction.
- 2.71 In short, an Extension right allows a Bidder additional time in which to submit Bids during a Round. Each Bidder starts the Auction with two Extension rights. Readers are referred to Section 3.5.9 of Document 19/56 for full details on Extension rights.

### Views of respondents

- 2.72 ESNB agrees that each Bidder be allowed two Extension rights in the event that they do not submit a Bid within the time limit for a given Round. ESNB submits the following three questions on Extension rights:
1. ESNB is of the view that a Bidder may only utilise one Extension per round. ComReg has not specifically addressed this and ESNB requests clarity on same (i.e. the potential for a Bidder to use two Extensions in one Round if after both the normal round and Extension period a Bid is not submitted, another Extension is invoked).
  2. ESNB assumes that a Zero Bid will effectively be submitted for a given Bidder who does not submit a valid Bid by the end of a given Extension. ESNB requests clarity on this matter.
  3. In the event that more than one Bidder does not submit a valid Bid in the time allocated for a given round, will each Bidder who invokes the Extension have one of their Extension rights removed? ESNB assumes this is the case.

### ComReg's assessment and final position

- 2.73 In relation to 1, each Bidder starts the Auction with two Extension rights which can be used over the duration of the Auction. Paragraph 3.198 of the draft IM states that:

*“The **Extension period will end one hour after the scheduled end of the Round**, or once all Bidders who are using Extensions have successfully submitted their Bids, whichever is the earlier.”* [Emphasis added].

A Bidder may only use one Extension right per Round and ComReg has updated the IM accordingly to provide clarification that the use of more than one Extension right per Round is not permitted (see Sections, 3.5.8 of Document 19/80).

2.74 In relation to 2 and 3, where a Bidder does not enter a Bid during the Round or the Extension period, a Zero Bid will be entered automatically on their behalf. ComReg refers to the below paragraphs in Document 19/56 to address ESBNs second and third queries:

- Paragraph 3.197:

*“In the event that a Bidder with non-zero Eligibility for the Round and one or more remaining Extension rights fails to submit any Bids during a Round, the **Round will automatically be extended for that particular Bidder, and one of its remaining Extension rights will be deducted**. The EAS will automatically extend the time within which that Bidder can submit Bids by one hour from the scheduled end of the Round.”* [Emphasis added].

- Paragraph 3.198:

*“The Extension period will end one hour after the scheduled end of the Round, **or once all Bidders who are using Extensions have successfully submitted their Bids**, whichever is the earlier.”* [Emphasis added].

- Paragraph 3.199:

*“**Bidders that have already submitted a Bid (or Bids) during the Round cannot take any further action during the Extension period**; they will be informed that the Round has been extended and should wait for the announcement that the Extension period has ended.”* [Emphasis added].

2.75 Finally, where multiple Bidders invoke Extension rights during the same Round, each of these Bidders would have an Extension right removed.

## **Clause 8(6) of Annex 2 of Document 19/56**

### **ComReg’s view in Document 19/56**

2.76 Clause 8(6) of the draft Regulations in Annex 2 of Document 19/56 states:

*“If a 400 MHz Band Licence is suspended or withdrawn, the Licensee shall not be entitled to be repaid any part of the Spectrum Access Fee or Spectrum*

*Usage Fee paid by the Licensee under this Regulation, but shall still be liable to pay any sums, including interest, that are outstanding.”*

## Views of respondents

- 2.77 ESNB understands that if a Licence is suspended, withdrawn or handed back, future Spectrum Usage Fees would not apply. ESNB considers that if its understanding is correct, then this Clause should be adapted to state that future Spectrum Usage Fees are not due for payment.

## ComReg’s assessment and final position

- 2.78 ComReg considers that it is clear from the ordinary meaning of the term “Spectrum Usage Fee” that it only applies whilst spectrum is being used for the duration of the Licence, i.e. whilst the Winning Bidder holds the Licence and uses spectrum under the terms of the Licence. This meaning is also clear by:
- the definition of “Spectrum Usage Fee” in Regulation 2 of the draft Wireless Telegraphy (400 MHz Band Licences) Regulations; and
  - the further explanations of the characteristics of SUFs set out in the draft IM at paragraph 2.39.

## Joint Bidding

### ComReg’s view in Document 19/56

- 2.79 ComReg, in paragraph 3.32 of Document 19/56, outlined the availability of joint bidding. Prior to the Application Date for submission of Applications, Interested Parties can decide, if they wish, to bid jointly in the Award as a consortium. ComReg envisages that this could be a useful option for smaller potential Bidders.

## Views of respondents

- 2.80 ESNB asks ComReg to provide clarity on which entity would be punished or sanctioned in the event of severe breaches of the Award Rules.

