



Commission for
Communications Regulation

ComReg and Vodafone Ireland Limited agree to strike out Vodafone's judicial review proceedings [2014/595/JR], with no further order

Information Notice

Reference: ComReg 15/56

Date: 17 June 2015

1. On 12 June 2015, Vodafone and ComReg agreed to strike out judicial review proceedings [2014/595/JR] in which Vodafone had challenged the way in which ComReg has conducted its spectrum management role, and in particular how it conducted its role in the context of the 2014 acquisition by Hutchison 3G UK Holdings Limited ("Hutchison") of Telefónica Ireland Limited¹ ("O2 Ireland") ("the Merger"). An outline of the key facts of these proceedings is contained in **Annex 1** to this Information Notice.
2. In essence, Vodafone brought the case because it did not believe that ComReg had exercised its spectrum management function in the context of the Merger. ComReg, for its part, maintains that it has at all times been mindful of its statutory functions, duties and obligations and, in this regard, prior to the Merger, in the context of the Merger and in the aftermath of the Merger, it has exercised, and continues to exercise, its spectrum management role appropriately, in the context of all spectrum bands including those at issue.
3. In particular, ComReg assessed the Merger from a spectrum management perspective² and continues to monitor spectrum use in Ireland (including as it may be affected by the Merger³) in accordance with its relevant statutory functions, duties and obligations. In summary:
 - ComReg has put in place a regulatory regime to ensure and incentivise efficient spectrum use. In particular ComReg, via the spectrum licensing regime⁴, put in place various specific *ex-ante* measures to ensure on-going efficient use of spectrum in the relevant bands and in particular coverage and roll-out obligations and the payment of upfront spectrum access fees and ongoing spectrum usage fees;
 - ComReg continues to monitor and supervise compliance by all of the MNOs with the conditions attached to their respective licences, including those identified above;
 - ComReg continues to monitor and supervise compliance by all of the MNOs with the provisions of the Regulatory Framework⁵; and

¹ This company has since changed its name to Three Ireland Services (Hutchison) Limited.

² See, in particular, ComReg document entitled "*ComReg Analysis of the Observations Document*" in **Annex 2**.

³ In Particular, in the context of the 800 MHz, 900 MHz, 1 800 MHz and 2.1 GHz spectrum bands.

⁴ See, in particular, ComReg Document 12/25

⁵ In particular, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 and the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011.

- ComReg regularly meets with the MNOs to discuss relevant matters such as market trends, deployment of new technologies, coverage levels etc.
4. ComReg would observe that, in the carrying out of its spectrum management function, a public review in respect of concerns expressed by an undertaking is unlikely to be undertaken in circumstances where there is no *prima facie* basis for it.
 5. ComReg also takes this opportunity to confirm that:
 - administrative matters concerning the spectrum divestment aspect of the Commitments will be addressed by ComReg at the appropriate time (e.g. if and when the commitment to divest spectrum is likely to be exercised) and will depend on what is proposed by the relevant parties in accordance with the terms of the Commitments. These matters cannot be addressed until this time;
 - ComReg will soon publish its consultation on its spectrum strategy statement, which will set out its current thinking on matters relevant to the effective management and efficient use of the radio spectrum generally (including, making available additional spectrum rights, award process matters including competition-based spectrum caps (having regard to existing spectrum holdings) trading of spectrum rights, duration of spectrum rights, conditions attached to spectrum rights, collaboration between wireless operators and publication of information concerning radio spectrum)⁶;
 - ComReg will publish this summer its proposals for the award of rights of use in the 3.6 GHz band, as outlined by ComReg in Information Notice 15/14; and
 - ComReg expects to publish its response to Consultation 14/65 concerning the liberalisation of the paired terrestrial 2GHz spectrum band later this year.
 6. Finally, in the interests of contributing to an open market, ComReg sets out at **Annex 2** to this Information Notice key correspondence and other material relating to this matter.

⁶ To the extent that interested parties have any views which they wish ComReg to consider in the preparation of this consultation, then ComReg remains open to receipt of these views on the basis that such views will be published alongside the consultation (in accordance with ComReg's Consultation Procedures (Document 11/34) and Guidelines on the Treatment of Confidential Information (Document 05/24).

Annex: 1 Outline of Key Facts

- On 1 October 2013 Hutchison notified the European Commission, pursuant to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“the EU Merger Regulation”), of the (then proposed) Merger. The European Commission then commenced an investigation into the Merger (“the Merger Investigation”).
- ComReg extensively engaged with the European Commission in relation to the Merger Investigation.
- On 28 May 2014 it was announced that the European Commission had decided to approve the Merger, subject to certain commitments (“the Commitments”).
- From February 2014 Vodafone interacted with ComReg in relation to the Merger in the form of correspondence, meetings and phonecalls. During this interaction Vodafone asked that ComReg take certain positions in the Merger Investigation, outlined its interpretation of the radio spectrum management legislation and repeatedly, and in various ways, contended that ComReg must take certain actions in relation to the exercise of its radio spectrum management powers in the context of the Merger.
- Throughout the engagement with Vodafone, ComReg remained unclear as to the precise nature of Vodafone’s request, the basis for the request and the basis for ComReg taking any such action. Therefore, on 11 July 2014 ComReg wrote to Vodafone and suggested that Vodafone submit a document setting out comprehensively the precise nature of its concerns.
- On 31 July 2014 McCann FitzGerald solicitors, on behalf of Vodafone, sent ComReg a letter, to which was attached a document entitled “*Spectrum Accumulation arising from the Hutchison/O2 Merger in Ireland: Observations on ComReg’s Obligations and Powers*” (“the Observations Document”). The Observations Document, amongst other things, contended that “*There are sufficient grounds for ComReg, under its radio spectrum management function, to be obliged to open a review of effects of [the Merger] and consider whether it is necessary to take appropriate measures*”. Vodafone indicated that it considered that such a review should be undertaken in conjunction with a public consultation.

- On 26 September 2014 ComReg finalised an analysis of Vodafone's Observations Document entitled "ComReg's Analysis of the Observations Document". This document, which was made available to Vodafone in December 2014 subsequent to the institution of the proceedings, contained a detailed analysis and indicated that "*In the absence of a basic case suggesting that there are concerns relating to spectrum management (with a cogent legal and factual basis), it does not appear that there would be any point in seeking views in relation to the issues raised*" and concluded that "*For the reasons outlined above, ComReg does not agree with Vodafone's contention that 'There are sufficient grounds for ComReg under its radio spectrum management function, to be obliged to open a review of effects of the Transaction and to consider whether it is necessary to take appropriate measures'*".
- On 13 October 2014 Vodafone sought and was granted leave to bring the judicial review proceedings. These proceedings focused on compelling ComReg to respond to the Observations Document.
- On 14 October 2014 ComReg sent Vodafone a letter replying to the Observations Document. In this letter ComReg indicated to Vodafone that it would not be conducting a public review and consultation of the type requested by Vodafone and gave detailed reasons for this conclusion. In arriving at this conclusion, ComReg took full account of the Observations Document and assessed the Merger from a spectrum management perspective in the context of the Observations Document.

Annex: 2 Publication of key correspondence and other relevant material

Correspondence

1. Vodafone letter to ComReg dated 21 February 2014 (redacted).



21 February 2014

Mr. Gerry Fahy and Mr. Jeremy Godfrey
Commission for Communications Regulation,
Block DEF,
Abbey Court,
Irish Life Centre,
Lower Abbey Street,
Dublin 1

Proposed merger between Hutchison 3G UK and Telefonica Ireland (the "transaction")

Dear Mr. Fahy / Mr. Godfrey

Following our meeting on 28 January 2014, we are writing to set out certain concerns which Vodafone Ireland Limited ("Vodafone") has in relation to the transaction.

Relevant role of ComReg

We are of course aware that the proposed transaction is a concentration with a community dimension and that its effects from a competition law perspective therefore fall exclusively to be determined by the European Commission in accordance with EC Council Regulation 139/2004 (the "Merger Control Regulation").

We assume that, in its role as NRA, ComReg is being called on by the European Commission to assist in the Commission's analysis of the transaction and/or to provide or verify relevant market information pertinent to that analysis, or to assist the Commission in considering whether particular remedies proposed by the parties could feasibly be imposed to resolve competition concerns relative to the transaction in the particular circumstances of the Irish market.

By way of example, we presume that any remedy or condition relative to the transaction which would impact on spectrum allocation could be viewed positively by ComReg only if it is consistent with the rights and obligations of ComReg itself and of the other holders of spectrum rights in Ireland pursuant to the legal provisions of Irish law and other terms on which spectrum was allocated, including most obviously those of the 2012 spectrum auction. Because of this, any remedy proposed as a solution by the European Commission to any competition concerns identified in the transaction must, in our view, be "integrated" in the sense of addressing not only any competition law concerns, but also being consistent with the terms on which all relevant operators currently hold spectrum and being consistent with the wider objective of ComReg under section 12(2)(b) of the Communications Regulation Act 2002 (the "2002 Act") to "ensure the efficient management and use of the radio frequency spectrum." and the obligation of ComReg as regulator under Regulation 9(11) of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. 335 of 2011) (the "Authorisation Regulations") to "ensure that radio frequencies are efficiently and effectively used having regard to section 12(2)(a) of the Act of 2002 and Regulation 16(1) and 17(1) of the Framework Regulations". As you know, Regulation 17 of

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Framework Regulations refers in particular to (a) the effective management of radio frequencies for electronic communications services, and (b) that spectrum allocations are based on objective, transparent, non-discriminatory and proportionate criteria. These national legal provisions implement the Framework Directive 2002/21/EC (as amended by Directive 2009/140/EC). These provisions are not derived from national competition law, and so are not affected by the Commission's exclusive merger control jurisdiction. ComReg must still fulfil its duties and obligations.

Nothing in the Merger Control Regulation or in Regulation 3(7) of the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014 (S.I. 34 of 2014) (the "Spectrum Transfer Regulations") reduces or qualifies the obligation of ComReg in Regulation 9(11) of the Authorisation Regulations. For this reason, any remedy proposed in the course of the European Commission's competition review can only be accepted if it is also consistent with (i) the obligation under section 12(2)(b) of the 2002 Act and Regulation 9(11) of the Authorisation Regulations to ensure efficient spectrum management and (ii) the rights of spectrum holders pursuant to the terms on which they acquired or hold spectrum, in particular in the 2012 auction.

While any information or views that ComReg might make available to the European Commission for the purpose of the informing the competition law analysis is plainly a matter for ComReg, we would wish ComReg to understand that Vodafone has a direct and material interest in ensuring that the requirements of section 12(2)(b) and Regulation 9(11) and the terms of the spectrum allocation (in particular in the 2012 auction) are adhered to both during any period when the European Commission is exercising its jurisdiction under the Merger Control Regulation and at any time following the coming into effect of the transaction, if it is approved.

Possible spectrum remedies

A number of possible outcomes could arise in relation to the allocation of spectrum in the context of the transaction (if the transaction is cleared, unconditionally or subject to particular remedies or conditions).

A first possibility is that the parties to the transaction would be permitted to combine their current allocations of spectrum. Aside from any submissions which we have made to the European Commission from a competition law perspective in that regard, we believe that such an outcome would be inconsistent with the obligations cited above under section 12(2)(b) and Regulation 9(11) and would infringe the rights of Vodafone and perhaps of others in their own spectrum allocations based on the terms on which spectrum was offered and allocated following the spectrum auction. Should that eventuality arise, Vodafone would consider whether action against the decision of the European Commission was appropriate, but it would also have to consider its position as to enforcing section 12(2)(b) and Regulation 9(11) and any rights of its own in domestic law arising from its participation in the spectrum auction and its purchase of spectrum in the circumstances in which that auction was conducted and that purchase occurred. If the outcome is inconsistent with the basis or terms on which Vodafone paid for its current spectrum allocation, Vodafone would have to consider action for compensation or price adjustment as appropriate.

Secondly, it is also of course possible that any remedy or conditions imposed by the European Commission would involve the return of excess spectrum to ComReg to be re-offered to the market should ComReg determine that it is appropriate to do so. That approach seems to us to be proper both from a competition law perspective and from a public law perspective and also one which is much more likely to be consistent with the legislative framework, ComReg's prior practice and the established rights of existing spectrum holders under the terms on which spectrum was purchased.

Network sharing



MVNOs and other wholesale access

As also outlined at our meeting, we believe that provided that the spectrum issues identified above are appropriately resolved, there is no need for intervention by way of remedy or condition in relation to MVNO and national roaming agreements, which will continue to be negotiated on a commercial basis.

You might please acknowledge safe receipt of this letter and confirm whether ComReg's consideration of the impacts of the transaction from an efficient spectrum management perspective as required by section 12(2)(b) and Regulation 9(11) is intended to occur in a manner which is integrated into the European Commission's merger control decision or is intended to occur separately.

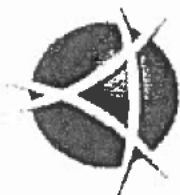
We look forward to hearing from you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Edward Traynor', is written over a horizontal line.

Edward Traynor
Head of Legal and Regulatory
Vodafone Ireland Limited

2. ComReg letter to Vodafone dated 4 March 2014.



Commission for
Communications Regulation
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Rialáil Cumarsáide

04 March 2014

Mr Edward Traynor
Head of Legal and Regulatory
Vodafone Ireland Limited
MountainView
Leopardstown
Dublin 18

Proposed merger between Hutchison 3G UK and Telefonica Ireland (the "Proposed Acquisition")

Dear Mr Traynor

I refer to your letter to Commissioners Fahy and Godfrey of 21 February concerning the above matter.

