



Commission for
Communications Regulation

Interim 1800 MHz Rights of Use for the period 1 January 2015 to 12 July 2015

**Decision No. 13 of 2014 Final Decision and
Consultation Response**

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**An Coimisiún um Rialáil Cumarsáide
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Chapter 1

1 Introduction and Background

- 1.1 The Commission for Communications Regulation (“ComReg”) is the statutory body responsible for regulating the provision of electronic communications networks and services in Ireland and for ensuring the efficient management and use of the radio frequency spectrum, pursuant to its relevant functions, objectives, duties and powers which are set out in primary and secondary legislation.
- 1.2 This paper sets out ComReg’s response to its consultation and draft decision (“Consultation 14/88”) on a proposal to facilitate the granting by it of an interim wireless telegraphy licence (the “Interim 1800 MHz Licence”) to Telefónica Ireland Limited (“Telefónica”), should Telefónica seek to apply for same.
- 1.3 Consultation 14/88 stated that the specific purpose of the Interim 1800 MHz Licence would be to cover the period of approximately 6½ months between the expiry of Telefónica’s current 15-year GSM 1800 MHz licence, on 31 December 2014, and the commencement of its rights of use to liberalised 1800 MHz radio spectrum for 15 years, commencing on 13 July 2015.
- 1.4 ComReg received two responses to Consultation 14/88, from Hutchison 3G Ireland Ltd (“Hutchison”) and Vodafone Ireland Ltd (“Vodafone”). Hutchison stated that its response is provided on behalf of both it and Telefónica. Hutchison and Telefónica are now both owned by Hutchison Whampoa Limited following its recent acquisition of Telefónica, as approved by the European Commission under the EU Merger Regulation.
- 1.5 ComReg’s assessment and consideration of the responses received is set out herein together with ComReg’s final decision that it will put in place a process to facilitate the granting of an Interim 1800 MHz Licence to Telefónica, should Telefónica apply for same.

1.1 Background

- 1.6 The background to this matter is set out in section 1.1 of Consultation 14/88 and for ease of reference this background is largely repeated below.
- 1.7 In September 1999, the two existing GSM licensees at that time, Eircell (now Vodafone) and Esat Digifone (now Telefónica), were each offered wireless telegraphy licences of 15-years duration, by which they would each obtain spectrum rights of use consisting of 2 x 14.4 MHz in the 1800 MHz band. The

licence offer was subject to payment of the applicable spectrum access fees¹ and a number of licence conditions, including the provision of GSM 1800 MHz coverage to more than 33.3% of the population by the end of 2002. Eircell and Esat Digifone both accepted the offer and each was granted a 15-year GSM 1800 MHz licence, commencing on 1 January 2000 and expiring on 31 December 2014².

1.8 In 2012, ComReg held a Multi-Band Spectrum Award (“MBSA”) process for the award of spectrum rights of use in the 800 MHz, 900 MHz and 1800 MHz spectrum bands (taking into account the fact that two of the three existing GSM licences in the 1800 MHz band would expire on 31 December 2014, while the third and final licence would expire on 12 June 2013). The MBSA process was designed to meet a number of objectives and it included features tailored to the specific situation in Ireland. This included the following:

- the use of two “Time Slices” for the award of spectrum rights of use, with Time Slice 1 running from 1 February 2013 to 12 July 2015 and Time Slice 2 running from 13 July 2015 to 12 July 2030.
- an early liberalisation option by which the existing GSM licensees (Vodafone, Telefónica and Meteor Mobile Communications Limited (“Meteor”)) could bid in such a manner as to liberalise some or all of their respective existing GSM spectrum rights of use in the 900 MHz and/or 1800 MHz bands in Time Slice 1.

1.9 It was recognised, at the time, that the creation of the two Time Slices and in particular the commencement date of Time Slice 2 could result in there being an interim period of approximately 6½ months between the expiry of the existing 15-year GSM 1800 MHz licences held by Vodafone and Telefónica, on 31 December 2014, and the commencement of any acquired liberalised 1800 MHz rights of use in Time Slice 2 (i.e. 13 July 2015). This situation could only affect Vodafone and Telefónica and not the third GSM 1800 MHz licensee, Meteor, as the expiry date of its licence was aligned with the commencement date of Time Slice 2 (being 13 July 2015). The possibility of such a gap emerging between existing GSM 1800 MHz rights of use and liberalised 1800 MHz rights in Time Slice 2 was commented upon by interested parties in their submissions to ComReg.³ ComReg noted that this possibility would only occur

¹ Telefónica paid a spectrum access fee of IR£5.686 million and Vodafone paid IR£5.69 million.

² See ComReg Press Release PR070999a <http://www.comreg.ie/fileupload/publications/pres070999a.pdf>

³ See, for example, ComReg Documents 11/10, 11/102, 12/21, 12/49.

in certain circumstances⁴ and it stated that it would assess this possibility following the MBSA but in advance of the expiry of the affected licences.⁵

1.10 The MBSA was completed in late 2012⁶ in such manner that there would be a period of approximately 6½ months between the expiry of Telefónica's existing GSM 1800 MHz licence on 31 December 2014 and the commencement of its liberalised 1800 MHz rights of use in Time Slice 2 on 13 July 2015. During that period, Telefónica⁷ would not hold spectrum rights of use in the 1800 MHz band. This is further outlined in Table 1 below.

Table 1: Telefónica's existing spectrum rights of use in the 1800 MHz band

Telefónica's 1800 MHz Licences	Licence Commencement date	Licence Expiry Date ⁸	Spectrum Licensed	Licence Details
GSM 1800	01/01/2000	31/12/2014	2 x 14.4 MHz	L2G1001
Liberalised Use (1800 MHz only)	13/07/2015	12/07/2030	2 x 15 MHz	MLU1007

1.11 Following completion of the MBSA, a number of interested parties again commented upon the possibility of there being an Interim 1800 MHz Licence.⁹ ComReg again stated that it would assess any substantiated and objectively justified request for an Interim 1800 MHz Licence having regard to its statutory functions, objectives and duties and that it expected that it would make a decision in advance of licence expiry.¹⁰ Furthermore, in the consultation commenced in September 2013 on the granting of 1800 MHz spectrum rights of use which were as yet unassigned ("ComReg Document 13/88") ComReg noted that it required clarity on certain facts and the outcomes of certain

⁴ The circumstances would be where Vodafone or Telefónica maintained their existing GSM 1800 MHz licence (in part of in full) in Time Slice 1, and obtained Liberalised Use 1800 MHz spectrum rights of use in Time Slice 2.

⁵ See, for example, ComReg Documents 10/105 (Section 3.5), 11/60 (paragraph 4.129), 11/60A (Annex 6.5), 12/25 (section 4.6), 12/50 (section 6.4).

⁶ See ComReg Document 12/123 <http://www.comreg.ie/fileupload/publications/ComReg12123.pdf>

⁷ In the MBSA competition, Vodafone availed of the early liberalisation option to liberalise its existing GSM 1800 MHz spectrum rights and obtain Liberalised Use 1800 MHz spectrum rights in Time Slice 1 with an expiry date of 12 July 2015. On the other hand, Telefónica was unsuccessful in its bids to use the early liberalisation option to obtain Liberalised Use 1800 MHz spectrum rights in Time Slice 1, and it retained its GSM 1800 MHz licence with an expiry date of 31 December 2014.

⁸ The correct expiry date for Licence MLU1007 is 12/07/2030 (i.e. 15 year rights of use).

⁹ See, for example, ComReg Documents 13/04 (Telefónica, Vodafone), 13/57 (Telefónica).

¹⁰ See, for example, ComReg Documents 13/05 (Section 2.3.2), 13/70 (Section 4.1) and 13/88 (Section 2.3).

matters before it could assess the matter of granting an Interim 1800 MHz Licence for the period in question. ComReg noted the following, in particular:

- Telefónica, at that time, had not yet objectively demonstrated that it would require GSM spectrum rights of use in the 1800 MHz band, for the 6½ month period.
- The outcome of ComReg's 2013 consultation on the granting of unassigned 1800 MHz spectrum rights of use was still unknown.
- The decision of the European Commission in respect of the proposed acquisition of Telefónica by Hutchison Whampoa was, at that point in time, still unknown.

1.12 Noting that it had obtained clarity regarding the above facts and outcomes, Consultation 14/88 assessed the issue of granting an Interim 1800 MHz licence to Telefónica.