## ComReg’s response and final position

- 2.81 In paragraph 3.32 of the draft IM, ComReg states that the consortium formed will be deemed to be a single entity for the purposes of the Award Process, and in the event of this single entity becoming a Winning Bidder in the Award, a 400 MHz Band Licence would be issued to this consortium as a single entity.
- 2.82 Should a member of a consortium be in breach of the Award Rules, the consortium as a whole would be held accountable for the breach. In this case, ComReg may impose sanctions on the consortium in accordance with Section 3.3.4 of the IM and/or Section 4 and 5 of the Competition Act 2002.

## Chapter 3

# 3 Other updates to the IM

## 3.1 Introduction

3.1 This Chapter sets out updates and changes to the text of Document 19/56 not already discussed in Chapter 2 of this document. These updates and changes relate to:

- Ownership Rules;
- Bid withdrawals;
- Reporting Breaches of the Award Rules; and
- Network Utility Operator Documentation.

3.2 For the avoidance of doubt, this Chapter does not discuss changes made to the text of Document 19/56 to correct typographical errors or to improve the clarity of text generally.

3.3 ComReg notes ESNB's submission in respect of editorial changes and has made the suggested changes where appropriate.

## 3.2 Ownership Rules

3.4 ComReg, in Document 19/56, noted that, in previous awards, it has enforced ownership rules to help ensure that Bidders bid for (and if they are successful, win) Licences as independent entities and in accordance with applicable law. In particular, the ownership rules were implemented to ensure that competition caps could not be circumvented and prevent any Bidder from having any unfair advantage or from distorting competition within the Award Process, by being able to coordinate with any other Bidder. However, ComReg has determined that a competition cap is not necessary for the purpose of this Award, and therefore ComReg is of the view that ownership rules are not required for this Award.

3.5 The purpose of this text in the draft IM was to inform Interested Parties of the reasons behind the exclusion of ownership rules from this Award. ComReg has removed text relating to ownership rules from section 3.3.4 of the draft IM as it has no material use in the final IM.

## 3.3 Bid withdrawal

3.6 ComReg, in paragraph 3.63 of Document 19/56, stated that following submission of its Application, an Applicant cannot withdraw or amend any Application Bids, (unless the Applicant is permitted to do so by ComReg or required to do so by ComReg in line with Section 3.4.2 of the draft IM).



- 3.7 Following its own review of the draft IM and in line with previous open award formats, ComReg has decided to allow the withdrawal of Applications on or before **16:00 hours (Irish time) on Friday 25 October 2019**.
- 3.8 ComReg has added text to Section 3.4.2 of the IM and also to Section 4.2.1 to reflect this.

### 3.4 Reporting Breaches of the Award Rules

- 3.9 The draft IM provides details on the process for contacting ComReg in the event of a breach of the Award Rules or other offending behaviour. In the final IM, ComReg has consolidated this process in paragraph 3.99 to 3.103 and added further details with regard to the process for reporting breaches of the Award Rules. In particular, ComReg has provided additional details of the process for reporting breaches of the IM that may occur at particular times during the Award Process. For example:
- during the Award Process but not during the Part A Assessment Stage or the Part B Assessment Stage; and
  - during the Part A Assessment Stage or the Part B Assessment Stage,
- 3.10 Readers are referred to Section 3.3.4 of the IM for full details.

### 3.5 Network Utility Operator Documentation

- 3.11 Paragraph 3.45 of the draft IM stated that:

*“A Network Utility Operator applying for the Part A Lot in the electricity sector must provide ComReg with four copies of its current licence obtained from the Commission for Regulation of Utilities (“CRU”) that satisfies ComReg’s definition of a Network Utility Operator as per Annex 1, and a Network Utility Operator applying for the Part A Lot in the gas or water sector must provide ComReg with four copies of documentation that satisfies ComReg’s definition of a Network Utility Operator as per Annex 1.”*

- 3.12 Upon review of the above, ComReg considers that it could provide additional clarity on what documentation a Network Utility Operator in the gas and water sectors must submit as part of its Application to partake in the Award Process:
- a Network Utility Operator in the gas sector can provide ComReg with a written statement signed by an Authorised Agent confirming that it is the company, or a subsidiary of the company, the functions of which are laid out in section 8 of the Gas Act 1976 and in section 11 of the Gas (Interim) (Regulation) Act 2002, or a Network Utility Operator in the gas sector can provide ComReg with a copy of the relevant licence(s) granted by the Commission for Regulation of Utilities to own and operate a transmission or distribution system under section 16(1) of the Gas (Interim) (Regulation) Act 2002, as appropriate; and

- a Network Utility Operator in the water sector must submit a written statement from an Authorised Agent confirming that it is the private company limited by shares formed by virtue of section 4 of the Water Services Act 2013 as amended.