"Relevant role of ComReg" and "Possible spectrum remedies"

In relation to the matters raised by you under the above headings, ComReg firstly notes your view that:

- nothing in EC Council Regulation 139/2004 (the "Merger Control Regulations") or in Regulation 3(7) of the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014 (S.I. 34 of 2014) (the "Spectrum Transfer Regulations") reduces or qualifies the obligation of ComReg in relation to the efficient use of radio frequencies under section 12(2)(a) of the Communications Regulation Acts 2002-2011 (the "2002 Act") and Regulation 9(11) of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. 335 of 2011) (the "Authorisation Regulations");
- any remedy proposed in the course of the European Commission's (EC) competition review of the Proposed Acquisition can only be accepted if it is also consistent with (i) the above-mentioned obligations under the 2002 Act and the Authorisation Regulations and (ii) the rights of spectrum holders pursuant to the terms on which they acquired or hold spectrum, in particular in the 2012 Multi-Band Spectrum Award (MBSA); and
- the combination of the merging parties' spectrum rights of use (the "Primary Accumulation") would be inconsistent with the above-cited obligations in relation to efficient spectrum use and would also infringe Vodafone's rights in its own spectrum allocations based on the terms on which spectrum was offered and allocated following the MBSA.

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Regarding the issue of whether or not the Primary Accumulation and/or any proposed remedy which may be accepted by the EC in connection with the Proposed Acquisition would be consistent with ComReg's spectrum efficiency obligation under the 2002 Act and Regulation 9(11) of the Authorisation Regulations, we would firstly draw your attention to the following:

- Regulation 17(10) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. 335 of 2011) (the "Framework Regulations")¹;
- the coverage and roll-out conditions attaching to both "liberalised" rights of use awarded in the MBSA and 2.1 GHz rights of use; and
- the fact that the licensing regulations relating to both liberalised and 2.1 GHz rights of use requires payment by holders of such rights of use of annual spectrum usage fees in relation to such rights.

Therefore, in the context of ComReg's obligations to ensure the efficient use of spectrum rights of use, ComReg will, of course, continue to appropriately enforce the above-mentioned coverage and rollout conditions and require the prompt and full payment of applicable spectrum usage fees by liberalised use and 2.1 GHz rights holders. For the avoidance of doubt, this applies not just in relation to the liberalised and 2.1 GHz spectrum rights which may be directly affected by the Proposed Acquisition, but in relation to all liberalised use and 2.1 GHz rights, including those held by Vodafone.

Regarding the issue of whether or not the Primary Accumulation and/or any proposed remedy which may be accepted by the EC in connection with the Proposed Acquisition would be consistent with "the rights of spectrum holders pursuant to the terms on which they acquired or hold spectrum, in particular in the 2012 auction", we presume that Vodafone is referring to the spectrum caps which ComReg imposed in, and enforced during the course of, the MBSA process, and to which Vodafone refers, *inter alia*, in its Response to the EC's Statement of Objections, dated 17 February 2014. In that regard, ComReg would draw your attention to, *inter alia*:

- page 69 of ComReg Document 11/60 which relevantly provides that "The proposed spectrum caps would be imposed in order to conduct a competition leading to the release of the spectrum bands under new licences; the caps would not apply in perpetuity." (emphasis added);

¹ Regulation 17(10) provides that ComReg may, having regard to its objectives under section 12 of the 2002 Act, Regulation 16 of the Framework Regulations and its functions under the Specific Regulations (as defined in the Framework Regulations) - which would include its ensuring the efficient use of spectrum as set out in Regulation 9(11) of the Authorisation Regulations - lay down rules 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, and where such rules are applied in a proportionate, non-discriminatory and transparent manner.



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- paragraph 3.4.13 of the MBSA Decision Instrument contained in ComReg Document 12/25²;
- the definition of "Spectrum Caps" in the MBSA Information Memorandum (ComReg Document 12/52)³.

Given these documents, ComReg considers that any argument that the MBSA spectrum caps were not competition-based only, to be completely unsustainable.

Furthermore, we note from, *inter alia*, Vodafone's response to ComReg Document 11/60 that Vodafone perfectly understood the competition-based only nature of the MBSA spectrum caps. In particular, Vodafone states (at paragraph 8):

"Vodafone has no objection to ComReg's new proposal for a 2 X 10 MHz competition cap in the 900 MHz band for the first time slice only." (emphasis added).

Finally, ComReg notes your views in the context of "Network Sharing" and "MVNOs and other wholesale access" and, further, observes that Vodafone has raised such views to the EC in relation to the Proposed Acquisition.

Yours sincerely

George Merrigan
Director – Market Framework Division

² This paragraph provides that:

"spectrum caps which will apply to each Qualified Bidder in the competitive selection procedure, and for the duration of that procedure, as follows:

- 2 x 50 MHz for spectrum rights in aggregate across the 800 MHz, the 900 MHz and the 1800 MHz bands, in each of Time Slice 1 and 2;
 - 2 x 20 MHz for spectrum rights in aggregate across the 800 MHz and the 900 MHz bands, in each of Time Slice 1 and 2; and
 - 2 x 10 MHz for spectrum rights in the 900 MHz band in Time Slice 1 only,
- with all spectrum rights of use in the relevant bands, irrespective of whether such rights are on a Liberalised Use-, GSM-only, or other basis being taken into account when determining the spectrum rights in a band." (emphasis added)

³ Which provides:

"Explicit maximum limits set on the amount of spectrum that any one Bidder can be awarded in the Award Process. These are:

- 2 x 20 MHz of sub-1GHz spectrum in a Time Slice;
- 2 x 50 MHz of spectrum in a Time Slice; and
- 2 x 10 MHz of 900MHz spectrum in Time Slice 1." (emphasis added).

3. Vodafone submission dated 31 July 2014.



Spectrum Accumulation arising from the Hutchison/O2 Merger in Ireland: Observations on ComReg's Obligations and Powers

1. Introduction and Executive Summary
 - 1.1 In 2013 Hutchison 3G UK Holdings Limited ("Hutchison"), an indirect wholly-owned subsidiary of Hutchison Whampoa Limited and the owner of Irish mobile communications operator "Three", announced an intention to acquire 100% of the shares of Telefónica Ireland Limited ("O2 Ireland") (the "Transaction"). The underlying Sale and Purchase Agreement was signed on 22 June 2013. Following notification to and review by the European Commission under Council Regulation (EC) No 139/2004 ("EUMR"), the European Commission approved the Transaction on 28 May 2014, the approval being conditional on the implementation of commitments. The Transaction completed on 15 July 2014. At that point, it became clear to Vodafone that, as a result of the Transaction, the radio spectrum assigned by ComReg to O2 Ireland would come under the control of Hutchison.
 - 1.2 On a number of occasions since the announcement of the Transaction, Vodafone has requested that ComReg, in exercise of its statutory powers, should intervene to review consequences of the Transaction insofar as it impacts ComReg's function of managing Ireland's radio frequency spectrum, in particular those parts of the spectrum that are used for mobile communication, and to determine whether it is necessary to take appropriate measures. Vodafone has made this request by reference to its concerns about the impact of the Transaction on the promotion of competition and the efficient use and effective management of the spectrum resource. In addition, Vodafone has pointed out to ComReg that, due to the fundamental shift in the assignments of the mobile communication radio spectrum resulting from the Transaction which is a private law agreement to which ComReg is not a party, the assignment arrangements for the spectrum affected can no longer be regarded as being based on objective, transparent, non-discriminatory and proportionate criteria.
 - 1.3 In response to its most recent request for ComReg intervention, Vodafone was asked by ComReg to "[submit] a document setting out comprehensively the precise nature of its



concerns, including the legal basis and a detailed description of the facts upon which Vodafone relies¹.

1.4 In this submission, Vodafone will outline its concerns and the facts that give rise to those concerns; it will also explain why ComReg not only has the power but is also under an obligation to take steps to determine whether, in light of the Transaction and its effects on the assignments of the mobile communication radio spectrum, the standards imposed by statute in relation to ComReg's radio spectrum management function are satisfied and, if they are not, whether it is necessary for ComReg to take appropriate measures.

1.5 In summary:

- ComReg exercises exclusively the radio spectrum management function in Ireland; it cannot delegate or abrogate that function;
- Two crucial aspects of that function are assignment and enforcement in respect of the rights to use radio spectrum;
- ComReg's enforcement role within its radio spectrum management function is on-going and dynamic; its exercise is not precluded by an EUMR process or clearance;
- In exercising its radio spectrum management function, ComReg is bound to promote and achieve certain objectives (or standards) which are set out in statute and relate, notably, to the promotion of competition, the efficient management and use of the radio spectrum and the assignment of individual rights of use for radio spectrum on the basis of objective, transparent, non-discriminatory and proportionate criteria;
- Where, following review, ComReg finds that the arrangements for the rights to use radio spectrum are not in compliance with the objectives associated with ComReg's radio spectrum management function, ComReg has the power and obligation to intervene in order to take appropriate measures;

¹ Letter dated 11 July from Caroline Dee-Brown, General Counsel, ComReg to Sean Barton, Partner, McCann FitzGerald. McCann FitzGerald are solicitors to Vodafone in this matter.



- There are sufficient grounds for ComReg, under its radio spectrum management function, to be obliged to open a review of effects of the Transaction and to consider whether it is necessary to take appropriate measures.

2. The European Commission's Review of the Hutchison/O2 Concentration

- 2.1 By way of background, Vodafone will briefly summarise the EUMR process and its outcome in relation to the Transaction. Vodafone's position is that ComReg's obligations are not abrogated, and the exercise of its powers is not precluded, by the notification of a concentration with a Community dimension under the EUMR or by a European Commission Decision declaring the concentration compatible with the common market.
- 2.2 The Transaction fell within the jurisdiction of the European Commission under the EUMR and was notified on 1 October 2013.
- 2.3 As the European Commission was of the view that the Transaction raised competition concerns on the Irish mobile communications market at both the retail and wholesale levels, it opened a Phase II investigation into the Transaction on 6 November 2013. Following the delivery of a Statement of Objections and discussions with the European Commission, the merging companies submitted a package of commitments to the European Commission. Various iterations of this package of commitments were submitted by Hutchison to the European Commission.
- 2.4 After some time and a number of iterations, the European Commission formed the view that the commitments submitted addressed its competition concerns and it approved the Transaction on 28 May 2014. The approval was conditional on the full implementation of the commitments (the "Final Commitments"). The full text of those Final Commitments has not yet been published or otherwise communicated to Vodafone. On the basis of publicly available information, Vodafone understands that, in summary, the Final Commitments provide for :
- Hutchison to offer up to 30% of the merged network's capacity to two MVNOs in Ireland at fixed payments (the "MVNO Commitment");
 - From 1 January 2016 to 1 January 2026, an option for one of the two MVNOs to acquire five blocks of the merged entity's spectrum in the 900 MHz, 1800 MHz and 2100 MHz



bands. If acquired, the MVNO will hold the spectrum for the remainder of the licence attached to the relevant spectrum block (the "MNO Commitment"); and

- Hutchison to make an offer to eircom to continue on improved terms the network sharing agreement which eircom has with O2 Ireland (the "Network Share Commitment").

2.5 UPC has entered into an agreement with Hutchison to take up the MVNO Commitment. It has also been reported that Carphone Warehouse has finalised an agreement with Hutchison to take up the MVNO Commitment.

2.6 The European Commission's Decision approving the Transaction subject to conditions has not yet been published. However, in relation to ComReg's statutory radio spectrum management function and related powers, the European Commission has confirmed that in the Decision it *"notes that the MNO commitment and this decision are without prejudice to ComReg's statutory powers, notably those in relation to effective use of spectrum"*.³

2.7 This paper is without prejudice to Vodafone's position on the compatibility of the Final Commitments, in particular the MNO Commitment, with EU and Irish electronic communications regulatory law.

3. ComReg's Response to the European Commission's Clearance Decision

3.1 On the same day the European Commission announced its conditional approval of the Transaction, ComReg issued an Information Notice.

3.2 In its Notice, ComReg stated that it remained concerned that, given the substance and form of the Final Commitments, the European Commission's competition concerns would not be fully addressed, and that significant negative consequences for Irish consumer welfare may result.

3.3 ComReg identified its primary concerns with the Final Commitments as being, in summary, that:

- (a) *"they appear inadequate and ineffective to address the serious competition concerns and consumer harm identified by the [European Commission] (for example higher prices)"*; and

³ E-mail Simon Vandewalle, European Commission to Nick Woodrow, Vodafone dated 24 June 2014



(b) *"they do not appear to comply with the [European Commission's] requirements as set out in its Remedies Notice".*

3.4 ComReg also stated that it remained *"of the strong view that the behavioural commitments are insufficient to address the structural competition deficit identified as likely to result from the [transaction]"*:

3.5 ComReg said that *"in light of the [European Commission] approved changes to the mobile market structure"*, it would *"in keeping with its statutory powers"*:

(a) *"monitor the competitive dynamic of the mobile markets affected"; and*

(b) *"proceed with its strategy for managing the radio spectrum including the identification of other spectrum releases in order to promote competition and further promote innovation and network investment, among other things."*

3.6 As far as Vodafone is aware (based on publically accessible records), ComReg has not taken any steps in connection with the Transaction since the publication of the Information Notice.

4. ComReg's Radio Frequency Spectrum Management Function

4.1 Management of radio frequency spectrum is an essential part of ComReg's mission. Spectrum management is the process of regulating the use of radio frequencies to promote efficient use and gain a net social benefit³. Spectrum is a finite natural resource; impartial and disinterested management is required in order to maximize the benefits that may be derived from its allocation, assignment and use. Failure properly or effectively to manage spectrum imposes costs on users of spectrum and on consumers.

4.2 The Department of Communications, Energy and Natural Resources (the "Department") in its *"Consultation on Spectrum Policy Priorities"* ("2014 Consultation") published recently has again confirmed the importance of radio spectrum and its effective and efficient use: *"Spectrum is a valuable natural national resource, which needs to be used as effectively and efficiently as possible for the good of the state - both economic and social - and the good of all its citizens"*⁴.