1.2 Contents of Consultation 14/88

1.13 Aside from the background to this matter (as discussed above), Chapter 1 of Consultation 14/88 included a summary of interim licensing in the 900MHz band because a number of issues raised by that interim licencing process are clearly relevant to ComReg's consideration of the request for an Interim 1800 MHz Licence.

1.14 Chapter 2 of Consultation 14/88 set out ComReg's preliminary considerations and views regarding the submissions made by Telefónica on 7 May 2014, 14 July 2014, and 18 July 2014, in support of its request that ComReg put in place a process to facilitate the granting of an Interim 1800 MHz Licence. A summary of Telefónica's submissions and ComReg's preliminary view is set out below.

Summary of Telefónica's May and July 2014 submissions

1.15 Telefónica submitted information to ComReg by which it sought to objectively demonstrate that it ought to be facilitated in obtaining an Interim 1800 MHz Licence. Those submissions are set out in Annex 2 of Consultation 14/88.

1.16 Paragraphs 2.3 - 2.8 of Consultation 14/88 set out the key points made by Telefónica as to what it considered to be the potential consequences of it losing its 1800 MHz spectrum rights of use for the 6½ month period.

1.17 Paragraph 2.9 of Consultation 14/88 outlined the range of actions which Telefónica submitted would not be feasible to eliminate or substantially mitigate the impact of it losing its 1800 MHz spectrum rights of use for the 6½ month period.

1.18 Telefónica further submitted that its acquisition by Hutchison Whampoa would not help to mitigate the effects of it temporarily losing its GSM 1800 MHz rights of use for 6½ months, as Hutchison is using its two blocks of 1800 MHz

spectrum to roll-out its LTE service, primarily in urban areas. [REDACTED]

1.19 Telefónica further submitted that it would not be feasible for it to re-engineer its GSM 1800 MHz network from the current three spectrum blocks to two spectrum blocks, in the time period that remains prior to its GSM 1800 MHz licence expiring on 31 December 2014.

1.20 Section 2.1.4 of Consultation 14/88 set out a number of other considerations which Telefónica considers relevant to its request.

ComReg's preliminary assessment of the Telefónica's submissions

1.21 Section 2.2 of Consultation 14/88 set out ComReg's preliminary assessment of Telefónica's submissions. At paragraph 2.16, ComReg set out what were, at the time, its preliminary views:

- *the temporary loss by Telefónica of its GSM 1800 MHz rights for 6½ months could result in mobile users experiencing a significant degradation in their quality of service (QoS). This would particularly affect Telefónica's customers (see section 2.1.1 above), but it is likely that customers of other electronic communications networks (fixed and mobile) would also be affected, given that networks interconnect and customers on different networks communicate with one another;*
- *a reduced QoS on Telefónica's network could result in an unnecessary distortion in market competition, by impeding Telefónica's ability to retain and win customers. ComReg further considers the potential impacts on competition in the context of the draft RIA;*
- *Telefónica's assessment that there is no feasible strategy by which it could eliminate or substantially mitigate the impact of it temporarily losing its current GSM 1800 MHz rights appears objectively justified and reasonable. Further, ComReg considers that investments in its network which it otherwise would not have to make, for the specific purpose of mitigating the effects of its temporary loss of its spectrum rights of use in the 1800 MHz band, would not be likely to promote efficient infrastructure investment; and*
- *having the 1800 MHz spectrum currently used by Telefónica for GSM sitting fallow in the 6½ month period in the alternative would not be an efficient use of that spectrum in the circumstances.*

1.22 Consultation 14/88 noted that, based on its preliminary assessment (quoted above), ComReg considered putting in place a process to facilitate the

assignment of GSM 1800 MHz spectrum rights of use to Telefónica for the period 1 January 2015 to 12 July 2015 to be a viable regulatory option.

1.23 Chapter 3 of Consultation 14/88 set out a draft Regulatory Impact Assessment (RIA) in which two regulatory options were identified:

- **Option 1:** allow Telefónica's existing GSM 1800 MHz Licence to expire on 31 December 2014; or
- **Option 2:** put in place a process to facilitate the assignment of GSM 1800 MHz spectrum rights of use to Telefónica for the period 1 January 2015 to 12 July 2015.

1.24 Following its draft analysis of the above two options, ComReg indicated its preliminary preference for Option 2.

1.25 Chapter 4 of Consultation 14/88 set out ComReg's proposal that the licence conditions for an Interim 1800 MHz Licence would be set by reference to Telefónica's existing GSM-only 1800 MHz Licence and Chapter 5 set out ComReg's draft Decision on the relevant matters.

1.3 Summary of ComReg's position in this document

1.26 This section presents a summary of a number of ComReg's positions in this document that support its decision to put in place a process to facilitate the granting of an Interim 1800 MHz Licence. ComReg's final decision is set out in Chapter 5 and the reasons for that decision are contained in Chapters 1 – 4 herein. The key reasons may be summarised as follows:

- ComReg stated in advance of the MBSA that it would assess any substantiated and objectively justified request for an Interim 1800 MHz Licence, having regard to its statutory functions, objectives and duties, and that it expected make a decision in advance of licence expiry on 31 December 2014. The current consultation process which has led to the decision is thus entirely consistent with what ComReg previously stated that it would do, at or around this point in time;
- The submissions from Telefónica and the response to this Consultation made by Hutchison (representing itself and Telefónica) together constitute a substantiated and objectively justified request for an Interim 1800 MHz Licence, having demonstrated the potential for significant disruption to customer services that would otherwise occur;
- Of the two responses to Consultation 14/88, Hutchison agrees with ComReg's preliminary positions and proposed decision (now finalised) while Vodafone disagrees with same. As discussed throughout this document, ComReg is satisfied that none of Vodafone's submissions

constitute a substantive ground for making a decision to not facilitate the granting of the Interim 1800 MHz Licence.

- Having particular regard to certain of Vodafone's submissions, ComReg is satisfied as to the following:
 - (i) the granting of the 1800 MHz Interim Licence would not constitute the conferring of an illegal State aid;
 - (ii) ComReg took full account of the fact that Telefónica has been acquired by Hutchison Whampoa;
 - (iii) the combined spectrum holdings of Hutchison and Telefónica could not be used to successfully mitigate the effects of the 6½ month 1800 MHz spectrum gap in a manner that would be feasible or proportionate, having regard to the time remaining prior to licence expiry and the relatively short duration of the Interim 1800 MHz Licence;
 - (iv) ComReg did not fail to identify and consider any additional viable options in its draft RIA other than the two options set out therein (and in the final RIA herein); and
 - (v) this consultation process has not been rushed nor has ComReg incorrectly prioritised this consultation over responding to Vodafone's written submission of 31 July 2014 (now the subject of High Court judicial review proceedings) which ComReg replied to on 14 October 2014.
- Having regard to its overriding objectives to promote competition, contribute to the development of the internal market, promote the interests of users, and ensure the effective management and efficient use of spectrum, there is no better alternative measure than granting an Interim 1800 MHz Licence.
- Having regard to the regulatory principles and other provisions set out in Regulation 2 of the Framework Regulations¹¹, granting an Interim 1800 MHz Licence is an objectively justified, transparent, non-discriminatory and proportionate regulatory measure, given the salient facts and the likely consequences, in terms of the negative impact on competition and on consumers, that would result from not granting an Interim 1800 MHz Licence.

1.27 The decision to grant an Interim 1800 MHz Licence also:

¹¹ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. 333/2011)

- promotes regulatory predictability by ensuring that a consistent regulatory approach is taken over an appropriate period. The decision is consistent with what ComReg stated that it would do prior to licence expiry on 31 December 2014 and it is also consistent with the decision taken by ComReg, in 2011, to grant interim GSM licences in the 900 MHz band to Vodafone and Telefónica;
- ensures that there is no discrimination in the treatment of undertakings as only Hutchison/Telefónica faces the imminent expiry of Telefónica's existing 1800 MHz GSM licence, on 31 December 2014, and no other undertaking is in similar circumstances; and
- will do no more than maintain the *status quo* for the interim period (i.e. the decision is proportionate - see also Section 3.4 below in this regard) and should thereby safeguard competition to the benefit of consumers and maintain the current level of infrastructure based competition;

1.28 In addition, allowing the 1800 MHz rights of use at issue to expire and to lie fallow for the 6½ month period, only for those same rights of use to be taken up again by the same operator at the end of that 6½ month period, would not constitute encouraging the efficient use and ensuring the effective management of that spectrum.