3.13 Readers are referred to the Application Form, and paragraph 3.45 of the IM.

## Chapter 4

# 4 Next Steps

- 4.1 Table 1 of Chapter 3 of the IM sets out the timetable for the next steps of the Award Process.
- 4.2 ComReg will also facilitate the submission of questions regarding the Award Process and Award Rules and will respond publicly to these questions on an anonymised basis. The deadline for the submission of questions regarding the Award Process is **16:00 hours (Irish time) on Friday 13 September 2019**. The process for submission of questions is set out in Section 3.3 on the IM.
- 4.3 ComReg will process questions received within the stipulated period (as set out in Table 1 of the IM). Questions and corresponding answers will be published concurrently on ComReg's website. ComReg will not reply directly to these questions.
- 4.4 ComReg requires that any questions containing confidential material<sup>16</sup> be accompanied by a redacted, non-confidential version of the question. Should a question that is considered confidential by its submitter not be accompanied by a redacted, non-confidential version, ComReg will not accept the question as being validly submitted, nor will ComReg publish the question on its website or address the matters raised therein.
- 4.5 In the event that ComReg receives correspondence on matters relating to this document, the IM and the Award Process generally, ComReg hereby gives notice that it will publish all material correspondence received in this regard subject to the provisions of ComReg's guidelines on the treatment of confidential information.

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<sup>16</sup>Note, unless a question or part thereof is explicitly denoted confidential, ComReg will assume that the querist considers the question to be non-confidential. In this regard, ComReg would then have the authority to publish the question in whole or in part as it deems appropriate, in line with ComReg's guidelines on the treatment of confidential information (Document 05/24).

## Annex: 1 Legal Basis

- A 1.1 The Communications Regulation Acts 2002-2017<sup>17</sup> (the “2002 Act”), the Common Regulatory Framework (including the Framework and Authorisation Directives<sup>18</sup> as transposed into Irish law by the corresponding Framework and Authorisation Regulations<sup>19</sup>), and the Wireless Telegraphy Acts 1926 to 2009<sup>20</sup> set out, amongst other things, powers, functions, duties and objectives of ComReg that are relevant to the management of the radio frequency spectrum in Ireland and to this preliminary consultation.
- A 1.2 Apart from licencing 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 1.3 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 generally excludes those not considered relevant (for example, in relation to postal services, premium rate services or market analysis). For the avoidance of doubt, however, the inclusion of particular material in this Annex does not necessarily mean that ComReg considers same to be of specific relevance to the matters at hand.

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<sup>17</sup> The Communications Regulation Act 2002, the Communications Regulation (Amendment) Act 2007, the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010, the Communications Regulation (Postal Services) Act 2011, the Communications Regulation (Postal Services) (Amendment) Act 2015, and the Communications Regulation (Postal Services) (Amendment) Act 2017.

<sup>18</sup> 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”)

<sup>19</sup> 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.

<sup>20</sup> The Wireless Telegraphy Acts 1926 to 1988 and Sections 181 (1) to (7) and (9) and Section 182 of the Broadcasting Act 2009.

A 1.4 All references in this annex to enactments are to the enactment as amended at the date hereof, unless the context otherwise requires.

## Primary Objectives and Regulatory Principles under the 2002 Act and Common Regulatory Framework

A 1.5 ComReg's primary objective in carrying out its statutory functions in the context of electronic communications are to:

- Promote competition<sup>21</sup>
- contribute to the development of the internal market<sup>22</sup>
- promote the interests of users within the Community<sup>23</sup>;
- 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;<sup>24</sup> 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 regulations<sup>25</sup> in particular those designed to ensure effective competition<sup>26</sup>

## Promotion of Competition

A 1.6 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;

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<sup>21</sup> Section 12 (1)(a)(i) of the 2002 Act.

<sup>22</sup> Section 12 (1)(a)(ii) of the 2002 Act.

<sup>23</sup> Section 12(1)(a)(iii) of the 2002 Act.

<sup>24</sup> 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 electronic communications networks and services ("ECN" and "ECS"), 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.

<sup>25</sup> The 'Specific Regulations' comprise collectively the Framework Regulations, the Authorisation Regulations, 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).

<sup>26</sup> Regulation 16(1)(a) of the Framework Regulations.

- ensuring that there is no distortion or restriction of competition in the electronic communications sector; and
- encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

A 1.7 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 1.8 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.

### **Contributing to the Development of the Internal Market**

A 1.9 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 1.10 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.

### Promotion of Interests of Users

A 1.11 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 1.12 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.