³ Martin Cave, Chris Doyle, William Webb, *Modern Spectrum Management*, Cambridge University Press, 2007.

⁴ Department of Communications, Energy and Natural Resources, *Consultation Spectrum Policy Priorities* (24 July 2014), paragraph 2.2.



- 4.3 ComReg's central role in radio frequency spectrum management in Ireland derives from the Communications Regulations Act 2002 (the "2002 Act"), which is also the statute under which ComReg is established. The 2002 Act identifies ComReg's "functions" and in connection with these functions, ComReg is assigned "objectives" under the Act. These "objectives" may be understood to be the standards ComReg has to promote and achieve in the exercise of its functions.
- 4.4 ComReg's functions are set out in concise terms in Section 10 of the 2002 Act; its objectives are laid out in a more detailed manner in Section 12 of the 2002 Act and in related measures. Vodafone's understanding of the interaction between ComReg's functions and its statutory objectives will be discussed in more detail in Parts 5 and 6 below.
- 4.5 A core ComReg function (second only to ensuring compliance by operators with their obligations) is "to manage the radio frequency spectrum" (Section 10 (1) (b), 2002 Act).
- 4.6 ComReg has itself provided a succinct description of what is involved in the management of radio spectrum:

"Management of the radio spectrum is the combination of administrative, regulatory and technical procedures necessary to ensure the efficient operation of radio communications equipment and services. Simply stated, spectrum management is the overall process of regulating and administering access to and use of the radio frequency spectrum. A primary goal of spectrum management is to ensure optimal use of the radio spectrum, in social, economic and technical terms.

ComReg's spectrum management activities embrace four main areas, namely deciding at a strategic level, in consultation with interested parties, how the spectrum should be used, developing and implementing the regulatory framework for such use, making the relevant frequencies available through competitions, authorisation, etc., and maintaining an interference-free environment⁵.

- 4.7 The respective roles of the Department and ComReg are, in turn, succinctly summarised in the 2014 Consultation:

⁵ http://www.comreg.ie/radio_spectrum/spectrum_management.540.html



"One of the key roles of the Department is the development of effective policies for the regulation and optimum use of Ireland's national radio frequency spectrum, underpinned by an appropriate legislative framework.

Spectrum policy is part of the overall national policy governing the telecommunications sector in Ireland, which also covers next generation broadband, electronic communications services and international connectivity. The Department also has the responsibility to develop a national broadcasting policy and associated spectrum use.

*The implementation of those national policies rests with the Commission for Communications Regulation (ComReg), an independent body under the aegis of the Department. It has statutory responsibility for the efficient management and use of the radio spectrum within the policy and legal framework set by the Government and the EU. Spectrum management is the overall process of regulation and administering access to and use of the radio frequency spectrum. The management of spectrum at the national level requires ComReg to make decisions on spectrum usage within Ireland. In making such decisions ComReg must balance international considerations, impact on existing users, EU legislative framework and national requirements and in addition must consider such issues as political and policy consideration, spectrum availability, technical issues relating to avoidance of interference, the usage of the spectrum in neighbouring countries, equipment availability and spectrum demand."*⁶

5. Assignment and Enforcement of Rights to Use as a Crucial Part of ComReg's Radio Spectrum Management Function

- 5.1 A crucial part of a regulator's management function in respect of radio spectrum is the assignment and enforcement of rights to use spectrum. The assignment part of the regulator's function is referred to by ComReg in the summary above as "*making the relevant frequencies available through competitions, authorisation, etc.*" In exercising this part of its statutory function, ComReg has the exclusive task of deciding, among other things, who holds the right to use radio spectrum, which spectrum they may use, for how long they should enjoy the right to use and the terms on which they hold the right to use. This is not a task that ComReg can delegate or abrogate; there is no provision for such delegation or abrogation in the relevant

⁶ 2014 Consultation, paragraph 2.4.1-2.4.2.



statutes. This is hardly surprising because these assignment decisions are at the core of ComReg's Section 10 of the 2002 Act radio spectrum management function.

- 5.2 With regard to the parts of the radio spectrum most frequently used for mobile communications (namely the 800 MHz, 900 MHz and 1800 MHz bands), ComReg exercised the assignment aspect of its management function most recently when it assigned rights to use spectrum in those bands to four operators on foot of the Multi-Band Spectrum Auction process which ended on 15 November 2012. Since then and as a result of the Transaction, a fundamental change has occurred in relation to those assignments insofar as the radio spectrum assigned to O2 has come under the control of Hutchison; this change occurred without any exercise by ComReg of its radio spectrum management function. Vodafone will explain later in this paper why acquiescence by ComReg in this fundamental change is incompatible with ComReg's exclusive radio spectrum management function and the objectives and standards associated with that function and why ComReg is not only permitted but required to review the compatibility of Hutchison's radio spectrum accumulation with ComReg's radio spectrum management function and the related objectives and standards in Irish law and, if necessary, to take appropriate measures.
- 5.3 ComReg's powers and its obligations in relation to this aspect of its radio spectrum management function were not exhausted when it had completed the assignment process following the Multi-Band Spectrum Auction. ComReg has an on-going supervisory or enforcement role as part of its management function. It must ensure on an on-going basis that arrangements for the use of spectrum continue to comply with the standards imposed on it as objectives by statute in its radio spectrum management function (see Part 6 below for a more detailed discussion of those standards). In other words, the fact that the previous spectrum assignment procedure complied with those objectives and standards does not release ComReg from its on-going supervisory or enforcement role, particularly in circumstances where an external event (in this case, a private law agreement between spectrum users) results in a substantial change in the overall assignments of rights to use spectrum.
- 5.4 This on-going supervisory obligation, it could be argued, is implicit in the broad scope of ComReg's statutory function "to manage the radio frequency spectrum". However, it is also made explicit in EU and Irish law. Regulation 9(11) of the European Communities (Electronic

⁷ Section 10 (1) (b), 2002 Act.



Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011) (the "Authorisation Regulations") provides that *"the Regulator shall ensure that radio frequencies are efficiently and effectively used having regard to section 12(2)(a) of the Act of 2002 and Regulations 16(1) and 17(1) of the Framework Regulations. The Regulator shall ensure that competition is not distorted by any transfer or accumulation of rights for use of radio frequencies. For this purpose the Regulator may take appropriate measures such as mandating the sale or lease of rights of use for radio frequencies"*.

5.5 The significance of the references to section 12 of the 2002 Act and the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (SI no. 333 of 2011) (the "Framework Regulations") will be discussed in more detail in Part 6 below. For the moment, Vodafone seeks to explain the basis of its view that this provision not only confirms ComReg's on-going supervisory obligation but also provides ComReg with a basis to intervene (by taking appropriate measures) in circumstances where there has been a substantial change in the overall assignments of rights to use, for example due to transfers or accumulation, which gives rise to issues of compliance with the objectives and standards required of ComReg in its radio spectrum management function.

5.6 By way of parenthesis, Vodafone notes that Regulation 9 (11) is the domestic implementation of Article 5(6) of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), as amended by Directive 2009/140/EC (the "Authorisation Directive"). That provision of the Directive is addressed directly to competent national authorities (which obviously includes ComReg) and, as a result, did not require any further implementation in domestic law. Article 5(6) requires the national authorities to *"ensure that radio frequencies are efficiently and effectively used in accordance with Articles 8(2) and 9(2) of Directive 2002/21/EC (Framework Directive). They shall ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies. For such purposes, Member States may take appropriate measures such as mandating the sale or the lease of rights to use radio frequencies"* (emphasis added). Vodafone notes that, from the text of Article 5(6), it is clear that a national authority may intervene by taking appropriate measures in support either of its obligation of ensuring efficient and effective use of radio spectrum (the first purpose, mentioned in the first sentence, of Article 5 (6)) or of ensuring that competition is not distorted (the second purpose, mentioned in the second sentence, of Article 5 (6)) or both.



- 5.7 Returning to the on-going nature of ComReg's supervisory obligation, it is clear from the references, by way of examples, in the text of Regulation 9(11) (and Article 5(6)) to transfers or the accumulation of rights of use that the Irish and EU legislators intended that ComReg's radio spectrum management function should be dynamic and not static. Transfers or an accumulation of the type envisaged in Regulation 9(11) are events that can only occur after an assignment process. Even after it has completed a spectrum assignment process that complies in every respect with the objectives and standards set out in Irish law, ComReg is required to continue to ensure that radio frequency spectrum is managed in accordance with those objectives and standards. Vodafone notes that its understanding of the legislative framework within which ComReg is required to act is confirmed by the first Policy Principle in the Spectrum Policy Statement of the Department of Communications, Energy and Natural Resources adopted in September 2010: *"Spectrum management processes will be dynamic and responsive to stakeholders' needs and to developments in markets and technologies"*.
- 5.8 For the avoidance of doubt, Vodafone does not accept the proposition that, because another regulatory body (in this case, the European Commission acting under the EUMR) has reviewed and cleared under a separate regulatory system a transaction that will result in a significant change in the overall assignment of rights to use, ComReg is precluded from exercising its radio spectrum management function or is released from its obligation to ensure that arrangements for the use of radio spectrum are compliant with the objectives and standards that ComReg is required to promote and achieve in the exercise of that function. Vodafone finds no basis for such a proposition in either the EU or Irish law relating to the powers and obligations of ComReg. Instead, the reference in Article 5(6) to *"any transfer or accumulation of rights of use of radio frequencies"*, unlimited by any reference to merger clearance or any other process, tends to confirm Vodafone's view. As already explained, the European Commission has confirmed in its Decision clearing the Transaction that *"the MNO commitment and this Decision are without prejudice to ComReg's statutory powers, notably those in relation to effective use of spectrum"*. In Vodafone's view, this is not surprising since the two systems (merger control and electronic communications regulation), while largely seeking to promote similar objectives in terms of consumer welfare, have separate fields of focus, have different objectives and are administered by separate regulatory bodies. In this context, Vodafone notes that radio spectrum management, the function delegated to ComReg under the 2002 Act, is a national competence. In addition, Vodafone notes the different Treaty bases for the European Commission's merger control function and for the EU harmonisation of the regulatory aspects



of the radio spectrum management function by national authorities. Review of transactions under the EUMR and under Irish electronic communications law are conducted by reference to different separate substantive tests.

5.9 A parallel from another EU Member State that faced issues similar to those arising from the Transaction may be helpful and should provide guidance to ComReg on the course to adopt when confronted with a fundamental change in spectrum rights to which it was not a party. ComReg is aware that, while the EUMR review of the Transaction was underway, the European Commission was also reviewing the proposed acquisition of KPN's German mobile telecommunications business E-Plus by Telefónica Deutschland. ComReg will also be aware that the German communications regulator ("BNetzA"), following the announcement of the proposed acquisition, started its own separate regulatory review under the German communications statute ("TKG") in order to assess the impact of aggregation of the merging parties' spectrum holdings on competition and on the efficient use of spectrum. The proposed acquisition was cleared by the European Commission under the EUMR on 2 July 2014; the BNetzA review under the TKG continues. In Vodafone's submission, ComReg should adopt the same approach as its German counterpart and seek, by means of review, to determine the impact of the Transaction on its radio spectrum management function and the objectives and standards it is required to promote and achieve in connection with that function.

5.10 Vodafone also notes that, during the course of the European Commission's EUMR review of the Transaction, ComReg adopted the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014 (the "Transfer Regulations"). Regulation 3(7) provides that "*these Regulations shall not apply to any transfer that forms part of a merger or acquisition which is required to be notified to the Competition Authority in accordance with Part 3 of the Competition Acts 2002 to 2012 or to the European Commission in accordance with Council Regulation (EC) No 139/2004*". In Vodafone's submission, the adoption of these Regulations and, specifically, Regulation 3(7) does not deprive ComReg of its jurisdiction to review transactions such as the Transaction by reference to its radio spectrum management function and the objectives and standards it is required to promote and achieve in connection with that function. Vodafone notes that ComReg itself has not publically made any suggestion that it does not retain its radio spectrum management in connection with the Transaction and, in particular, did not make any such suggestion in the Information Notice.



- 5.11 For the avoidance of doubt, Vodafone does not accept the proposition that the Transfer Regulations in any way exclude ComReg from exercising its radio spectrum management function in connection with transfers that form part of transactions such as the Transaction. In support of its view, Vodafone would, first, point to the fact that transfers that form part of transactions notified under the EUMR, such as the Transaction, are excluded from the scope of the Transfer Regulations; they are unaffected by the Transfer Regulations. ComReg's powers and obligations under its radio spectrum management function and statutory objectives in respect of such transfers (and the transactions of which they form part) are unaltered by the Transfer Regulations. In other words, the exclusion of these transfers confirms that they continue to be subject to the primary supervisory and enforcement aspect of ComReg's statutory function. Secondly, Vodafone notes that the radio spectrum management function is a statutory function conferred on ComReg by the Oireachtas in primary legislation, namely the 2002 Act. ComReg, a statutory body established by that Act, cannot, by means of secondary legislation adopted under delegated powers granted to it under another statute (in this case, the Wireless Telegraphy Act, 1926 (as amended)) abrogate or abandon in whole or in part a statutory function conferred on it by the Oireachtas. In addition, Vodafone notes that the proposition that the Transfer Regulations in some way exclude the supervisory and enforcement aspect of ComReg's statutory radio spectrum management function is not coherent with the language of the Transfer Regulations themselves which in their introductory recital state that they are adopted "for the purposes of giving effect to Regulation 19 of the Framework Regulations". That Regulation, which is entitled "transfer or lease of individual rights to use radio frequencies", requires ComReg to deal with transfers "having regard to its objectives under section 12 of the Act of 2002". The application of ComReg's statutory function and associated objectives to spectrum transfers is confirmed by the specific provision which ComReg seeks to implement by means of the Transfer Regulations. Therefore, ComReg's supervisory and enforcement powers are not excluded or abrogated under the Transfer Regulations; rather than being precluded from exercising those powers in the context of transfers of spectrum consequent on a merger or acquisition, ComReg remains obliged to exercise these powers.