1.29 In summary, granting an Interim 1800 MHz Licence is appropriate in the present case because it goes no further than is necessary in the prevailing circumstances and is a measure which maintains the *status quo* for a minimum length of time, being the interim period 1 January 2015 to 12 June 2015, following which Telefónica's rights of use to liberalised 1800 MHz spectrum for a 15-year period will commence.

1.4 Structure of this document

1.30 This document is structured as follows:

- **Chapter 2** – ComReg's assessment and final position on respondents' views on Consultation 14/88;
- **Chapter 3** – ComReg's final Regulatory Impact Assessment (Final RIA);
- **Chapter 4** – Interim 1800 MHz Licence conditions;
- **Chapter 5** – Final Decision (No. 13 of 2014);
- **Chapter 6** – Next Steps;
- **Annex 1** – Glossary;
- **Annex 2** – Non-confidential Telefónica submissions of May and July 2014; and

- **Annex 3** - Non-confidential submissions from Hutchison and Vodafone.

Chapter 2

2 Assessment of responses to Consultation 14/88 and final position

2.1 Introduction

2.1 ComReg asked three questions of interested parties in Consultation 14/88:

- Q.1 Do you agree with ComReg’s preliminary assessment of Telefónica’s submissions? Please provide reasons, evidence and other relevant material in support of your view.**
- Q.2 Do you agree with ComReg’s views and analysis set out in its draft Regulatory Impact Assessment? Please provide reasons, evidence and other relevant material in support of your view.**
- Q.3 Do you agree with ComReg’s Interim 1800 MHz licence proposals as set out in chapter 4? Please provide reasons, evidence and other relevant material in support of your view.**

2.2 ComReg received two responses to Consultation 14/88, from Vodafone and Hutchison. Non-confidential versions of both responses are set out in Annex 3. In summary, it can be said that the two respondents set out near diametrically opposing views in their responses; Hutchison agrees with ComReg’s preliminary positions and its proposed decision while Vodafone strongly disagrees with same. ComReg did not receive any submission from the only other mobile network operator in Ireland (Meteor Mobile Communications Limited, a subsidiary of eircom Limited).

2.3 ComReg notes that the original submissions in this matter were made by Telefónica, the directly affected licensee, whereas the response to consultation is made by Hutchison, on behalf of Hutchison and Telefónica. This is because Hutchison and Telefónica are now both owned by Hutchison Whampoa following its recent acquisition of Telefónica. That acquisition was conditionally approved by the European Commission on 28 May 2014.

2.4 ComReg would note that, for the purposes of this consultation and decision, it is treating all of the original submissions by Telefónica of May and July 2014 and the response to Consultation 14/88 by Hutchison as representing the combined position of Telefónica and Hutchison. References in this document to Hutchison should therefore be inferred as being references to Hutchison and Telefónica and references to Telefónica should likewise be inferred as being

references to Telefónica and Hutchison, unless the context suggests otherwise. When referring to the views expressed by or the market position of both parties, post-acquisition, for ease of reference this document refers to “Hutchison/Telefónica”.

2.2 Overview of submissions

2.2.1 Hutchison’s submission

- 2.5 Hutchison, in its response to Consultation 14/88, submits that the information previously provided by Telefónica (in its submissions of 7 May, 14 July and 18 July 2014) and considered by ComReg in Consultation 14/88 remains substantially current (see Section 1.2 above). Hutchison also states in its response that it agrees with ComReg’s proposed process for granting an Interim 1800MHz Licence to Telefónica. Hutchison considers this to be the most appropriate course of action in the current circumstances and to be non-discriminatory as no other licensee has been in the exact same circumstances. Hutchison submits that the *“nearest analogous situation occurred in 2011 when ComReg issued interim GSM Licences to Vodafone and O2, and the approach is consistent with that decision”* (page 2 of its submission).
- 2.6 Hutchison considers that granting an Interim 1800MHz Licence is objectively justified, as evidenced by ComReg’s analysis of Telefónica’s earlier submissions. Hutchison also considers that granting an Interim 1800MHz Licence is proportionate as such a measure *“is no more and no less than is required to avoid the consumer disruption that would be inevitable if the licence gap remained”*. Hutchison also considers that the process for calculating fees for the Interim 1800MHz Licence seems appropriate under the circumstances, noting that the proposed approach is consistent with previous ComReg decisions.
- 2.7 Hutchison also refers to the fact that this process requires a decision by ComReg and the making of regulations which require the consent of the Minister, and Hutchison submits that ComReg needs to progress rapidly to ensure that a licence can be in place on time.
- 2.8 Hutchison states that the number of locations where LTE is operational on its network has increased to [REDACTED] sites with continued roll-out. Hutchison further submits that these sites are substantially in the same areas as where Telefónica uses GSM 1800MHz and as a result there is no possibility of Hutchison using the 1800MHz spectrum assigned to it for GSM during the licence gap period. Hutchison states that there are approximately [REDACTED] [REDACTED] GSM-only devices still active on Telefónica’s network and that

most of those customers would suffer loss of service or significant degradation in quality of service if Telefónica's network was required to cease providing GSM 1800MHz services.

2.2.2 Vodafone's submission

2.9 Vodafone disagrees with ComReg's preliminary assessment and proposal and with Telefónica's earlier submissions, described in Consultation 14/88 and included in Annex 2 thereto (and for ease of reference is included again in Annex 2 of this document).

2.10 Vodafone's submission and the issues raised therein can, in ComReg's view, be captured under the following headings:

- Spectrum efficiency issues raised by Vodafone in its letter of 31 July to ComReg;
- State aid;
- Consideration of Telefónica rather than the combined entity;
- Ability of the combined entity to mitigate the spectrum gap;
- RIA options; and
- Other.

2.3 ComReg's response to submissions received

2.11 ComReg notes that Hutchison generally agreed with ComReg's proposals in its response to Consultation 14/88 and ComReg therefore does not consider the Hutchison response further save to the extent relevant when considering the concerns raised by Vodafone. As noted above, ComReg did not receive any submission from the only other mobile network operator in Ireland (Meteor Mobile Communications Limited, a subsidiary of eircom Limited).

2.12 Each of the main issues raised by Vodafone in its response to Consultation 14/88, as listed above, are addressed below.

Spectrum efficiency issues raised in letter of 31 July

2.13 In its submission, Vodafone reiterates certain arguments in relation to spectrum management and efficiency which it previously raised in a separate letter to ComReg dated 31 July 2014, and which are now the subject of High Court judicial review proceedings, brought by Vodafone against ComReg on 13 October 2014.

ComReg response

2.14 In its letter to ComReg of 31 July 2014, Vodafone raised certain spectrum efficiency and management matters in light of the European Commission's decision to approve the acquisition of Telefónica by Hutchison Whampoa. ComReg notes that Vodafone considers the concerns raised in that letter to be of relevance to this consultation process in an overarching sense. ComReg further notes that since the commencement by Vodafone of its judicial review proceedings relating to this issue, ComReg has, by letter dated 14 October 2014, responded to the 31 July letter and set out its position. ComReg's response sets out the reasons why it does not consider that there is a *prima facie* case for it 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, and ComReg further states that it will not be conducting a public review and/or consultation of the type requested by Vodafone, at this time. Apart from noting Vodafone's submission in this consultation, the fact of ComReg's response, and the fact of the matter being the subject of separate, on-going court proceedings, ComReg does not intend to comment further in line with its general practice not to comment on matters which are the subject of on-going legal proceedings.

State aid

- 2.15 Vodafone submits that allocating a spectrum right of use in a manner which confers a selective advantage on an operator gives rise to the possibility of that operator receiving a State aid. Vodafone further submits that such a selective advantage will arise where a State resource is allocated in circumstances that do not conform to market practice and that there is, in the present case, a directly comparable market practice that should assist ComReg in assessing whether a State aid might be involved.
- 2.16 Vodafone submits, in this regard, that while the 1800 MHz spectrum rights of use which it obtained through the MBSA is liberalised, in practice this has had no benefit as Vodafone continues to use its liberalised 1800 MHz spectrum to provide GSM-only services. Vodafone further submits that the value of its bid for liberalised 1800 MHz spectrum in Time Slice 1 primarily reflected the value of avoiding the time gap rather than the liberalised nature of the spectrum.
- 2.17 Vodafone submits that to assign what it describes as the same benefit to Hutchison/Telefónica, without a competition and at a price which it submits is lower than it has paid, would be unfair and would undermine the outcome of the MBSA and give rise to at least a *prima facie* concern that a selective advantage, indicative of a State aid, was being conferred on Hutchison/Telefónica.