## Regulatory Principles

A 1.13 In pursuit of its objectives under Regulation 16(1) of the Framework Regulations and Section 12 of the 2002 Act, ComReg must apply objective, transparent, non-discriminatory and proportionate regulatory principles by, amongst other things:

- 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.

## BEREC

A 1.14 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.

## Other obligations under the 2002 Act

A 1.15 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<sup>27</sup>;
- 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<sup>28</sup>; 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.<sup>29</sup>

## Policy Directions

A 1.16 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.

### Policy Direction No.4 on Industry Sustainability

A 1.17 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.

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<sup>27</sup> Section 12(3) of the 2002 Act.

<sup>28</sup> Section 12(5) of the 2002 Act.

<sup>29</sup> Section 12(6) of the 2002 Act.

### **Policy Direction No.5 on Regulation where necessary**

A 1.18 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 1.19 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 1.20 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 Management of the Radio Frequency Spectrum**

A 1.21 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**

A 1.22 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.

## Other relevant obligations under the Framework and Authorisation Regulations

### Framework Regulations

A 1.23 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 1.24 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 1.25 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 1.26 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 1.27 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 (“ITU-RR”).

A 1.28 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 1.29 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 1.30 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 1.31 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 1.32 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 1.33 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.

## Authorisation Regulations

### Decision to limit rights of use for radio frequencies

- A 1.34 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 1.35 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 1.36 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 1.37 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 1.38 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 1.39 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 1.40 Regulation 10(1) of the Authorisation Regulations provides that, notwithstanding Section 5 of the Wireless Telegraphy Act, 1926, but subject to any regulations under Section 6 of that 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 rights of use:

- 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 1.41 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 1.42 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 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 1.43 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 1.44 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**

A 1.45 Regulation 19 of the Authorisation Regulations permits ComReg to impose fees for rights of use which reflect the need to ensure the optimal use of the radio frequency spectrum.

A 1.46 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.

## **Amendments of rights and obligations**

A 1.47 Regulation 15 of the Authorisation Regulations permits ComReg to amend rights and conditions concerning rights of use, 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).



## Other Relevant Provisions

### Wireless Telegraphy Act, 1926 (the “1926 Act”)

- A 1.48 Under Section 5(1) of the 1926 Act, ComReg may, subject to that Act, and on payment of the prescribed fees (if any), grant to any person a licence to keep and have possession of apparatus for wireless telegraphy in any specified place in the State.
- A 1.49 Section 5(2) provides that, such a licence shall 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 may be prescribed in regard to it by regulations made by ComReg under Section 6.
- A 1.50 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 1.51 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 following matters:
- 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 1.52 Section 6(2) provides that Regulations made by ComReg under Regulation 6 may authorise and provide for the granting of a licence 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.

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

A 1.53 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:*

- 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.”

### **EECC and other relevant standards**

A 1.54 The project team has taken account, where relevant, of:

- provisions of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code including, for instance, provisions relating to spectrum rights of use, whilst noting that this Directive has yet to be transposed in this jurisdiction;
- reports by the International Telecommunication Union (“ITU”), including Report ITU-R SM.2351 (Smart grid utility management systems), Working Document towards a preliminary draft revision of Report ITU-R SM.2351-2, 28 June 2018;
- standards of the European Telecommunications Standards Institute (“ETSI”), including ETSI TR 103 528: “SmartM2M; Landscape for open source and standards for cloud native software applicable for a Virtualized IoT service layer” and ETSI TR 103 527: “SmartM2M; Virtualized IoT Architectures with Cloud Back-ends”.

## Annex: 2 Qualification Stage Details

A 2.1 Potential Applicants to the 400 MHz Band spectrum Award are encouraged to submit complete and clear applications to the Award and in full accordance with the IM. In the interests of allowing for a prompt Qualification Stage and to save on the requirement for Applicants to submit additional information, ComReg sets out below certain further details on the specifics that are required in certain parts of the IM. These details are informed from ComReg's experience of assessing Applications in recent Award Processes. Interested Parties should refer to the list below prior to submitting its Application.

### Supplying Appropriate Evidence

A 2.2 The Applicant is required to submit "appropriate evidence" (in accordance with paragraph 3.44 of the IM) that the persons signing the Application Forms and the persons bidding on behalf of the Applicant are duly authorised by the Applicant to do so.

### Both Authorised Agents Sign the Applicant Declaration

A 2.3 The Applicant is required to submit an Applicant Declaration signed by both Authorised Agents.

### Confirmation with Regard to the Existence of Insiders

A 2.4 The Applicant is required to confirm that there are no Insiders (for example, outside advisors) involved in its Bid.

A 2.5 Witnessing of the specimen signature of the sole authorised signature is required. The name and position of the witness rather than that of the Authorised Agent is required.