6. The Standards by Which ComReg Must Exercise its Radio Spectrum Management Function

- 6.1 The radio spectrum resource is a public good. For the achievement of the greatest value in terms of societal welfare from that resource, the proper exercise of ComReg's radio spectrum management function is of fundamental importance. For this reason, both the European and



Irish legislators have imposed standards which must be promoted and achieved by ComReg in the exercise of that function.

6.2 In the Irish legislation, those standards (which are referred to as "objectives") are set out in Section 12 of the 2002 Act. At European level, they are set out in 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 (the "Framework Directive"), which has been implemented in Ireland by the Framework Regulations.

6.3 The link between ComReg's radio spectrum management function and these standards or objectives underpins the entire legislative structure but Regulation 9(11) of the Authorisation Regulations makes it explicit and explains what ComReg may do if the radio spectrum arrangements are out of kilter with the statutory standards or objectives. In that Regulation, those standards are identified as "*ensuring 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 ensuring that competition is not distorted by any transfer or accumulation of rights to use*". Where ComReg finds that those standards are not satisfied (and Vodafone will submit below that there are very strong reasons for ComReg to be concerned that they are no longer satisfied after and as a result of the Transaction), it may take the necessary "*appropriate measures*" to remedy the situation, which may include "*mandating the sale or the lease of rights to use radio frequencies*". Although not explicitly mentioned in the legislation, Vodafone would expect ComReg, prior to determining whether it is necessary to take "*appropriate measures*", to seek to conduct a review and consultation on the compliance of the overall spectrum arrangements following the Transaction with its statutory function and associated objectives.

6.4 Moving onto the specific bases for ComReg's standards and objectives; insofar as Section 12 of the 2002 Act is concerned, Vodafone would identify the following objectives as particularly relevant to ComReg's radio spectrum management function in the context of the Transaction:

- in relation to the provision of electronic communications networks, electronic communications services and associated facilities, to promote competition (Section 12 (1) (a) (i));




- to ensure the management and use of the radio frequency spectrum are efficient (Section 12 (1) (b)); and
- to ensure the management and use of the radio frequency spectrum is in accordance with section 13 Ministerial Directions (Section 12 (1) (b)).

6.5 In addition, Section 12 (3) imposes a general obligation of proportionality on ComReg in the exercise of its statutory functions, including the radio frequency spectrum management function.


6.6 On the basis of Section 12 (1) (b) of the 2002 Act, Ministerial Directions made under Section 13 are also binding on ComReg in the exercise of its radio spectrum management function. The Minister issued a number of Directions in 2003 and 2004, two of which, in Vodafone's assessment, are of particular relevance to the current situation:

- *"The Commission 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"* (Direction 11, 21 February 2003); and
- *"The Commission 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."* (Direction 4, 21 February 2003).

6.7 On the basis of these Directions, Vodafone observes that ComReg, in the exercise of its radio spectrum function, must take account of the interests of all users of the radio frequency spectrum and not limit itself to an assessment of the interests of, for example, the parties to a private law transaction that leads to a fundamental change in the overall assignments of rights to use spectrum. In addition, ComReg is required, when exercising this function, to take account of the impact of its decisions on the sustainability of the business of all undertakings affected; Vodafone observes that its business is directly and adversely affected by any decision of ComReg (whether through acquiescence or failure to act or otherwise) in relation to spectrum management in connection with the Transaction. The Minister's Directions correctly require ComReg, when exercising its functions, to focus on the industry sector and the markets




involved (rather than the situation of individual operators). The accumulation of radio spectrum by Hutchison as a result of the Transaction has direct and adverse effects on the mobile communications industry and on the markets for mobile communications. Operators in those markets made substantial investment, technology and commercial decisions based on the radio spectrum assignments resulting from the Multi-Band Spectrum Auction administered by ComReg in exercise of its radio spectrum function. Those assignments have been disturbed to a very material extent by the Transaction, which brings the spectrum assigned to O2 Ireland under the control of Hutchison as a result of a private law agreement between those two parties to which ComReg was not a party and which has not been reviewed for compatibility with ComReg's statutory functions and objectives. For this reason alone, Vodafone submits that, in order for ComReg to be compliant with the Minister's Directions, it must initiate a review of effects of the Transaction and consider whether it is necessary to take the appropriate measures provided for by law.



6.8 Further standards are imposed on ComReg in the exercise of its radio spectrum management function by the Irish legislation implementing EU Electronic Communication Directives. In this regard, Regulation 17 of the Framework Regulations, (headed "*Management of radio frequencies for electronic communications services*") is of particular relevance. Pursuant to Regulation 17, ComReg is bound to adhere to the following objectives in its radio spectrum management function:

- ensuring the effective management of radio frequencies for electronic communications services (Regulation 17 (1) (a), Framework Regulations); and
- ensuring that spectrum allocations 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 (Regulation 17 (1) (b), Framework Regulations).

7. Decision No 243/2012/EU establishing a multiannual radio spectrum policy programme



7.1 By way of parenthesis, Vodafone submits that Decision No 243/2012/EU of 14 March 2012 establishing a multiannual radio spectrum policy programme (the "RSPP Decision") does not in any way preclude ComReg from exercising its powers under EU and Irish electronic communications law in respect of the Transaction. The purpose of the RSPP Decision is to



establish a multiannual radio spectrum policy programme for the strategic planning and harmonisation of the use of spectrum to ensure the functioning of the internal market in the Union policy areas involving the use of spectrum, including electronic communications.

7.2 Vodafone notes that the RSPP Decision is expressed (Article 1 (1), second paragraph) to be without prejudice to existing Union law, particularly the Framework Directive and the Authorisation Directive which, in their national implementation in the Framework Regulations and the Authorisation Regulations, are, together with domestic statutory provisions setting out ComReg's radio spectrum management function and the objectives and standards it must promote, the basis for the observations set out in this paper concerning ComReg's obligations and powers in relation to radio spectrum management. Vodafone again reminds ComReg that radio spectrum management, the function delegated to ComReg under the 2002 Act, is a national competence; that situation cannot, and is not intended to, be altered by means of a Decision such as this.

8. ComReg Must Initiate a Review in Order to Determine Whether it is Necessary to Take Appropriate Measures

8.1 Although ComReg expressed concerns about the effects of the Transaction, including concerns about consumer harm and higher prices, it has not taken any steps in exercise of its radio spectrum management function in connection with the spectrum accumulation by Hutchison that arises on foot of the Transaction. ComReg, through its inactivity, has essentially acquiesced (or is at grave risk of acquiescing) in the spectrum accumulation. In Vodafone's submission, ComReg not only has the power but is also under an obligation to take steps to determine whether, in light of the Transaction and its effects on the arrangements for the rights to use spectrum, the standards imposed by statute in relation to ComReg's radio spectrum management function are satisfied and, if it finds that they are not, whether it is necessary for ComReg to take appropriate measures under Regulation 9 (11) of the Authorisation Regulations.

8.2 Until the completion of the Transaction, arrangements for the use of spectrum in the 800 MHz, 900 MHz and 1800 MHz bands in the State were based on ComReg's exercise of the assignment aspect of its spectrum management function, specifically the Multi-Band Spectrum Auction process which ended on 15 November 2012. In setting the terms of the Auction, ComReg, in its own words was "*guided by its statutory functions, objectives and relevant duties*



*in relation to Ireland's radio frequency spectrum*⁸. ComReg provided a detailed description of its understanding of those statutory functions, objectives and relevant duties in Annex 2 to ComReg 12/25a. Prominent in that Annex 2 was ComReg's analysis of issues directly relevant to any review of the effect of the Transaction: ComReg's obligations to ensure the promotion of competition, the efficient management and use of the radio spectrum and the assignment of individual rights of use for radio spectrum on the basis of objective, transparent, non-discriminatory and proportionate criteria. The assignments made by ComReg on foot of the Multi-Band Spectrum Auction were made in compliance with those obligations.

- 8.3 Those spectrum assignments are now fundamentally altered as the result of the Transaction, with the spectrum that was assigned to O2 Ireland being placed under the control of Hutchison. This fundamental alteration in the assignment of spectrum did not occur as the result of any exercise by ComReg of its statutory management function but rather as the result of a private law agreement between Telefónica and Hutchison, to which ComReg was not a party. The identity of holders of the rights to use and the extent of their rights in these crucial spectrum bands are no longer the result of decisions by ComReg.
- 8.4 Vodafone's submission is that, at the very least, ComReg can no longer be certain that the radio spectrum arrangements in the bands affected by the Transaction are compliant with the standards and objectives associated with ComReg's statutory radio spectrum management function. In relation to the promotion of competition, Vodafone notes that ComReg cannot rely on the European Commission's EUMR Decision as a basis to defend the compatibility of the spectrum arrangements arising on foot of the Transaction with that objective. First, Vodafone reminds ComReg that the test applied by the European Commission in an EUMR review⁹ is substantively different to the standard ComReg is required to apply under Section 12 of the 2002 Act: namely, "*in relation to the provision of electronic communications networks, electronic communications services and associated facilities, to promote competition*". Secondly, Vodafone reminds ComReg that it cannot, in any event rely on the European Commission's appraisal because ComReg itself has highlighted the inadequacy at the core of the EUMR process when it stated in its Information Notice that "*the European Commission's competition concerns will not be fully addressed, and that significant negative consequences*

⁸ ComReg 12/25- Multi-band Spectrum Release: Release of the 800 MHz, 900 MHz and 1800 MHz Radio Spectrum Bands, paragraph 2.13.

⁹ EUMR, Article 2(3): "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

for Irish consumer welfare may result, that "[the Final Commitments] appear inadequate and ineffective to address the serious competition concerns and consumer harm identified by the European Commission] (for example higher prices)' and that "the behavioural commitments are insufficient to address the structural competition deficit identified as likely to result from the [Transaction]'. Vodafone agrees with ComReg's competition analysis and submits that, on this basis alone, there are sufficient grounds for ComReg to be obliged to open a review under its radio spectrum management function of effects of the Transaction and to consider whether it is necessary to take appropriate measures under Regulation 9 (11) of the Authorisation Regulations.

8.5 In relation to ComReg's obligation to ensure the efficient management and use of the radio spectrum, it is undisputed that the Transaction results in a radical departure from the radio spectrum assignment arrangements provided for and foreseen by ComReg in the instruments that set up the Multi-Band Spectrum Auction (namely, ComReg 12/25 and ComReg 12/52). The spectrum caps adopted to ensure a competitive market and efficient radio spectrum use have in practice been cast aside as a result of a private law agreement between Telefónica and Hutchison, to which ComReg was not a party. Hutchison, as a result of the Transaction, controls close to half of the total radio spectrum used for mobile communications in Ireland and controls substantially more of that spectrum than any other operator. In particular, Hutchison controls 50% more spectrum than Vodafone or Meteor in the key 900MHz band. Given the relative market positions of the operators (in terms, for example, of numbers and types of subscribers, capacity and the extent of network deployment), there must be, at the very least, a serious possibility that the Transaction will not ensure efficient management and use of the radio spectrum by reference to the most simple efficiency standard, namely whether, given the limited nature of the resource, one operator has a surplus by reference to its reasonable requirements and the reasonable requirements of its rivals. Given the very significant disparity in spectrum holdings by reference to reasonable requirements and the significant departure from the spectrum caps judged necessary by ComReg to ensure efficiency, Vodafone again submits that, on this basis alone, there is sufficient basis for ComReg to be obliged to open a review and to consider the necessity of appropriate measures.

8.6 Finally, in relation to ComReg's obligation to ensure the assignment of radio spectrum by reference to objective, transparent, non-discriminatory and proportionate criteria, it cannot be disputed that, due to the aggregation of radio spectrum by Hutchison as a result of Transaction, radio spectrum assignment in the bands affected is now the result of that private law



arrangement and is no longer based on any process conducted by reference to the statutory criteria. The lawful criteria that ComReg used to assign the spectrum on the basis of the Multi-Band Spectrum Auction have been circumvented.

- 8.7 Vodafone submits that ComReg cannot, by acquiescence, abdicate its spectrum management function. It must, at the very least, make the transfer of control of this spectrum to Hutchison subject to review for compliance with the objectives imposed on ComReg by statute. In circumstances where ComReg finds, after consultation and review, that the transfer is compliant with those objectives, Hutchison may be allowed to retain the right to use the spectrum ComReg had assigned to O2 Ireland (or to retain the right on such terms as ComReg determines are necessary to bring the radio spectrum assignments in the bands affected into compliance with the statutory objectives). In circumstances where it cannot reconcile Hutchison's accumulation of spectrum with those objectives, ComReg has the power, under Regulation 9(11) of the Authorisation Regulations, to take appropriate measures.
- 8.8 Accordingly, Vodafone requests that ComReg, in exercise of its statutory radio spectrum management function, should, without further delay, initiate a review of the consequences of the Transaction, insofar as they affect the assignment of spectrum in the 800 MHz, 900 MHz and 1800 MHz bands in the State.
- 8.9 Vodafone also requests that, while it is considering this request, ComReg should not take any step under the assignment aspect of its radio spectrum management function in respect of radio spectrum it previously assigned to any mobile communications operator that might prejudice its ability to adopt appropriate measures if it later determines such measures are necessary.