ComReg response

- 2.18 In its submission, Vodafone suggests that it has demonstrated that the grant of the proposed Interim 1800 MHz Licence would amount to State aid and that ComReg should “*immediately confer with the Directorate General for Competition in the European Commission concerning the compatibility of its proposed measure in favour of Hutchison/Telefonica with the State aid rules*”. In reaching this conclusion, Vodafone almost exclusively relies on the argument that the proposed Interim 1800 MHz Licence “*gives rise to at least a prima concern that a selective advantage indicative of the presence of State aid is being provided to Hutchison / Telefonica*”.
- 2.19 However, in ComReg’s view, not only has Vodafone failed to demonstrate a *prima facie* case of State aid but its analysis of the presence of a selective advantage is wholly inadequate and incorrect.
- 2.20 Article 107(1) TFEU lays down the following four conditions which must be satisfied for a measure to be regarded as State aid:
- there must be an intervention by the State or through State resources which entails a financial burden on the State;
 - the measure must confer a selective advantage on an undertaking carrying on an economic activity; this entails two separate and cumulative notions:
 - first, an advantage must be conferred, in that the recipient receives a benefit that is not normally available;
 - second, that advantage must be selective, in that it is conferred only on certain undertakings;
 - the measure must distort or threaten to distort competition; and
 - there must be an effect or potential effect on trade between Member States.
- 2.21 The above four conditions are cumulative in that if any one condition is not satisfied then a measure will not involve State aid. However, in its analysis Vodafone appears to consider only one aspect of State aid, namely the presence of a selective advantage. Vodafone does not even attempt to demonstrate the presence of any of the other three conditions.
- 2.22 ComReg is of the view that the mere grant of a licence (being a State resource) does not engage Article 107(1). It is only the grant of a licence at an undervalue (thereby entailing a financial burden on the State) which could be regarded as aid granted through State resources.

- 2.23 ComReg would also note that it is being consistent in its regulatory approach in that the two Interim GSM 900 MHz Licences which it granted to Vodafone and Telefónica in 2011, and subsequently extended in 2012, were not granted at an undervalue but were subject to the same fees, adjusted for inflation, as had applied to the original, 15-year GSM 900 MHz licences. As discussed in chapter 4 below, the exact same approach is being taken for the Interim 1800 MHz Licence at issue in this document. The licence fee for the 6½ month period is derived from the current annual licence fee and adjusted for inflation. ComReg will therefore not forego or waive any licence income in granting the Interim 1800MHz Licence and so there is no question of ComReg granting the licence at an undervalue.
- 2.24 Furthermore, Vodafone's analysis of the presence of a selective advantage is deficient in that it does not consider who are the appropriate comparator(s) to Hutchison/Telefónica or whether the measure will result from an exercise by ComReg of its regulatory powers within the general scheme of the system of EU communications law in a manner consistent with the principle of non-discrimination (see the following paragraph in that regard). Vodafone incorrectly assumes that it is now in a comparable situation to Hutchison/Telefónica. This is patently not the case as, unlike Hutchison/Telefónica, Vodafone does not face the imminent expiry of its spectrum rights of use in the 1800 MHz band.
- 2.25 In addition, it is difficult to reconcile the views expressed by Vodafone and its legal advisors in response to ComReg Consultation 10/105, as to there being an absence of State aid in respect of the granting of the 900 MHz interim licences, against the views expressed by Vodafone in its response to this consultation.¹² For example:
- in respect of the first condition noted above on the presence of State aid, Vodafone's legal advisors (relying on the case law of the CJEU in this area) highlighted that although the 900 MHz interim licence may have had economic value, no transfer of State resources was involved because their award was consistent with the nature and general scheme of the EU regulatory system. ComReg would contend that a similar analysis would be relevant in this case;
 - in respect of the second condition, it was submitted at the time that the granting of the 900 MHz interim licences would not confer a selective advantage because it would result from an exercise by ComReg of its regulatory powers within the general scheme of the system of EU communications law in a manner consistent with the principle of non-discrimination. In reaching this conclusion, Vodafone and its legal advisors

¹² See ComReg Document 11/10. In particular, pages 51-78.

submitted, amongst other things, that the measure safeguarded existing competition and avoided undue effects on business sustainability and consumer disruption. It was further submitted that the measure did not involve any discrimination against Hutchison because Hutchison was not in a comparable situation to Vodafone or Telefónica¹³. ComReg would contend that the same analysis is relevant in this case; and

- in respect of the third criterion, it was submitted at the time that the purpose of the measure was to preserve the status quo for a limited time without affecting the rights of use of other operators and so the measure would not involve any distortion of competition. ComReg would contend that the same analysis would be relevant in this case (noting that the Interim 1800 MHz Licence is of shorter duration than the interim 900 MHz licences).

2.26 In that light, ComReg is satisfied that the grant of the 1800 MHz Interim Licence on the terms proposed in this document, and more particularly set out in the attached Decision, would not involve the conferring of a State aid.

2.27 In response to Vodafone's submission that the 1800 MHz rights of use which it obtained through the MBSA process are liberalised but that this fact has not benefited Vodafone, as it has thus far used those liberalised rights to provide GSM-only services, ComReg would point out that this is a commercial decision by Vodafone and that Vodafone was not compelled to bid for Liberalised Use Licences¹⁴ in Time Slice 1 but was free to bid in a manner of its choosing.

Consideration of Telefónica rather than the combined entity

2.28 Vodafone submits that Telefónica has not been an independent operator in the Irish electronic communications market since at least the completion of its acquisition by Hutchison Whampoa on 15 July 2014 and more likely since 28 May 2014, following the conditional clearance of the acquisition by the European Commission. Vodafone also notes that it might be argued "*that Telefónica's ability to act independently in the market was substantially impeded from the signature of the sale and purchase agreement with Hutchison on 22 June 2013*".

2.29 Vodafone submits that ComReg's analysis is fundamentally undermined by what is described as a failure to take adequate account of the fact that Hutchison and Telefónica are part of the same economic undertaking, and that

¹³ Incidentally, it was Hutchison who was opposed to the grant of 900 MHz interim licences to Vodafone and Telefónica.

¹⁴ Liberalised Use Licences provide greater flexibility in the range of services and technologies which could be deployed, to the ultimate benefit of consumers.

ComReg errs by repeatedly presenting Telefónica as an independent undertaking operating at arm's length from Hutchison, rather than taking account of the fact that Hutchison/Telefónica is a single undertaking.

ComReg response

- 2.30 First, in respect of Vodafone's suggestion at paragraph 2.28 that Telefónica had not been an independent operator in the Irish electronic communications market since at least the completion of the acquisition of it by Hutchison Whampoa and more likely since the time of the conditional clearance by the European Commission of the acquisition, the EU merger control rules are clear in that a merger cannot be implemented before it has been cleared by the European Commission. Furthermore, the results of the European Commission's initial market investigation (Phase I), dated 6 November 2013, indicated that the proposed acquisition could substantially lessen competition in the retail mobile telephony market in Ireland.¹⁵ In light of the clear merger control rules and the uncertainty created by the Commission's Decision to move to a Phase II market investigation, ComReg does not consider it credible to suggest that it should have viewed Hutchison and Telefónica as a single entity from the date of the initial agreement for Hutchison Whampoa to acquire Telefónica.
- 2.31 In respect of Consultation 14/88 referring in the main to Telefónica, rather than to Hutchison and Telefónica, ComReg as a general rule refers in its documents to the immediate licensee, being the specific authorised undertaking (person or corporate body) to which a wireless telegraphy licence has been granted.
- 2.32 Therefore, the fact that Consultation 14/88 refers in the main to Telefónica should not be inferred as indicating that ComReg was unaware of or did not consider the corporate and commercial realities resulting from the conditionally approved acquisition of Telefónica by Hutchison Whampoa. In fact, Consultation 14/88 makes specific references to the acquisition (see paragraph below) and ComReg is also on record as having engaged at length with the European Commission while the then proposed acquisition was still under *ex ante* review. ComReg also published an Information Notice¹⁶ setting out its views on the Commission's Decision to clear the acquisition.
- 2.33 ComReg clearly stated at paragraph 3.13 of Consultation 14/88 that "*for the purpose of this RIA, the interests of the applicant, Telefonica, and H3GI are aligned and will be considered together*". Furthermore, ComReg clearly

¹⁵ See: http://europa.eu/rapid/press-release_IP-13-1048_en.htm

¹⁶ See ComReg Document 14/53.

considered whether Hutchison and Telefónica would have sufficient combined spectrum resources to deal with the likely impacts of the spectrum gap¹⁷.

Ability of merged entity to mitigate the spectrum gap

- 2.34 Vodafone submits that Hutchison has been aware of the potential 1800 MHz spectrum gap for a considerable time and has had plenty of opportunity to develop a strategy to mitigate or eliminate the problem, especially when account is taken of the abundance of spectrum it holds following the acquisition of Telefónica by Hutchison Whampoa.
- 2.35 Vodafone refers in this regard to ComReg having discussed the issue more than a year ago in its consultation on unsold 1800 MHz lots (Consultation 13/88) and Vodafone further points to the fact that the potential 1800 MHz spectrum gap was clear from the outcome of the MBSA process. Vodafone submits that ComReg has failed to take account of this in its assessment, *“instead focussing on the Telefónica part of the Hutchison/Telefónica undertaking as if it was an independent market operator.”*
- 2.36 Vodafone contends that ComReg has failed to ask if *“...that undertaking has sufficient spectrum resources to deal with the harm identified by Telefónica and whether the Hutchison / Telefónica undertaking has taken sufficient measures to mitigate, from its own resources, the harm Telefónica purports to identify”* (page 5 of Vodafone’s submission) and that ComReg *“has failed properly (or at all) to consider the alternatives open to Hutchison/Telefónica from its own resources to resolve the gap”*.
- 2.37 Vodafone further contends that Hutchison has *“abundant and certainly sufficient spectrum resources”* to resolve the spectrum gap. In this regard, it notes that Hutchison has access to:
- two lots of 1800 MHz liberalised spectrum;
 - two lots of 800 MHz liberalised spectrum;
 - three lots of 900 MHz liberalised spectrum where LTE could be deployed; and
 - six lots of 2100 MHz spectrum which has similar propagation characteristics to the 1800 MHz band and Hutchison could migrate non-GSM handset customers to this band.

¹⁷ See, for example, paragraphs 2.10, 2.11 and 2.13 of Consultation 14/88.

ComReg response

- 2.38 As noted above, ComReg does not consider it credible to suggest that it should have taken into account the combined ability of Hutchison/Telefónica to plan or begin to mitigate the spectrum gap from June 2013.¹⁸ For the same reasons, ComReg does not consider it appropriate to regard Hutchison and Telefónica as having been in a position to begin mitigating the spectrum gap prior to the European Commission's decision of 28 May 2014. In particular, it is only since the date of that decision that Hutchison and Telefónica have had certainty that the acquisition of Telefónica by Hutchison Whampoa could in fact proceed. Indeed, this is reflected in ComReg's stated inability to fully consider the matter of the Interim 1800 MHz Licence until the completion of the European Commission's investigation.
- 2.39 Some obvious practical difficulties also arise with the implementation of mitigation strategies prior to completion of the European Commission's investigation. For example, it is at best questionable whether the sharing of technical information between Hutchison and Telefónica, necessary to provide for mitigation strategies, would have been possible while the investigation was ongoing. Furthermore, in the event of a negative clearance decision by the European Commission, Hutchison would have invested inefficiently where it was making such decisions based on the combined spectrum holdings of Hutchison and Telefónica.
- 2.40 In respect of the combined ability of Hutchison/Telefónica to mitigate the spectrum gap, ComReg sets out below its views on the various spectrum bands licensed to Hutchison/Telefónica which could be used to mitigate the spectrum gap. In this regard, it is particularly important to note at the outset two standout points, namely
- First, that there is legacy GSM use in the 1800 MHz band and, as a result, there is associated legacy network equipment and handset considerations leading to a crux in the practical feasibility of using other spectrum band combinations as an effective means to address the consumer issues. Hutchison submits that there are [REDACTED] GSM only devices still active on the Telefónica network and most of these customers would suffer a loss of service or a significant degradation in quality of service in the event of a loss of 1800 MHz spectrum; and
 - Second, it is not sufficient to merely look to the total spectrum available to Hutchison/Telefónica and consider the ability of Hutchison/Telefónica

¹⁸ Vodafone claims that "...Telefónica's ability to act independently in the market was substantially impeded from the signature of the sale and purchase agreement on the 22 June 2013" (at page 5 of its submission).

to replace/replicate its GSM 1800 MHz services using spectrum in any of the other mobile bands (800 MHz, 900 MHz, 2100 MHz, and liberalised 1800 MHz) from purely technical grounds. It is instead necessary to consider the proportionality of replacing GSM-only 1800 MHz services using spectrum in the other mobile bands. When this is done (see the RIA), it is apparent that none of the other mobile bands are effective substitutes for GSM-only spectrum in the 1800 MHz band in the present context and for the time period at issue.

- 2.41 Each of the posited technical means of replacing GSM 1800 MHz services using spectrum in other bands, for the interim period in question, is described and assessed below.
- 2.42 Focussing firstly on the 1800 MHz band in which Hutchison/Telefónica have 2 x 10 MHz of liberalised spectrum during the licence gap, ComReg explained in Section 3.3.1 of Consultation 14/88 (the draft RIA) that this spectrum is being used by Hutchison to support its LTE 1800 service. In its submission of 18 July 2014, Telefónica stated that Hutchison, at that time, had in excess of [REDACTED] customers using its LTE 1800 network. In its response to Consultation 14/88, Hutchison provided updated information in which it stated that the number of locations of its LTE 1800 network had increased to [REDACTED] sites with continued roll-out. Hutchison added that those sites are substantially in the same areas in which the Telefónica network uses GSM 1800 MHz, and as a result there was no possibility of using the liberalised 1800 MHz spectrum assigned to Hutchison for the provision of GSM, during the licence gap period.
- 2.43 Considering first a scenario in which Hutchison/Telefónica did attempt to mitigate the 1800 MHz spectrum gap by using liberalised 1800 MHz rights of use that are being used for LTE, ComReg notes that the co-channel (on the same frequency) usage of LTE and GSM requires that there be minimum geographic separation distances between LTE and GSM sites to avoid significant self-interference issues.¹⁹ This fact, when considered in combination with the current site locations of Hutchison's LTE 1800 MHz network²⁰, is likely to significantly undermine the potential mitigation actions that Hutchison/Telefónica could take in order to make liberalised 1800 MHz spectrum available for GSM alongside the existing LTE1800 network.

¹⁹ See ECC Recommendation (08)02 on the Frequency planning and frequency coordination for GSM / UMTS / LTE / WiMAX Land Mobile systems operating within the 900 and 1800 MHz bands <http://www.erodocdb.dk/Docs/doc98/official/pdf/ECCREC0802.PDF>

²⁰ Hutchison response to Consultation 14/88 submits that the LTE1800 sites are substantially in the same areas where the O2network uses GSM1800 MHz.

- 2.44 Another posited scenario would be for Hutchison to substantially modify or cease using its LTE 1800 network (e.g. by migrating its LTE1800 customers to the LTE 800 band) thereby freeing up 2 x 10 MHz of 1800 MHz spectrum for GSM. Network projects of this nature require considerable time and resources to complete and are projects that a MNO would not carry out in a rushed manner, given the potential consumer disruption issues. In the MBSA process, the relocation²¹ projects for Time Slice 1 consisted of a number of activities²² and required a period of circa 5 months (from December 2012 to April 2013)²³ to complete. As discussed in the course of the MBSA process, network re-tuning²⁴ projects are likely to require more time than network re-location projects²⁵ and it is notable that this scenario would involve a re-tune where the GSM 1800 MHz service would reduce from 2 x 14.4 MHz of spectrum to 2 x 10 MHz.
- 2.45 Noting the experience of the transition activities which occurred during the MBSA process, ComReg is of the view that it is highly unlikely that it would be possible for Hutchison to complete the transition activities under this scenario within the remaining term of the GSM 1800 MHz licence, so as to successfully mitigate the likely consumer disruption. In relation to whether Hutchison could have carried out this project earlier, ComReg notes Telefónica's submission of 14 July 2014 where it stated that *"it would not be possible for O2 to re-engineer its GSM 1800MHz network from the current three lots to just two lots within the time remaining."*
- 2.46 In addition to the transition activities and time considerations that are likely to be associated with the above scenario, ComReg notes that this scenario would also be likely to seriously compromise the quality of Hutchison's LTE service, reduce competition in LTE services, and negatively impact on consumers by

²¹ In the MBSA project, the term "relocate" referred to a scenario where the existing GSM licensee would be required to relocate its network to a spectrum assignment which is equal to or larger than its existing spectrum assignment.