4. ComReg letter to Vodafone dated 14 October.



Commission for
Communications Regulation
Coimisiún Um
Rialáil Cumarsáide

BY EMAIL & BY COURIER

14 October 2014

Mr Sean Barton
McCann FitzGerald
Solicitors
Riverside One
Sir John Rogerson's Quay
Dublin 2

RE: **European Commission Decision in Case M.6992: Hutchison 3G UK Holdings Limited / Telefonica Ireland Limited**
Your ref.: SEB\14663078.1

Dear Mr. Barton,

I refer to your letter of 31 July 2014 which contained the document entitled "*Spectrum Accumulation arising from the Hutchison/O2 Merger in Ireland: Observations on ComReg's Obligations and Powers*" and subsequent correspondence received from your office in relation to this matter.

The Commission for Communications ("ComReg") has considered this document and the issues raised in it in relation to the acquisition by Hutchison 3G UK Holdings Ltd ("Hutchison") of Telefonica Ireland Limited ("O2 Ireland") ("the Transaction").

ComReg regrets the delay in replying to your submission. This was due to a number of factors. First the submission required careful consideration. Second ComReg's consideration was interrupted by the absence of certain personnel during the holiday period. More recently ComReg requested Senior Counsel to review the draft response and that review was delayed due to the bereavement of a member of Counsel's family.

Notwithstanding the aforesaid delay and earlier correspondence from you we were surprised to learn from a phone call from Edward Traynor yesterday 13 October 2014 at 3 p.m. in the afternoon that Vodafone had made an *ex parte* application to the High Court without informing ComReg in advance. However, Mr Traynor was aware that ComReg was delivering a response. Notwithstanding such application ComReg has decided to send its intended response to Vodafone's submission which it had prepared. ComReg would request that Vodafone, having considered this response, withdraw the proceedings which have not yet been formally served on ComReg. We do acknowledge that papers were informally delivered by email from Mr Traynor on ComReg at 11.20 p.m. last night, 13 October 2014, but these have not yet been considered.

1

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Before responding to specific aspects of Vodafone's submission it is important to note that Vodafone's submissions demonstrate a reluctance on its part to accept the decision of the European Commission in relation to the Transaction. This is notwithstanding that the decision of the European Commission has not yet been published and therefore rights of appeal have not yet been triggered. It should also be noted that Vodafone is not entitled to mount a collateral challenge to the Commission's decision.

Furthermore Vodafone's complaints are in any event premature. Each of Hutchison and O2 Ireland continues to hold its own separate set of spectrum rights of use and operate as separate legal entities. The merged entity can only now set about using its assets with purpose given that the uncertainty with regard to merger approval has only recently been removed. It would therefore be premature for ComReg to institute a review in relation to impact of the Transaction on Spectrum in Ireland.

ComReg has in any event already clearly stated that it is the European Commission which has sole jurisdiction to take the decisions provided for in the EU Merger Regulation. ComReg does intend however to monitor the situation arising from the merger and will if necessary take appropriate action having regard to its legal powers and entitlements. Having considered your submission ComReg is satisfied that it has complied with its legal obligations to date and that Vodafone's complaints to the contrary are unfounded.

ComReg does not consider that there exists a *prima facie* case for ComReg to take any action pursuant to its spectrum management function in relation to the 800 MHz, 900 MHz and 1800 MHz bands at this juncture. Therefore, ComReg will not be conducting a public review and consultation of the type you request.

In particular, ComReg makes the following comments in response to your document:

1. Vodafone states, *"Although ComReg expressed concerns about the effects of the Transaction, including concerns about consumer harm and higher prices, it has not taken any steps in exercise of its radio spectrum management function in connection with the spectrum accumulation by Hutchison that arises on foot of the Transaction."* (paragraph 8.1)

1.1. ComReg did express concerns about the competition effects of the Transaction. This was in the context of the investigation being undertaken by the Commission in accordance with the EU Merger Regulation¹.

1.2. Article 21 (2) of the EU Merger Regulation provides that the European Commission has *"sole jurisdiction to take the decisions provided for in this Regulation"* and Article 21(3) thereof

prohibits EU Member States from applying national competition law to *"any concentration that has a Community dimension"*. The exclusive jurisdiction of the European Commission in this area

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)



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is acknowledged in Article 5(d)(e) of the RSPP Decision² and Regulation 3(7) of the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014³ and was previously acknowledged by Vodafone in correspondence.⁴ Therefore, national competition authorities (including national regulatory authorities with co-competition powers such as ComReg) have no role in assessing the competition effects of the Transaction. ComReg's role in this regard is limited to monitoring the behaviour of the merged entity and taking *ex post* action in relation to any anti-competitive behaviour of the merged entity in the future.

- 1.3. Vodafone complains that ComReg "has not taken any steps in exercise of its radio spectrum management function in connection with the spectrum accumulation by Hutchison that arises on foot of the Transaction". However "spectrum accumulation" is not in itself prohibited. The fact that that spectrum is used cumulatively (by one larger entity) rather than separately by two smaller entities is not necessarily indicative of inefficient or ineffective use of that spectrum (or, indeed a distortion of competition). Vodafone has not provided, nor is ComReg aware of, any facts that demonstrate that the merged entity has, or is likely in the future to use the spectrum controlled by it inefficiently or ineffectively, or in any way that would require intervention by ComReg using its radio spectrum management powers.
2. Vodafone considers that, following the Transaction, spectrum holdings in the 800 MHz, 900 MHz and 1800 MHz bands are no longer based on what it terms "the assignment aspect of [ComReg's] spectrum management function" (paragraphs 8.2, 8.3 and 8.6)
 - 2.1. ComReg in issuing the individual rights of use in the 800 MHz, 900 MHz and 1800 MHz bands pursuant to the Multi-Band Spectrum Auction ("MBSA") fulfilled its obligations pursuant to Regulation 17(1)(b) of the Electronic Communications Networks and Services (Framework) Regulations 2011 ("the Framework Regulations") This is acknowledged by Vodafone in the last sentence of paragraph 8.2 of its document. The blocks of 1800 MHz and 2.1 GHz spectrum issued to O2 Ireland and H3GI were also issued in compliance with ComReg's obligations pursuant to Regulation 17(1)(b). Therefore all spectrum controlled by H3GI post merger was issued in accordance with ComReg's obligations.
 - 2.2. ComReg has not issued any rights of use in the context of the Transaction. No issuing of rights of use has been requested. Therefore Regulation 17(1)(b) (and ComReg's obligation thereunder) is not relevant in this context.

² Decision No. 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme.

³ This states: "These Regulations shall not apply to any transfer that forms part of a merger or acquisition which is required to be notified to the Competition Authority in accordance with Part 3 of the Competition Acts 2002 to 2012 or to the European Commission in accordance with Council Regulation (EC) No 13/2004. The Commission must be informed of any such merger or acquisition at the same time it is notified to the Competition Authority or the European Commission, as appropriate."

⁴ Letter of 21 February to Mr. Gerry Fahy and Mr. Jeremy Godfrey of ComReg "We are of course aware that the proposed transaction is a concentration with a community dimension and that its effects from a competition law perspective therefore fall exclusively to be determined by the European Commission in accordance with EC Council Regulation 139/2004".



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- 2.3. Vodafone states, *"In relation to promotion of competition, Vodafone is of the view that ComReg cannot rely on the European Commission's EUMR Decision as a basis to defend the compatibility of the spectrum arrangement arising on foot of the Transaction with that objective. First Vodafone reminds ComReg that the test applied by the European Commission in an EUMR review is substantively different to the standard ComReg is required to apply under Section 12 of the 2002 Act..... Secondly, Vodafone reminds ComReg that it cannot, in any event rely on the European Commission's appraisal because ComReg itself has highlighted the inadequacy at the core of the EUMR process..."* (paragraph 8.4)
- 2.4. Vodafone's contention is essentially that ComReg should re-conduct an analysis which has been undertaken by the European Commission. ComReg does not propose to do this and in this regard relies in particular on Articles 21(2) and (3) of the EU Merger Regulation and Recitals 8 and 18 of that Regulation (see above).
- 2.5. In the event that Vodafone wishes to take issue with the European Commission's decision to approve the Transaction, it should pursue this matter directly with the European Commission.
3. Vodafone states, *"In relation to ComReg's obligation to ensure the efficient management and use of the radio spectrum, it is undisputed that the Transaction results in a radical departure from the radio spectrum assignment arrangements provided for and foreseen by ComReg in the instruments that set up the Multi-Band Spectrum Auction (namely, ComReg 12/25 and ComReg 12/52). The spectrum caps adopted to ensure a competitive market and efficient radio spectrum use have in practice been cast aside as a result of a private law agreement between Telefónica and Hutchison to which ComReg was not a party."* (paragraph 8.5)
- 3.1. Vodafone's attention is drawn to paragraph A6.84 of ComReg Document 11/60A which states: *"It should be noted the ComReg's proposed spectrum restriction is only for the duration of the proposed auction and operators would, subject to the licenses granted on award and their conditions, be free to trade, lease and combine rights of use of spectrum after the auction to the extent that such rights of use of spectrum are designated as being tradable or leasable and in line with competition law and the legal framework for electronic communications in Ireland."* (emphasis added).
- 3.2. Vodafone references the fact that the agreement between Hutchison and O2 Ireland's parent company, Telefonica, is a private law agreement. The spectrum management regime envisages transfer of spectrum rights (see for example the quote from A6.84 of 11/60A as set out in the preceding paragraph) and in general terms the transfer of rights of use pursuant to private law agreements is permitted.
4. Vodafone states that; *"Hutchison, as a result of the Transaction, controls close to half of the total radio spectrum used for mobile communications in Ireland and controls substantially more of that*



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spectrum than any other operator. In particular Hutchison controls 50% more spectrum in the key 900MHz bank” (paragraph 8.5)

- 4.1. Firstly, asymmetries in spectrum holdings frequently occur and they are not, of themselves, evidence of inefficient spectrum usage. For example, prior to the merger transaction, Vodafone itself held the largest overall amount of spectrum as compared to the other MNOs and this was not of itself considered to be evidence of inefficient use of spectrum. Prior to the Transaction, Vodafone had 2 blocks of 800 MHz spectrum whereas H3GI controlled none, again this was not considered to be problematic.
- 4.2. Secondly, ComReg notes that Vodafone has not provided, nor is ComReg aware of, evidence that suggests that the current level of asymmetry resulting from the Transaction is such that either H3GI or O2 Ireland has an undue surplus of spectrum.
- 4.3. Thirdly, Vodafone’s arguments do not take into account Hutchison’s commitments to divest five blocks of spectrum across the 900 MHz, 1800 MHz and 2100 MHz bands, available from 1 January 2016 for a period of 10 years, to either of the MVNOs.
- 4.4. Even if ComReg considered that there were grounds to equalise spectrum holdings in the 900 MHz band (which Vodafone references in particular) this would not be possible as there are 7 blocks of spectrum and 3 mobile network operators (if H3GI and O2 Ireland are viewed as one).
5. Vodafone submits that *“ComReg cannot, by acquiescence, abdicate its spectrum management function.”* (paragraphs 8.7)
 - 5.1. It is not correct to say that ComReg is, by acquiescence or otherwise, abdicating its spectrum management function. ComReg fully engaged with the European Commission in relation to the market investigations and has consistently monitored the Transaction, from the point of view of its spectrum management function, and indeed continues to do so. ComReg does not consider, based on the facts within its knowledge, that there is any current need for intervention utilising its spectrum management powers.
6. Vodafone states that *“Given the relative market positions of the operators (In terms, for example, of numbers and types of subscribers, capacity and the extent of network deployment, there must be, at the very least, a serious possibility that the Transaction will not ensure efficient management and use of the radio spectrum by reference to the most simple efficiency standard, namely whether, given the limited nature of the resource, one operator has a surplus by reference to its reasonable requirements and the reasonable requirements of its rivals. Given the very significant disparity in spectrum holdings by reference to reasonable requirements the significant departure from the spectrum caps judged necessary by ComReg to ensure efficiency. Vodafone again submits that, on this basis alone, there is*



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sufficient basis for ComReg to be obliged to open a review and to consider the necessity of appropriate measures” (paragraph 8.5).

6.1. ComReg considers that there is a fundamental inconsistency between Vodafone’s submission, to the European Commission in the context of the merger investigation, that it will be competitively disadvantaged due to the increased spectrum rights held by the merged entity (with the implicit assumption that the merged firm would make use of the additional spectrum), on the one hand, and the suggestion that the merged entity may not make efficient use of its spectrum rights, on the other.

6.2. Even if Vodafone’s stated metrics (i.e. the relative market positions of the operators in of numbers and types of subscribers, capacity and the extent of network deployment) were an appropriate indicator for spectrum efficiency, ComReg observes that the numbers and types of customers of each of the merging parties have not changed. That is, assuming that the pre-merger spectrum assignments were efficient (and there is no reason to believe that they are not and nor has Vodafone made any claims in this regard), they remain efficient as the Transaction does not change the numbers and types of customers relative to the spectrum holdings. Indeed, if one were to accept Vodafone’s competition concerns arising from the spectrum asymmetry, then it follows that the merged entity would have a greater number of customers going forward (compared to pre-merger numbers) due to customers moving from Vodafone and Meteor to the

6.3. competitively-advantaged merged entity) and this would, according to Vodafone’s metric, justify the merged entity having a greater quantum of spectrum relative to its competitors.

6.4. In addition, Vodafone’s submissions do not take into account Hutchison’s commitment to make available up to 30% of the merged company’s network capacity to two MVNOs in Ireland at fixed payments.

7. Finally, ComReg reminds Vodafone that it is not statutorily required, nor is it usual practice, for ComReg to publicly seek general views in circumstances where it is not proposing any intended regulatory measure (as is currently the case).



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ComReg will continue to monitor spectrum usage in Ireland including usage of spectrum licensed to the parties to the Transaction. ComReg considers this to be a reasonable and proportionate approach.