²² In the MBSA transition project for Time Slice 1, there were a number of project activities including site analysis, hardware delivery, site works, hardware verification, automatic frequency plan preparation, repeater retune/relocation, the relocation/transition activity, the post relocation verification activities and the post relocation optimisation activities. See ComReg 13/19 and 13/19a for further information.

²³ The 900 MHz and 1800 MHz MBSA transition projects were completed in April 2013. See ComReg 13/55 for further details.

²⁴ In the MBSA project, the term "retune" referred to a scenario where the existing GSM licensee would be required to retune its network to a spectrum assignment which is smaller than its existing spectrum assignment.

²⁵ In the MBSA process, the scenario of an operator having to retune its 900 MHz network from 2 x 7.2 MHz to a spectrum bandwidth of 2 x 5 MHz was considered and a period of 2 years was considered sufficient for an operator to take mitigating steps, based on "the worst case scenario" of re-engineering the existing 900 MHz network and deploying additional 1800 MHz GSM base stations. See Document 12/22, Section 3

delaying provision of LTE services (this is discussed in the RIA in Chapter 3). In addition, short-term network investments of this nature are not likely to be efficient investments, particularly if Hutchison's strategy includes the ongoing deployment of LTE in the 1800 MHz band.

- 2.47 In respect of the two blocks (or 2 x 10 MHz) of liberalised 800 MHz spectrum assigned to Telefónica, ComReg is firstly of the view that it is not possible to deploy GSM services in the 800 MHz band. Amongst other things, the 800 MHz band is not standardised for GSM²⁶ and ComReg is not aware of there being any GSM equipment for this band.
- 2.48 A second scenario in relation to the 800 MHz band is whether Telefónica's two lots of liberalised 800 MHz spectrum could be used to provide an LTE service to Hutchison's current LTE 1800 customers, thereby freeing up Hutchison's two blocks of liberalised 1800 MHz spectrum for GSM services during the licence gap period. Similar to the previous scenarios discussed above, the transition activities associated with this scenario would likely require considerable time and resources to complete. Noting the experience of the transition activities during the MBSA process, ComReg is of the view that it is highly unlikely that it would be possible for Hutchison/Telefónica to complete the transition activities under this scenario within the remaining term of the GSM 1800 MHz licence, so as to successfully mitigate the consumer disruption that would otherwise be likely to occur.
- 2.49 In respect of the three blocks (2 x 15 MHz) of liberalised 900 MHz spectrum available to Hutchison, ComReg is aware that two of the three blocks are currently used to provide UMTS900 services while the remaining block is used for GSM900 services.²⁷ In relation to the existing UMTS900 service, Hutchison stated in its response to Consultation 14/88 that Telefónica's network deployed UMTS900 services to [REDACTED] sites. In addition, data available to ComReg indicates that, in 2013, UMTS900 was rolled out to [REDACTED] [REDACTED] base transceiver stations on Hutchison's network, with plans to increase this to [REDACTED] base transceiver stations in 2014.
- 2.50 Considering first the scenario of additional 900 MHz spectrum being made available for GSM alongside the existing deployments of UMTS900, ComReg notes that, similar to the 1800 MHz band discussion above, the co-channel usage of GSM and UMTS can result in significant self-interference issues if co-

²⁶ See 3GPP TS 45.005 <http://www.3gpp.org/DynaReport/45005.htm>

²⁷ Telefónica's submission of May 2014 indicated that the roll-out of UMTS 900 entails the compression of GSM 900 MHz spectrum down to 2 x 5 MHz with a consequent reduction in GSM capacity which is in part being met through the use of 1800 MHz.

ordination actions are not taken in line with best practice recommendation.²⁸ Such co-ordination actions can require minimum geographic separation distances between UMTS and GSM sites. This fact, when considered in combination with the locations of the current deployment of UMTS900 sites on the Telefónica and Hutchison networks,²⁹ is likely to significantly undermine Hutchison's ability to assign additional 900 MHz spectrum for GSM alongside its existing UMTS900 networks.

- 2.51 Another posited scenario for the 900 MHz band is for Hutchison to substantially modify or cease using its UMTS900 networks (e.g. by turning-off some of all of its existing UMTS900 sites or by migrating UMTS customers onto the 2100 MHz band) in order that additional 900 MHz spectrum could be made available for GSM purposes. While such a scenario could be implemented in theory, similar to the 1800 MHz and 800 MHz band scenarios discussed above, the associated transition activities would be likely to require considerable time and resources to complete. Again noting the experience of the transition activities during the MBSA process, ComReg is of the view that it is highly unlikely that it would be possible for Hutchison/Telefónica to complete the transition activities under this scenario within the remaining term of the GSM 1800 MHz licence and successfully mitigate the likely consumer disruption matters.
- 2.52 Furthermore, and as discussed in the RIA in chapter 3, this scenario is likely to have considerable efficient investment, consumer welfare and competition considerations as it would be likely to seriously reduce the quality of Hutchison's UMTS service, reduce competition in UMTS services, and affect consumers by delaying the provision of UMTS900 services by Hutchison.
- 2.53 Another scenario posited by Vodafone was that the 900 MHz band could be used for LTE services. In considering this suggestion, ComReg again notes that the 900 MHz band is not a 'greenfield' band - i.e. it is not a clear band as Hutchison has deployed UMTS900 services therein and Telefónica has deployed a mix of GSM900 and UMTS900 services. Even though the 900 MHz could be used for advanced LTE services and could, in theory, be used to free up some of the liberalised 1800 MHz spectrum currently used by Hutchison so that that it could instead be used to address the licence gap, this would require transition activities for UMTS900 and LTE 1800 MHz (ComReg's consideration of the transition scenarios is set out above) and it would not free up sufficient

²⁸ See ECC Recommendation (08)02 on the Frequency planning and frequency coordination for GSM / UMTS / LTE / WiMAX Land Mobile systems operating within the 900 and 1800 MHz bands <http://www.erodocdb.dk/Docs/doc98/official/pdf/ECCREC0802.PDF>

²⁹ It is likely that some of the existing UMTS900 sites will currently fall within the existing GSM1800 coverage footprint of the Telefónica network, while more UMTS900 sites will overlap with GSM1800 footprint when co-channel mitigation actions, such as minimum geographic separation distances, are considered.

1800 MHz capacity to replicate Telefónica's network, to the extent required to address the likely consumer disruption and degradation of quality of service as Telefónica uses 2 x 14.4 MHz of 1800 MHz spectrum and in this scenario Hutchison would free only 2 x 10 MHz.

- 2.54 Finally, in relation to Vodafone's suggestion that non-GSM customers could be migrated to the 2100 MHz bands, ComReg notes that no additional 900 MHz or 1800 MHz spectrum would be made available for GSM purposes under this scenario unless substantial modifications to Hutchison existing UMTS900 or LTE1800 networks were facilitated. ComReg's consideration of the transition activities associated with Hutchison's existing UMTS900 and LTE1800 networks is set out above.
- 2.55 In light of the above, ComReg notes that Hutchison/Telefónica could, in theory, carry out transition activities to modify their existing GSM, UMTS and LTE network deployments, in the 800 MHz, 900 MHz, 1800 MHz and 2100 MHz bands, in order to mitigate the consumer disruption that would otherwise be likely to occur as a result of the licence gap. However, noting in particular the previous transition activities in the MBSA process, ComReg is of the view that, in practice, it is highly unlikely that it would be possible for Hutchison/Telefónica to complete any of the proposed transition activities within the remaining term of the current GSM 1800 MHz licence.
- 2.56 Finally, Comreg would also note that each of the transition scenarios discussed above would likely raise significant concerns in terms of the efficiency of the investment that would be required and the effects on consumer welfare³⁰ and on competition; these issues are discussed in greater detail in the RIA in Chapter 3.

RIA options

- 2.57 Vodafone submits that ComReg's draft RIA is flawed on the basis that ComReg failed to identify and consider the following options³¹ :
- Option 3: that the combined spectrum now held by Telefónica/Hutchison provides a sufficient basis, without a need for ComReg's regulatory intervention, to resolve the spectrum gap;
 - Option 4: rerunning the spectrum award for 1800 MHz blocks unsold in the MBSA.

³⁰ In relation to the discrete issue of moving the LTE1800 customers of Hutchison onto a LTE800 network, ComReg notes that some LTE1800 customers may not have handsets that work on the 800 MHz band and this could create additional LTE customer disruption issues.

³¹ Although ComReg does not consider that these are viable regulatory options, in the interests of clarity it adopts the same nomenclature as set out in the draft and Final RIAs and denotes these proposals as Option 3 and Option 4.

2.58 Vodafone submits that its Option 3 is essentially complementary to its separate submission to ComReg of 31 July 2014, in which it called for a review of the post-acquisition spectrum arrangements. In that regard, Vodafone sets out again its view that Telefónica/Hutchison has had sufficient time to find solutions to the 1800 MHz licensing gap and has a sufficient portfolio of spectrum with which to address this issue. Specifically, Vodafone claims that “[this] includes the two lots of liberalised 1800 MHz spectrum that Hutchison was allocated in the MBSA and which it has decided to dedicate to LTE”.

ComReg response

2.59 ComReg’s RIA Guidelines³² set out the manner by which ComReg would construct the first regulatory option: *“the first option will always be to make no change to the current regulatory policy, and other possible options will then be considered.”*

2.60 In ComReg’s view, Vodafone’s Option 3 is no different to Option 1 as already set out and fully considered in the draft RIA in Consultation 14/88 and again in Chapter 3 herein. It is also obvious that any consideration of the effect of choosing Option 1 on stakeholders, competition and consumers would involve a consideration of whether Hutchison/Telefónica could reasonably mitigate the licence gap using their combined spectrum holdings.

2.61 In respect of Vodafone’s observation that its Option 3 is essentially complementary to its submission to ComReg on 31 July 2014, ComReg reiterates its commentary at paragraph 2.14 and does not propose to consider it further here. ComReg would merely again note that it has responded to Vodafone on this issue by letter of 14 October 2014.

2.62 In relation to Vodafone’s proposed Option 4, ComReg does not consider this to be viable for a number of reasons. In particular, in terms of proper administrative practice, ComReg attempts to be consistent in its decision-making and to follow its stated approach where it is appropriate to do so. Not only would the proposed Option 4 constitute a radical deviation from ComReg’s previous statements and proposals on this matter³³ but it is also clear that it is

³² ComReg Document 07/56a – Guidelines on ComReg’s approach to Regulatory Impact Assessment.

³³ See Section 4.6.3 of Document 12/25 the Decision No. 4 of 2012 which set out that ComReg considered that the most appropriate, objectively justified and proportionate approach to an Interim 1800 MHz Licence would be (at paragraph 4.186)

“..• Commit to considering whether to grant interim GSM 1800 MHz rights of use (of approximately six and a half month duration) following the proposed auction but significantly prior to licence expiry; and

•Commit to grant such GSM 1800 MHz interim rights only where it is justified, reasonable and proportionate to do so, having regard to the salient facts at that time and ComReg’s statutory functions objectives and duties. (emphasis added)”

not a practical, proportionate or credible option, especially given the current timelines.

- 2.63 Option 4 would involve ComReg having to conduct and complete a complex consultation and award process to assign liberalised rights of use (to unsold 1800 MHz Lots) rather than proceed with an objectively justified, proportionate and non-discriminatory decision to put in place a facility to grant an Interim 1800 MHz GSM Licence.
- 2.64 Option 4 would also require Hutchison having to purchase rights of use to liberalised 1800 MHz spectrum when its only requirement, in terms of the licence gap, is for 1800 MHz spectrum for GSM. In ComReg's view, this would constitute a disproportionate approach to addressing the licence gap and it would be a departure from ComReg's previous, clearly stated position as to what its approach to this issue would be.³⁴ In any case, Telefónica and Vodafone were not compelled or required to purchase liberalised rights of use to 1800 MHz spectrum, in order to remedy the licence gap.
- 2.65 In summation, ComReg does not consider that Vodafone has identified any viable options other than the two set out in the draft RIA in Consultation 14/88, and in the final version of the RIA herein.

Other

- 2.66 Other issues raised by Vodafone in its response to Consultation 14/88, which are considered to overlap to various degrees with the issues set out and discussed above, are as follows:
- that the consultation is "rushed" based primarily on the assertion that ComReg has stated that it will not consult further prior to deciding on the Interim 1800 MHz Licence and that ComReg has not considered other relevant and viable options;
 - that ComReg has confusing priorities on the basis that it has not prioritised consideration of Vodafone's concerns expressed in its letter of 31 July 2014 over this consultation process;
 - that ComReg should require Hutchison to reconcile Telefónica's interim licence request with Hutchison's objections to the grant of the 900 MHz interim licences; and
 - in the context of its regulatory impact assessment that:
 - the grant of an Interim 1800 MHz Licence would not comply with ComReg's obligations in relation to spectrum management;

³⁴ Ibid footnote 33.

- there is a weakness in ComReg's factual analysis and that ComReg has selectively quoted Vodafone while ignoring the change in circumstances since Vodafone expressed those views; and
- that ComReg has relied on erroneous analogies with the earlier interim extensions.

ComReg response

Vodafone's claim of a rushed consultation

- 2.67 Vodafone suggests that ComReg has stated that it will not consult further prior to deciding on the Interim 1800 MHz Licence.
- 2.68 ComReg is conducting this consultation in accordance with the principles and procedures set out in its published Consultation Procedures (Document 11/34) which, amongst other things, state that the normal period of time for interested parties to respond to a consultation will be four weeks. That time period may be shortened or, upon the request of a respondent, extended. In this instance, the original four-week consultation period was extended by two weeks upon the request of Vodafone (see Document 14/96).
- 2.69 While ComReg may conduct more than one round of consultation on a particular matter it will only do so when it is necessary and appropriate. In this instance, ComReg considers that all relevant information and material was set out in sufficient detail in Consultation 14/88 such as to fully inform interested parties of the issue and of the proposed decision and of the factual and legal basis and reasoning which underpin the proposed decision and to give them an adequate opportunity of making submissions in relation to the matter. Further, ComReg does not consider that Consultation 14/88 omitted any material information nor has any new relevant material information since emerged which would necessitate another round of consultation.
- 2.70 In summary, ComReg considers that it must, insofar as possible, strive to exercise its regulatory functions in a manner which is, *inter alia*, consistent, predictable, and timely and ComReg considers that this consultation process has been conducted in accordance with those principles.

Vodafone's claim of confusing priorities

- 2.71 As noted previously, the subject matter of Vodafone's letter of 31 July 2014 is now the subject of judicial proceedings and ComReg does not propose to discuss that matter further here, save to note the following points of relevance.
- 2.72 ComReg would note that Consultation 14/88 is being conducted as part of ComReg's planned work programme. As set out in paragraphs 1.6 to 1.8

inclusive of Consultation 14/88, ComReg recognised from the outset of the MBSA that the creation of the two Time Slices, and in particular the commencement date of Time Slice 2, could result in there being an interim period of approximately 6½ months which could affect Vodafone and/or Telefónica depending on the outcome of the MBSA.

- 2.73 It has been quite clear to interested parties - since at least late 2012 (under Decision No. 4 of 2012 and Document 12/123) and arguably since the publication of Consultation 10/105 in 2010³⁴ - that a consultation of the current kind would, in certain circumstances, be necessary and would, accordingly, be entered into ComReg's work plan. It was also equally clear, from the outset, that if any eventual decision to grant an Interim 1800 MHz Licence was to be made then such a decision would have to be made sufficiently in advance of the date of expiry of Telefónica's current 1800 MHz GSM Licence, on 31 December 2014.
- 2.74 With regard to Vodafone's submission that ComReg should have prioritised responding to Vodafone's submission of 31 July over the current consultation, ComReg would note that it was not in fact a case of prioritising one over the other but instead both matters were progressed concurrently. On 14 October 2014, ComReg issued its response to Vodafone's submission of 31 July 2014. That response sets out the reasons why ComReg does not consider that there is a *prima facie* case for it 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, and further states that ComReg will not be conducting a public review and/or consultation of the type requested by Vodafone, at this time.

Hutchison's previous submissions (on interim licensing of 900 MHz radio spectrum)

- 2.75 ComReg generally agrees with Vodafone that Hutchison's past position in respect of the Interim 900 MHz Licences diverges from its current position in respect of the Interim 1800 MHz Licence. However, ComReg must note that much the same can be said of Vodafone's position. ComReg is cognisant of the fact that interested parties will adopt positions which suit their specific and immediate interests in respect of a particular issue and advocate views accordingly and that equally, they may adopt different positions and advocate views supporting same, when facts and circumstances change.
- 2.76 As ComReg made clear at the time of the consultation on Interim 900 MHz Licences, it was of the view (which was shared by Vodafone (see discussion on State aid above)) that Hutchison was wrong in those submissions. Given that

³⁴ See ComReg Documents 10/105 (section 3.5), 11/60 (paragraph 4.129), 12/25 (section 4.6), 12/50 (section 6.4), 13/05 (section 2.3.2), 13/70 (section 4.1) and 13/88 (section 2.3).