Yours sincerely

Caroline Dee Brown

General Counsel

Commission for Communications Regulation



c.c. Mr Damian Collins
McCann FitzGerald
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Other relevant material

5. ComReg document titled “ComReg’s Analysis of the Observations Document”, dated 26 September 2014.

Staff analysis of Vodafone's note, dated 31 July 2014, entitled "Spectrum Accumulation arising from the Hutchison/O2 Merger in Ireland: Observations on ComReg's Obligations and Powers"

Background

1. On 31 July 2014, Vodafone Ireland Ltd ("Vodafone") submitted to the Commission for Communications Regulation ("ComReg") a document concerning the acquisition by Hutchison 3G UK Holdings Ltd ("Hutchinson") of Telefonica Ireland Limited ("O2 Ireland"). That acquisition is described in the document and herein as "the Transaction". Vodafone's document is in response to ComReg's letter of 11 July 2014 in which it was suggested that Vodafone submit a document which set out *"comprehensively the precise nature of its [earlier expressed] concerns, including the legal basis and a detailed description of the facts upon which Vodafone relies."*
2. The following statement appears to encapsulate what Vodafone is contending, *"There are sufficient grounds for ComReg, under its radio spectrum management function, to be obliged to open a review of effects of the Transaction and to consider whether it is necessary to take appropriate measures"* (paragraph 1.5). Vodafone indicates at paragraph 6.3 of the document that it considers that such a review should be undertaken in conjunction with a consultation¹. Vodafone outlines in its document why it considers such a review is required.

Overview of the Transaction

3. The Transaction was first agreed in principle by Hutchison and O2 Ireland, the parties thereto, on 22 June 2013 and it was notified to the European Commission on 1 October 2013 in accordance with the EU Merger Regulation ("EU Merger Regulation")².
4. The Transaction was approved by the European Commission on 28 May 2014, following a Phase II investigation and subject to certain commitments being entered into by merging parties (as summarised in paragraphs 2.4 & 2.5 of Vodafone's document).
5. The Transaction was completed on 15 July 2014, though Hutchison and O2 Ireland continue to operate as separate legal entities for the time being, meaning that each company continues to hold

¹ *"Although not explicitly mentioned in the legislation, Vodafone would expect ComReg, prior to determining whether it is necessary to take 'appropriate measures' to seek to conduct a review and consultation on the compliance of the overall spectrum arrangements following the Transaction with its statutory function and associated objectives"*

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

its own separate set of spectrum rights of use (as assigned under various licences granted by ComReg pursuant to the Wireless Telegraphy Act, 1926).

6. Vodafone, in sections 2 and 3 of its document, describes the European Commission's review of the Transaction and quotes from ComReg's published comments in respect of the European Commission's final decision, giving conditional approval to the transaction. In section 3 of its document, Vodafone quotes at length from ComReg's Information Notice published on 28 May 2014 (Doc 14/53), in which ComReg expressed its concerns that the behavioural commitments imposed by the European Commission appeared *"inadequate and ineffective to address serious competition concerns and consumer harm"* and were *"insufficient to address the structural competition deficit identified as likely to result from the [concentration]"*. Vodafone's description of these events and of the contents of ComReg's Information Notice, which is a matter of public record, is accurate. ComReg notes in particular that the European Commission specified *"that the MNO commitment and [its] decision are without prejudice to ComReg's statutory powers, notably those in relation to effective use of spectrum"*.
7. The key facts are as follows:
- i. ComReg has the statutory function to manage the radio frequency spectrum ("spectrum"), in accordance with any Ministerial policy directions and with the primary objective of ensuring the efficient management and use of spectrum.
 - ii. ComReg assigns spectrum rights of use to undertakings through licences which are granted to undertakings under various sets of regulations, made by ComReg pursuant to the Wireless Telegraphy Act 1926.
 - iii. The size and scope of the Transaction was such that it was required to be notified to, and approved by, the European Commission before it could be put into effect, in accordance with the EU Merger Regulation.
 - iv. The European Commission conducted an *ex ante* review of the Transaction as notified to it, which review went to a full Phase II investigation.

- v. The European Commission's final decision, following its Phase II investigation, was to approve the Transaction subject to certain commitments. Those commitments directly relate to the relevant spectrum holdings.
- vi. During the European Commission's *ex ante* review of the notified Transaction, ComReg engaged with the European Commission at length and set out, in detail, its concerns as to the likely effects of the Transaction upon competition. ComReg's various views and concerns were expressed both in writing and verbally at various meetings with the European Commission.
- vii. Upon the European Commission announcing its final decision to approve the Transaction, subject to certain commitments, ComReg published an Information Notice (Doc 14/53) in which it set out its concerns as to the adequacy and effectiveness of the accepted commitments to address the structural competition deficit identified as likely to result from the Transaction.
- viii. Throughout the entire *ex-ante* review of the notified Transaction, the European Commission was the sole and exclusive decision-maker. While ComReg made its views and concerns known to the Commission, it did so exclusively in the capacity of an interested party.

General comments

8. Vodafone's document is difficult to properly analyse for the following reasons:
 - 8.1. The majority of the statements in sections 1, 2, 3, 4, 5, 6 and 7 are uncontroversial statements of fact. Indeed, section 4 is largely comprised of ComReg's own published description of what is involved in the management of spectrum. The content of these sections is generally accurate, albeit that a number of Vodafone's conclusions and assertions on the basis of these facts, are not accurate.
 - 8.2. It contains much repetition.
 - 8.3. It contains insufficient factual basis for Vodafone's contention that ComReg must take action.
 - 8.4. It makes no suggestions as to what ComReg could actually do to resolve Vodafone's concerns (which themselves are not clearly outlined).

8.5. Vodafone responds at length to "propositions" which have not been made.

9. It is in the context of the above constraints that ComReg has attempted to identify and assess the main issues raised by Vodafone.

Main issues raised by Vodafone

10. Vodafone states, "Although ComReg expressed concerns about the effects of the Transaction, including concerns about consumer harm and higher prices, it has not taken any steps in exercise of its radio spectrum management function in connection with the spectrum accumulation by Hutchison that arises on foot of the Transaction." (paragraph 8.1)

Assessment

- 10.1. ComReg did express concerns about the competition effects of the Transaction. This was in the context of the investigation being undertaken by the Commission in accordance with the EU Merger Regulation.

- 10.2. Article 21 (2) of the EU Merger Regulation provides that the European Commission has "sole jurisdiction to take the decisions provided for in this Regulation" and Article 21(3) thereof prohibits EU Member States from applying national competition law to "any concentration that has a Community dimension". The exclusive jurisdiction of the European Commission in this area is acknowledged in Article 5(d)(e) of the RSPP Decision³ and Regulation 3(7) of the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014⁴ and was previously acknowledged by Vodafone in correspondence⁵.

- 10.3. Therefore national competition authorities (including national regulatory authorities with co-competition powers such as ComReg) have no role in assessing the competition effects

³ Decision No. 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme.

⁴ This states: "These Regulations shall not apply to any transfer that forms part of a merger or acquisition which is required to be notified to the Competition Authority in accordance with Part 3 of the Competition Acts 2002 to 2012 or to the European Commission in accordance with Council Regulation (EC) No 13/2004. The Commission must be informed of any such merger or acquisition at the same time it is notified to the Competition Authority or the European Commission, as appropriate."

⁵ Letter of 21 February to Mr. Gerry Fahy and Mr. Jeremy Godfrey of ComReg "We are of course aware that the proposed transaction is a concentration with a community dimension and that its effects from a competition law perspective therefore fall exclusively to be determined by the European Commission in accordance with EC Council Regulation 139/2004".

of the Transaction. ComReg's role in this regard is limited to monitoring the behaviour of the merged entity and taking *ex post* action in relation to any anti-competitive behaviour of the merged entity in the future.

10.4. Vodafone complains that ComReg "*has not taken any steps in exercise of its radio spectrum management function in connection with the spectrum accumulation by Hutchison that arises on foot of the Transaction*". However "*spectrum accumulation*" is not in itself prohibited. Spectrum accumulation does not necessarily lead to a failure to use radio frequencies "*efficiently and effectively*" (as is required under Regulation 9(11) of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2011 ("the Authorisation Regulations")). The fact that that spectrum is used cumulatively by one larger entity rather than separately by two smaller entities is not necessarily indicative of inefficient or ineffective use of that spectrum (or, indeed, a distortion of competition). Vodafone has not provided, nor is ComReg not aware of, any facts that demonstrate that the merged entity has, or is likely in the future to use the spectrum controlled by it inefficiently or ineffectively, or in any way that would require intervention by ComReg using its radio spectrum management powers.

11. Vodafone takes issue with the fact that, following the Transaction, spectrum holdings in the 800 MHz, 900 MHz and 1800 MHz bands are no longer based on what it terms "*the assignment aspect of [ComReg's] spectrum management function*" (paragraphs 8.2, 8.3 and 8.6). Although not expressly mentioned by Vodafone, ComReg has for completeness also assessed the 2100 MHz band.

Assessment

11.1. Regulation 17(1)(b) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 ("the Framework Regulations")⁶ obliges ComReg to ensure "*that spectrum allocations used for electronic communications services and*

⁶ The Framework Regulations implement Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications and services (Framework Directive) ("the Framework Directive") which was amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services ("the Amending Directive"). Regulation 17 of the Framework Regulations implements Article 9 of the Framework Directive.

issuing of general authorisations or individual rights of use for such radio frequencies are based on objective, transparent, non-discriminatory and proportionate criteria”.

11.2. Regulation 17(1)(b) refers to *“issuing of general authorisations or individual rights of use for such radio frequencies”*, rather than *“assignment of radio frequencies”*. This change in terminology can be traced to in Article 9 of the Amending Directive. The obligation pursuant to Regulation 17(1)(b) appears to be what Vodafone is referring to when it references *“ComReg’s spectrum management function”*.

11.3. ComReg in issuing the individual rights of use in the 800 MHz and 900 MHz bands pursuant to the Multi-Band Spectrum Auction (“MBSA”) fulfilled its obligations pursuant to Regulation 17(1)(b) (this is acknowledged by Vodafone in the last sentence of paragraph 8.2 of the document of 31 July 2014). The blocks of 1800 MHz and 2.1 GHz spectrum issued to O2 Ireland and H3GI were also issued in compliance with ComReg’s obligations pursuant to Regulation 17(1)(b). Therefore all spectrum controlled by H3GI post merger was issued in accordance with ComReg’s obligations.

11.4. ComReg has not issued any rights of use in the context of the Transaction. No issuing of rights of use has been requested. Therefore Regulation 17(1)(b) (and ComReg’s obligation thereunder) is not relevant in this context.

11.5. In the event that ComReg is considering issuing individual rights of use for radio frequencies, whether in the context of the Transaction or otherwise, it will of course comply with Regulation 17(1)(b).

12. Vodafone states, *“In relation to promotion of competition, Vodafone is of the view that ComReg cannot rely on the European Commission’s EUMR Decision as a basis to defend the compatibility of the spectrum arrangement arising on foot of the Transaction with that objective. First Vodafone reminds ComReg that the test applied by the European Commission in an EUMR review is substantively different to the standard ComReg is required to apply under Section 12 of the 2002 Act..... Secondly, Vodafone reminds ComReg that it cannot, in any event rely on the European*

Commission's appraisal because ComReg itself has highlighted the inadequacy at the core of the EUMR process..." (paragraph 8.4)

Assessment

12.1. Vodafone's contention is essentially that ComReg should re-conduct an analysis which has been undertaken by the European Commission. ComReg does not propose to do this and in this regard relies in particular on Articles 21(2) and (3) of the EU Merger Regulation and Recitals 8 and 18 of that Regulation (see above).

12.2. In the event that Vodafone wishes to take issue with the European Commission's decision to approve the Transaction, it should pursue this matter directly with the European Commission.

13. Vodafone states, *"In relation to ComReg's obligation to ensure the efficient management and use of the radio spectrum, it is undisputed that the Transaction results in a radical departure from the radio spectrum assignment arrangements provided for and foreseen by ComReg in the instruments that set up the Multi-Band Spectrum Auction (namely, ComReg 12/25 and ComReg 12/52). The spectrum caps adopted to ensure a competitive market and efficient radio spectrum use have in practice been cast aside as a result of a private law agreement between Telefónica and Hutchison to which ComReg was not a party."* (paragraph 8.5)

Assessment

13.1. Vodafone's submission at paragraph 8.5 is premised on an assertion that the spectrum caps in the MBSA were *"adopted to ensure a competitive market and efficient radio spectrum"*. This is incorrect. ComReg has stated that the *"main purpose of spectrum caps is to ensure that extreme outcomes which could harm competition do not emerge from the proposed auction, while also ensuring that the distribution of spectrum shall be determined by competition amongst the bidders and not by the cap set on the amount of spectrum that each bidder may ... obtain."* (paragraph 4.36 of Response to Consultation and Draft Decision *"Multi-Band Spectrum*

Release, Release of the 800 MHz, 900 MHz and 1800 MHz radio spectrum bands" Document No. 11/60A, dated 24 August 2011). Furthermore paragraph A6.84 of 11/60A states *"It should be noted the ComReg's proposed spectrum restriction is only for the duration of the proposed auction and operators would, subject to the licenses granted on award and their conditions, be free to trade, lease and combine rights of use of spectrum after the auction to the extent that such rights of use of spectrum are designated as being tradable or leasable and in line with competition law and the legal framework for electronic communications in Ireland."* (emphasis added).

13.2. ComReg observes that the measures put in place by ComReg in the MBSA process to ensure efficient spectrum use were:

- Obligation on winning bidders to pay upfront spectrum access fees and ongoing spectrum usage fees;
- Coverage and roll-out obligations; and
- An obligation to comply with any rules to prevent spectrum hoarding as may be laid down by ComReg under the Framework Regulations⁷).

13.3. Vodafone references the fact that the agreement between Hutchison and O2 Ireland's parent company, Telefónica, is a private law agreement. There is no difficulty in principle with this fact and it is not clear why Vodafone repeatedly takes issue with this. Transfer of spectrum use rights by way of a private law agreement is not of itself indicative of failure to use spectrum efficiently or effectively. It is also not indicative of inefficient management. The spectrum management regime envisages transfer of spectrum rights (see for example the quote from A6.84 of 11/60A as set out in the preceding paragraph) and, in general terms, the transfer of rights of use pursuant to private law agreements is permitted.

14. Vodafone asserts that; *"Hutchison, as a result of the Transaction, controls close to half of the total radio spectrum used for mobile communications in Ireland and controls substantially more of that spectrum than any other operator. In particular Hutchison controls 50% more spectrum in the key 900MHz bank"* (paragraph 8.5)

⁷ Regulation 6(5) of the Wireless Telegraphy (Liberalised Use and Preparatory Licences in the 800 MHz, 900 MHz and 1800 MHz bands) Regulations, 2012 (SI No 251/2012)

Assessment

- 14.1. A graphic showing the pre and post merger spectrum holdings is included at Annex 1. From this graphic the following is apparent:

14.1.1. The 800 MHz band is divided for licensing purposes into 6 blocks of spectrum, which is licensed to O2 Ireland (2 blocks), Vodafone (2 blocks) and Meteor (2 blocks) across both time slices. Following the Transaction, Vodafone has the same number of blocks of 800 MHz spectrum as is controlled by H3GI in both time slices. Therefore, in relation to the 800 MHz band there is no disparity in spectrum holdings.

14.1.2. The 900 MHz band is divided for licensing purposes into 7 blocks of spectrum, which is licensed to Hutchison 3G Ireland Limited ("H3GI") (1 block), O2 Ireland (2 blocks), Vodafone (2 blocks) and Meteor (2 blocks) across both time slices. Following the Transaction H3GI controls 3 blocks i.e. 1 block of 900 MHz spectrum more than Vodafone. Whilst Vodafone's contention that "Hutchison controls 50% more spectrum in the key 900 MHz bank" is correct, however this is the smallest asymmetry possible having regard to the 5 MHz block size decided upon by ComReg for each of the 800 MHz, 900 MHz and 1800 MHz bands (see further below).

14.1.3. The 1800 MHz band is divided for licensing purposes into 15 blocks of spectrum. In TS1 the 1800 MHz band is licensed to H3GI (2 liberalised blocks) and O2 Ireland (3 blocks that are limited to the provision of GSM services), Vodafone (3 liberalised blocks) and Meteor (2 liberalised blocks and 2 blocks that are limited to the provision of GSM services). In TS2 the 1800 MHz band will be licensed to H3GI (4 blocks), O2 Ireland (3 blocks) Vodafone (5 blocks) and Meteor (3 blocks). Following the Transaction, in TS1 H3GI will control one less liberalised block than Vodafone and 3 more of the GSM blocks and in TS2 the difference in the number of spectrum blocks controlled by Vodafone and H3GI is the same as that between Vodafone and Meteor i.e. 2 blocks.

14.1.4. The 2.1 GHz band is divided for licensing purposes into 12 paired blocks and 4 unpaired blocks. Following the Transaction, H3GI controls 6 paired blocks and 1 unpaired block⁸. Vodafone holds 3 paired blocks. It is noted that Vodafone was licensed to use an unpaired block, but it chose to return this block to ComReg. Meteor holds 3 paired blocks. It is noted that both Vodafone and Meteor were licensed to use unpaired blocks, but each chose to return this block to ComReg.

14.2. Included in the above are the spectrum rights, which form the "divestment spectrum" which the commitments (subject to which the Transaction was approved by the European Commission) require H3GI to offer to an MVNO. The Divestment Spectrum, which is included in the table above, comprises of 2 x 5 MHz of 900 MHz spectrum in TS 2, 2 x 10 MHz of 1800 MHz spectrum in TS 2; and 2 x 10 MHz of 2100 MHz spectrum for the remainder of the licence period until 24 July 2022. This offer can be taken up for a period of 10 years from 1 January 2016.

14.3. Firstly, asymmetries in spectrum holdings frequently occur and they are not, of themselves, evidence of inefficient spectrum usage. For example, prior to the merger transaction, Vodafone itself held the largest overall amount of spectrum as compared to the other MNOs and this was not of itself considered to be evidence of inefficient use of spectrum. Prior to the Transaction, Vodafone had 2 blocks of 800 MHz spectrum whereas H3GI controlled none, again this was not considered to be problematic. In any event, spectrum asymmetries are more relevant for competition assessment and in that regard, staff firstly note the considerable material provided by Vodafone to the European Commission in the context of the merger investigation in support of its competition concerns arising from the spectrum asymmetry.

14.4. Secondly, ComReg notes that Vodafone has not provided, nor is ComReg aware of, evidence that suggests that the current level of asymmetry resulting from the Transaction is such that either H3GI or O2 Ireland has a surplus of spectrum.

⁸ The unpaired block is inconsequential as all MNO's were given access to one unpaired block. H3GI, Meteor and Vodafone have relinquished the unpaired block assigned to them as they were unable to use it and did not want to continue paying the annual usage fees. Telefónica is not using the unpaired block and has recently been considering relinquishing the block.

- 14.5. Thirdly, Vodafone's arguments do not take into account Hutchison's commitments to divest five blocks of spectrum in the 900 MHz, 1800 MHz and 2100 MHz bands, available from 1 January 2016 for a period of 10 years, to either of the MVNOs.
- 14.6. The disparity in spectrum holdings which Vodafone references is not of concern to ComReg at this point. Even if ComReg considered that there were grounds to equalize spectrum holdings in the 900 MHz band (which Vodafone references in particular) this would not be possible (see analysis at paragraph 15.8 below).
15. Vodafone states that *"Given the relative market positions of the operators (in terms, for example, of numbers and types of subscribers, capacity and the extent of network deployment, there must be, at the very least, a serious possibility that the Transaction will not ensure efficient management and use of the radio spectrum by reference to the most simple efficiency standard, namely whether, given the limited nature of the resource, one operator has a surplus by reference to its reasonable requirements and the reasonable requirements of its rivals. Given the very significant disparity in spectrum holdings by reference to reasonable requirements the significant departure from the spectrum caps judged necessary by ComReg to ensure efficiency. Vodafone again submits that, on this basis alone, there is sufficient basis for ComReg to be obliged to open a review and to consider the necessity of appropriate measures"* (paragraph 8.5).

Assessment

- 15.1. ComReg considers that there is a fundamental inconsistency between Vodafone's submission, to the European Commission in the context of the merger investigation, that it will be competitively disadvantaged due to the increased spectrum rights held by the merged entity (with the implicit assumption that the merged firm would make use of the additional spectrum), on the one hand, and the suggestion that the merged entity may not make efficient use of its spectrum rights, on the other (as is contained in the above statement that *"there must be, at the very least, a serious possibility that the Transaction will not ensure efficient management and use of the radio spectrum."*)

15.2. ComReg does not consider that there is a “*significant disparity*” in spectrum holdings (as analysed above).

15.3. Vodafone gives no detail as to what it means by “*reasonable requirements*”. This statement is therefore difficult to properly analyse. On a very basic level, if “*reasonable requirements*” is based on customer numbers/capacity and deployment of network, issuing spectrum on this basis would likely be problematic. For instance, whilst it may initially appear plausible for a large incumbent to claim it requires a certain amount of spectrum rights for its existing “*reasonable requirements*”, it would also appear equally plausible for a smaller operator to make claims for a larger amount of spectrum than it currently needs so as to allow it to grow and compete more effectively against larger operators. ComReg is not aware of any recent spectrum award in Europe concerning the relevant bands in which spectrum assignments between operators was determined on such bases. For example, assigning spectrum rights based on existing customer numbers or “*reasonable requirements*”. NRAs increasingly rely upon market-based spectrum release/assignment mechanisms (i.e. auctions) to avoid making administrative decisions involving such indeterminate and imprecise criteria when faced with competing demands for spectrum rights and imperfect information. That is, it is for the operators to make such assessments for themselves and compete with one another in auctions, usually subject to caps to prevent extreme outcomes which may be anti-competitive, based on such assessments.

15.4. Even if Vodafone's stated metrics (i.e. the relative market positions of the operators in terms of numbers and types of subscribers, capacity and the extent of network deployment) were an appropriate indicator for spectrum efficiency, the numbers and types of customers of each of the merging parties have not changed. That is, assuming that the pre-merger spectrum assignments were efficient (and there is no reason to believe that they are not (see further below) and nor has Vodafone made any claims in this regard, then Transaction does not change the numbers and types of customers relative to the spectrum holdings. Indeed, if one were to accept Vodafone's competition concerns arising from the spectrum asymmetry, then it follows that the merged entity would have a greater number of customers going forward (compared to pre-merger numbers) due to customers moving from Vodafone and Meteor to the

competitively-advantaged merged entity) and this would, according to Vodafone's metric, justify the merged entity having a greater quantum of spectrum relative to its competitors.

15.5. In addition, Vodafone's submissions do not take into account Hutchison's commitment to make available up to 30% of the merged company's network capacity to two MVNOs in Ireland at fixed payments.

15.6. As outlined at paragraph 13.1, the spectrum caps in the MBSA auction were not imposed for the purpose of ensuring spectrum efficiency.

15.7. ComReg does not agree that "*sufficient basis*" has been demonstrated by Vodafone and refers to its analysis above.

15.8. It is noted that Vodafone does not describe what it means by, or give any examples of what it terms "*appropriate measures*". ComReg considered how, if it considered there was a basis (which it does not) it would, in theory, remedy the disparity Vodafone complains of in the 900 MHz band in relation to which Vodafone takes particular issue (i.e. that H3GI controls one paired block of spectrum more than Vodafone). The following summarises the position in this regard:

15.8.1. As there are 7 blocks in the 900 MHz band in total and 3 mobile network operators ("MNOs") (for the purpose of this analysis O2 Ireland is considered to be incorporated into H3GI), one MNO will always have one block more than the other two MNOs in this band. This is a mathematical fact. An approach whereby spectrum was divided equally between MNOs would not be appropriate. The inappropriateness of this approach is illustrated by the following consideration of how, in theory, equality of spectrum holdings could be achieved:

- 1) Assign one of the blocks of 900MHz currently controlled by H3GI to Vodafone. This would, however, then give rise to a situation where H3GI would control 2 blocks of 900 MHz spectrum and Vodafone 3 blocks of 900 MHz spectrum i.e. simply reverse the inequality in Vodafone's favour. This approach would mean

that H3GI could make similar arguments relating to disparity in spectrum holdings;

- 2) Withdraw one block of 900 MHz spectrum from H3GI and allow this block to remain unused for the duration of the current licenses. Allowing spectrum, for which there is a demand and which could be used, to lie fallow would be contrary to ComReg's statutory objective to ensure the efficient and effective use of radio spectrum.
- 3) Subdivide one block of 900 MHz spectrum and share it either between H3GI and Vodafone or between all three MNOs. This would not be appropriate from a technical perspective and difficult from a practical perspective, as:
 - i) From a technical perspective, 5 MHz blocks are the most appropriate. ComReg first proposed a 5 MHz spectrum block size in a 2008 consultation on liberalization of the use of 900 MHz, and 1800 MHz bands⁹ and the reasoning behind this proposal was set out in detail in pages 28 and 29 of this consultation document and is relied on again here. Vodafone, in response to this consultation, agreed with this proposal and indeed indicated that *"a minimum spectrum block size of 2 x 5MHz would be appropriate as this is the minimum block size feasible for the deployment of UMTS services"* (emphasis added). Following this consultation ComReg proceeded to decide to utilise a 5 MHz spectrum block size in the 900 MHz and 1800 MHz band. This use of 5 MHz spectrum block sizes decision is also supported by both (1) the subsequent EC 800 MHz Decision¹⁰ (2010/267/EU), which mandated block sizes within the 800 MHz band in multiples of 5 MHz, and (2) the limits set for out of band emission and protection of other services (e.g. television) in

⁹ Consultation Paper "Liberalising the Use of the 900 MHz and 1800 MHz Spectrum Bands, Liberalisation of the GSM Spectrum Bands & Options for the Release of Spectrum in these Bands" Document No. 08/57, dated 17 July 08

¹⁰ Commission Decision of 6 May 2010 on harmonised technical conditions of use in the 790-862 MHz frequency band for terrestrial systems capable of providing electronic communications services in the European Union (2010/267/EU). See Article 2(1) thereof.

adjacent bands, which have been calculated and agreed across Europe using 5 MHz blocks.

- ii) Reflecting the technical limitations of blocks of less than 5 MHz, practically blocks of less than 5 MHz cannot be facilitated under the current statutory instrument governing this regime¹¹. S.I. 251 of 2012 defines a "Spectrum Block" as "5 MHz paired block of spectrum in any of the 800 MHz, 900 MHz or 1800 MHz bands, respectively". Annual spectrum usage fees are related to Spectrum Blocks (as defined) and the technical conditions in S.I. 251 of 2012 are related to 5 MHz blocks and would likely not be adequate for smaller blocks sizes. A further practical difficulty is that Ireland's memoranda of understanding with the UK in relation to how spectrum is used in border areas are based on paired 5 MHz blocks.

15.9. Therefore, even if ComReg considered that Vodafone was correct in its contention that it should remedy the disparity Vodafone complains of in the 900 MHz band and in relation to which Vodafone takes particular issue (i.e. that H3G has one paired block of spectrum more than Vodafone), no remedy would be possible. This fact illustrates that the review suggested by Vodafone would be pointless.

16. *"Vodafone submits that ComReg cannot, by acquiescence, abdicate its spectrum management function."* (paragraphs 8.7)

16.1. It is not correct to say that ComReg is, by acquiescence or otherwise, abdicating its spectrum management function. ComReg fully engaged with the European Commission in relation to the market investigations and has consistently monitored the Transaction, from the point of view of its spectrum management function, and indeed continues to do so. ComReg does not consider, based on the facts within its knowledge, that there is any current need for intervention utilising its spectrum management powers. A summary of ComReg's current

¹¹ Wireless Telegraphy (Liberalised Use and Preparatory Licences in the 800 MHz, 900 MHz and 1800 MHz bands) Regulations, 2012.

assessment of the Transaction from a spectrum management perspective is attached at Annex

1. See also ComReg's letter to Vodafone of 4 March 2014.

17. *"Accordingly, Vodafone requests that ComReg, in exercise of its statutory radio spectrum management function, should, without further delay, initiate a review of the consequences of the Transaction, insofar as they affect the assignment of spectrum in the 800 MHz, 900 MHz and 1800 MHz bands in the State"* (paragraph 8.8)

17.1. Vodafone requests that ComReg *"initiate a review"* (paragraph 8.8). Vodafone describes this proposed review in paragraph 6.3 as follows *"conduct a review and consultation on the compliance of the overall spectrum arrangements following the Transaction with its statutory function and associated objectives"*.

17.2. As outlined above, ComReg has, and continues to, monitor the Transaction from the point of view of its spectrum management function. ComReg does not consider, based on the facts within its knowledge, that there is any current need for intervention utilising its spectrum management powers and the reasons for this conclusion are set out at Annex 1.

17.3. It is noted that it is still relatively early in the merger process. The decision of the European Commission in Case M7992 has not yet been published, therefore rights of appeal have not yet been triggered. Each of H3GI and O2 Ireland continues to hold its own separate set of spectrum rights of use and operate as separate legal entities. The merged entity can only now set about utilising its assets with purpose given that the uncertainty with regard to merger approval has only recently been removed. Therefore it would be pre-mature for ComReg to initiate a review in relation to the impact of the Transaction on spectrum in Ireland.

17.4. ComReg is not statutorily required, nor is it usual practice for ComReg, to publicly seek general views in circumstances where it is not proposing any intended regulatory measure¹² (as

¹² Regulation 12(2) of the Framework Regulations provides *"Except in cases falling within Regulation 13(8), where the Regulator intends to take a measure in accordance with the Specific Regulations or intends to provide for restrictions in accordance with Regulation 17(3) and (5), which have a significant impact on a relevant market, the Regulator shall observe the procedures referred to in paragraphs (3) and (4)"*

is currently the case). In the absence of a basic case suggesting that there are concerns relating to spectrum management (with a cogent legal and factual basis), it does not appear that there would be any point in seeking views in relation to the issues raised. It would not be a good use of ComReg's resources to conduct a public consultation of the type envisaged by Vodafone.

Conclusion

17.5. For the reasons outlined above, ComReg does not agree with Vodafone's contention that *"There are sufficient grounds for ComReg, under its radio spectrum management function, to be obliged to open a review of effects of the Transaction and to consider whether it is necessary to take appropriate measures"*.

17.6. ComReg will continue to monitor spectrum usage in Ireland including usage of spectrum licensed to the parties to the Transaction. This would appear to be a reasonable and proportionate approach at this juncture.

26 September 2014

Annex 1: Summary of ComReg's assessment of the Transaction from a spectrum management perspective

1. Introduction

1.1. In the context of the recent acquisition of Telefónica Ireland Limited ("O2 Ireland") by Hutchison 3G UK Holdings Limited ("Hutchison") ("the Transaction"), ComReg has assessed whether there is a need for ComReg to exercise its spectrum management powers.

2. Overview of the effect of the Transaction on spectrum.

2.1. The Transaction will bring together Telefónica Ireland and Hutchison's Irish subsidiary Hutchison 3G Ireland Limited operating under the brand name "3" ("H3G"). The transaction means that the second and the fourth largest mobile network operators in Ireland will form one larger company facing two competitors, Vodafone Ireland Limited ("Vodafone") and Eircom Limited ("Eircom").

2.2. The following table details the pre-merger and post-merger control of spectrum holdings of in Ireland:

Band (MHz)	H3GI (post-merger)		Vodafone		Meteor		O2 Ireland (pre-merger)		H3GI (Pre-merger)	
	TS1	TS2	TS1	TS2	TS1	TS2	TS1	TS2	TS1	TS2
800	2 (MBSA)	2 (MBSA)	2 (MBSA)	2 (MBSA)	2 (MBSA)	2 (MBSA)	2 (MBSA)	2 (MBSA)	0 (MBSA)	0 (MBSA)
900	3 (MBSA)	3 (MBSA)	2 (MBSA)	2 (MBSA)	1 (GSM) 1 (MBSA)	2 (MBSA)	2 (MBSA)	2 (MBSA)	1 (MBSA)	1 (MBSA)
1800	2 (MBSA) 3 (GSM)	7 (MBSA)	3 (MBSA)	5 (MBSA)	2 (GSM) 2 (MBSA)	3 (MBSA)	3 (GSM)	3 (MBSA)	2 (MBSA)	4 (MBSA)
2100	6 (+1 unpaired block) (3G – exp 2022)	3 (3G – exp 2022)	3 (3G – exp 2022)	3 (3G – exp 2027)	3 (+1 unpaired block) (3G – exp 2022)	3 (3G – exp 2022)	3 (3G – exp 2022)	3 (3G – exp 2022)	3 (3G – exp 2022)	3 (3G – exp 2022)

Pre and Post-merger MNO spectrum control (number of duplex blocks)

Notes: **TS1:** 1 February 2013 to 12 July 2015 (Time Slice 1)

TS2: 13 July 2015 to 12 July 2030 (Time Slice 2)

GSM: Licenced for GSM only;

3G: Licenced for 3G/IMT-2000 systems (and potentially LTE in future – consultation underway);

MBSA: Licenced for all technologies permitted under the EC Decisions on 800 MHz, 900 MHz and 1800 MHz bands.

2.3. The commitments, subject to which the Transaction was approved by the European Commission, involve H3GI committing to the following:

- offering to Eircom that the existing Network Share Agreement (between Meteor and O2 Ireland) is amended to reflect substantially the same terms set out in the MOU which has been commercially negotiated between Hutchison and Eircom;
- providing wholesale access under Capacity Agreements in return for fixed annual fees to an Upfront MVNO and to a Second MVNO; and
- offering to the Upfront MVNO and the Second MVNO (but not both) certain spectrum rights of use to ("Divestment Spectrum") enable one or the other to become a MNO. This offer can be taken up for a period of 10 years from 1 January 2016.

2.4. The Divestment Spectrum, which is included in the table above, comprises:

- 2 x 5 MHz of 900 MHz spectrum in TS 2;
- 2 x 10 MHz of 1800 MHz spectrum in TS 2; and
- 2 x 10 MHz of 2100 MHz spectrum for the remainder of the licence period until 24 July 2022.

3. Overview of ComReg's spectrum management powers

3.1. Section 10(1) (b) of the Communications Regulation Act 2002 ("the 2002 Act") provides that one of the functions of ComReg is:

"to manage the radio frequency spectrum and the national numbering resource in accordance with a direction under section 13."

3.2. Section 12(1)(b) of the 2002 Act provides that an objective of ComReg in exercising its functions is *"to ensure the efficient management and use of the radio frequency spectrum and numbers from the national numbering scheme in the State in accordance with a direction under section 13."*

3.3. Regulation 9 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2011 ("the Authorisation Regulations") is titled "Rights of use for radio frequencies" and sets out inter alia how rights of use for radio frequencies for the provision of electronic communications networks or services shall be facilitated (under a general authorisation) and the circumstances in which ComReg may grant individual rights of use for radio frequencies.

3.4. Of specific relevance in this instance is that Regulation 9(11) of the Authorisation Regulations provides:

"The Regulator shall ensure that radio frequencies are efficiently and effectively used having regard to section 12(2)(a) of the Act of 2002 and Regulations 16(1) and 17(1) of the Framework Regulations. The Regulator shall ensure that competition is not distorted by any transfer or accumulation of rights of use for radio frequencies. For this purpose

the Regulator may take appropriate measures such as mandating the sale or the lease of rights of use for radio frequencies.”

- 3.5. Section 12(2)(a) of the 2002 Act and Regulations 16(1) and 17(1) of the Framework Regulations in so far as appears relevant for current purposes can be summarised as placing obligations on ComReg relating to the promotion and protection of competition, encouraging efficient use and ensuring the effective management of radio frequencies and ensuring that spectrum allocations are based on objective, transparent, non-discriminatory and proportionate criteria.
- 3.6. Regulation 17 of the Framework Regulations is titled “*Management of radio frequencies for electronic communications services*” and in so far as is relevant provides:

“(1) The Regulator shall, subject to any directions issued by the Minister under section 13 of the Act of 2002 and having regard to its objectives under section 12 of the Act of 2002, Regulation 16 and Article 8a of the Framework Directive, ensure—

(a) the effective management of radio frequencies for electronic communications services,

(b) that spectrum allocations 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

(c) that harmonisation of the use of radio frequency spectrum across the European Union 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 the Radio Spectrum Decision.

(2) Unless otherwise provided in paragraph (3), the Regulator shall 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 Act of 2002 in accordance with European Union law.....

(10) The Regulator may, having regard to its objectives under section 12 of the Act of 2002 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 paragraph shall be applied in a proportionate, non-discriminatory and transparent manner....”

4. Does the Transaction give rise to a situation where ComReg should utilise its powers pursuant to Regulation 9(11)?

- 4.1. Pursuant to Regulation 9(11) of the Authorisation Regulations, ComReg is obliged to ensure that “*radio frequencies are efficiently and effectively used having regard to section 12(2)(a) of the Act of 2002 and Regulations 16(1) and 17(1) of the Framework Regulations*”

- 4.2. ComReg has considered whether facts exist which could illustrate failure to use spectrum controlled by H3GI "efficiently and effectively". ComReg notes:
1. The number of subscribers utilising the spectrum controlled by H3GI has not changed.
 2. ComReg is not aware of any spectrum controlled by H3GI that is not being used.
 3. Both H3GI and O2 Ireland are compliant with their roll-out and coverage obligations in relation to spectrum licences.
 4. All relevant spectrum usage fees are paid to date
- 4.3. On the basis of the current facts known to it ComReg does not consider that the Transaction has resulted or will result in inefficient or ineffective use of spectrum
- 4.4. Pursuant to Regulation 9(11) of the Authorisation Regulations, ComReg is obliged to ensure *that competition is not distorted by any transfer or accumulation of rights of use for radio frequencies.*"
- 4.5. The Commission has assessed the Transaction under the EU Merger Regulation. This means that the Transaction is solely within the jurisdiction of the Commission and therefore that national competition authorities (such as ComReg) have no role in assessing the competition effects of the merger. It would not be appropriate for ComReg to assess the Transaction from a competition point of view. ComReg relies in particular on Articles 21(2) and (3) of the EU Merger Regulation and Recitals 8 and 18 of this Regulation.
- 4.6. ComReg will however continue to monitor the behaviour of the merged entity and consider taking ex-post action in relation to any anti-competitive behaviour of the merged entity in the future.
- 4.7. Conclusion: No action is currently required.
5. **Does the Transaction give rise to a situation where ComReg should utilise its powers pursuant to Regulation 17?**
- 5.1. Pursuant to Regulation 17(1)(a) ComReg is obliged to ensure *"the effective management of radio frequencies for electronic communications services"*.
- 5.2. ComReg has considered whether there are actions it should take to fulfil this obligation. On the basis of the current facts ComReg does not consider that the Transaction has resulted or will result in a situation where its intervention will be required pursuant to this power.
- 5.3. Pursuant to Regulation 17(1)(b) ComReg is obliged to ensure *"that spectrum allocations 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,..."*

- 5.4. Spectrum allocation is defined in the Framework Regulations as *“the designation of a given frequency band for use by one or more types of radiocommunications services, where appropriate, under specified conditions”*.
- 5.5. It is noted that that there is no change in spectrum allocation arising from the Transaction.
- 5.6. ComReg has not issued any rights of use in the context of the Transaction. No issuing of rights of use has been requested. Therefore Regulation 17(1)(b) (and ComReg’s obligation thereunder) is not relevant in this context.
- 5.7. Pursuant to Regulation 17(10) ComReg may lay down rules in relation to spectrum hoarding.
- 5.8. ComReg considers that there is no need to lay down such rules at this stage to address issues that have or may result from the Transaction. ComReg relies on the measures put in place by ComReg in the MBSA process to ensure efficient spectrum use included the following (obligation on winning bidders to pay upfront spectrum access fees and ongoing spectrum usage fees; and coverage and roll-out obligations) and, as outlined above there is no prima facie case of failure to use spectrum controlled by H3GI “efficiently and effectively” and the potential countervailing effects of the MVNO commitments (i.e where 30% of merged entity’s capacity is available for MVNO new entrants and the potential for one of the MVNOs to avail of the divestiture spectrum).
- 1.1. ComReg has considered whether there are actions ComReg should take to fulfil this obligation. On the basis of the current facts ComReg does not consider that the Transaction has resulted or will result in a situation where its intervention will be required pursuant to this provision.
- 1.2. Conclusion: No action is currently required.

2. Conclusion

- 2.1. ComReg has considered whether there are actions it should take in relation to spectrum management in the context of the Transaction. On the basis of the current facts ComReg does not consider that intervention is required. ComReg will continue to monitor the situation.