ComReg felt at that time that submissions by Hutchison inimical to interim-licensing were not well-founded, and ought properly to be rejected, it would seem strange for ComReg to require Hutchison to reconcile those submissions with its application for an Interim 1800 MHz Licence in the present case, in circumstances where ComReg believes its position and submissions to be well-founded, based on ComReg's own consideration and analysis. However, where a party advocates a view which does not accord with ComReg's own considered views and analysis, and where that party previously advocated a view which does so accord, ComReg feels it is appropriate both to set out its views as to why such party's current analysis does not appear to it to be well-founded, and to note that that party had previously shared ComReg's current analysis in a previous, analogous, case.

RIA

Statutory objectives and non-discrimination

- 2.77 Vodafone submits that the grant of an Interim 1800 MHz Licence would not comply with ComReg's obligations in relation to spectrum management. Vodafone asserts in this regard that ComReg has not considered all viable regulatory options and has not properly considered the mitigating "fixes" available to Hutchison. Vodafone also suggests that the proposed measure obviously confers an advantage on Hutchison and discriminates in favour of Hutchison.
- 2.78 ComReg has addressed, above, the issues of the posited alternative regulatory options and the ability of Hutchison to reasonably mitigate the licence gap.
- 2.79 In respect of the alleged selective advantage conferred on Hutchison and the alleged discriminatory nature of the proposed measure, ComReg has already considered this issue under the State aid heading above. In particular, ComReg would point out that at no point has it discriminated against Vodafone. As Vodafone is aware, it is settled case law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. Both Vodafone and Telefónica, being in a comparable situation at the time, were both treated equally under the MBSA in that both were given the option to bid for 1800 MHz liberalised spectrum, with full knowledge that ComReg had committed to revisit the 1800 MHz licence gap issue in due course in the event of a certain outcome in the MBSA. Vodafone does not appear to question this fact. However, Vodafone now suggests that the grant of an Interim 1800 MHz Licence to Hutchison/Telefónica would discriminate against it without explaining why it should be considered to be in a comparable situation to Hutchison/Telefónica (particularly where, unlike Hutchison/Telefónica, Vodafone does not face the imminent expiry of any rights to use of spectrum

with consequential business and consumer disruption). Furthermore, Vodafone does not address the fact that the grant of the Interim 1800 MHz Licence merely maintains the *status quo* in the market whereas Vodafone's decision to acquire liberalised 1800 MHz rights of use in Time Slice 1 was entirely commercial and allowed it to deploy the latest technologies in the 1800 MHz band in Time Slice 1. ComReg therefore rejects Vodafone's suggestion that the proposed measure discriminates against Vodafone.

2.80 In light of the above, ComReg does not consider that the proposed measure runs contrary to its statutory obligations. On the contrary, ComReg considers that the grant of an Interim 1800 MHz Licence would encourage the efficient use of spectrum and avoid distortions of competition which could otherwise arise. Indeed, ComReg considers that a failure to grant an Interim 1800 MHz Licence would, in light of the specific facts and circumstance pertaining to this case, run contrary to ComReg's statutory obligations, e.g. in terms of avoiding distortions of competition and significant consumer disruption, and encouraging the efficient use of spectrum (see the RIA as set out in chapter 3).

Vodafone's claim of weakness in factual analysis and selective quotation

2.81 ComReg refutes the assertion that it has not performed a rigorous assessment of the "spectrum alternatives" (Vodafone's words) in its draft RIA in Consultation 14/88. Vodafone has not provided any factual evidence or technical analysis to back up the broad claims it makes in respect of the suitability of other radio spectrum bands to address the licence gap.

2.82 In relation to the use of information on websites or from other sources, ComReg, as a matter of course in carrying out its work, uses all relevant information available and seeks to check the authenticity of such information. ComReg is satisfied that the information on which it has relied in this consultation process is robust and reliable.

2.83 ComReg is further of the view that Vodafone has not provided an evidence-based counter assessment in respect of what it submits are the means available to Hutchison/Telefónica to mitigate the consumer harm, including potential harm to more vulnerable users, that ComReg considers would likely arise from not granting an Interim 1800 MHz Licence.

2.84 Vodafone also asserts that ComReg, in paragraph 3.23 of its draft RIA, has selectively extracted earlier quotes from Vodafone. The quoted statements were made between 2010 and 2012, prior to the MBSA, when Vodafone advocated the granting of Interim 1800 MHz Licences. Vodafone submits that it agrees with its previous statements, as quoted, and that it would agree with an Interim 1800 MHz Licence "*if circumstances had continued as envisaged at the times those comments were made.*" However Vodafone asserts, in this regard, that the current reality (which it submits was ignored by ComReg in its draft RIA

in Consultation 14/88) is that Hutchison now controls spectrum awarded to two operators in the MBSA to an extent significantly in excess of the caps sets in the MBSA, with the combined spectrum holding representing 38% of total spectrum below 1 GHz and 48% of spectrum above 1 GHz.

- 2.85 ComReg considers the above to be essentially a repeat of Vodafone's earlier assertion, set out on pages 5 and 6 of its response to Consultation 14/88, that Hutchison/Telefónica together have abundant and sufficient spectrum resources by which to resolve the licence gap without an Interim 1800 MHz Licence being required. This assertion by Vodafone has been addressed above, with ComReg having fully considered the feasibility and proportionality of Hutchison/Telefónica using spectrum in other bands in order to mitigate the licence gap.
- 2.86 ComReg is of the view that it is not sufficient to merely look to the total spectrum available to Hutchison/Telefónica and to consider the technical ability of Hutchison/Telefónica replacing its GSM 1800 MHz spectrum with spectrum in any of the other mobile bands. It is instead necessary to consider the *proportionality* of replacing GSM-only 1800 MHz spectrum with spectrum in any other band (800 MHz, 900 MHz, 2100 MHz, and liberalised 1800 MHz). When this is done, it is apparent that none of the other mobile bands are substitutable for GSM-only spectrum in the 1800 MHz band, for the time period at issue. It would be disproportionate to require Hutchison/Telefónica to have to make such a substitution for such a relatively short time period. ComReg, in short, considers that the correct approach is to first look to the problem, which is the 6½ month licence gap, and then look at the practicalities of each of the proposed solutions; when this is done, it is clear that an Interim 1800 MHz Licence represents the most practical, proportionate measure, in the totality of the circumstances.
- 2.87 ComReg would also note that the approval of the acquisition of Telefónica by Hutchison Whampoa was conditional on a package of specified remedies including MVNO and spectrum divestiture remedies and that this is relevant to the combined spectrum holdings of Hutchison/Telefónica.
- 2.88 Finally, ComReg is of the view that the past statements by Vodafone, quoted in Consultation 14/88 and referred to above, do apply to the present circumstances and that it was appropriate to refer to same. In particular, given that the decision made herein is based in large part on a concern that the licence gap represents a risk of significant consumer disruption, a statement by Vodafone in its response to a 2010 consultation is considered particularly relevant and so is repeated below:³⁵

³⁵ Vodafone response to ComReg question 4 in Consultation 10/105 (see also page 60 of Document 11/10 and at page 10 of Vodafone's response therein) as follows:

- *Even if it were the case that the 2½ year period of notice of this temporary loss of 1800 MHz access were adequate to enable licensees to undertake effective mitigation measures, which has not been established by ComReg, requiring operators to incur potentially significant costs in dealing with a temporary discontinuity in access to 1800 MHz spectrum arising from a flaw in the structure of ComReg’s proposed auction approach cannot be regarded as efficient or consistent with ComReg’s statutory objectives. Moreover the opportunity cost of granting Interim 1800 MHz licences, where required, is extremely low to non-existent as it would assigning rights of use for spectrum that would not otherwise be in use for the relevant 6½ month period. Indeed by permitting continued use of spectrum for delivery of communications services of high social and economic value that would otherwise remain unutilised for the period the granting of Interim 1800 MHz licences would fulfil the statutory regulatory objectives of maximising the efficient use of spectrum and promoting the interests of end users.”*

2.89 In light of the above, ComReg rejects Vodafone’s various assertions as to there being any weaknesses in its factual analysis. ComReg is also of the view that the selected past statements by Vodafone are relevant and that it was therefore appropriate to quote them.

Vodafone’s claim of reliance on erroneous analogies with earlier interim extensions

2.90 This point is essentially a re-thread of some of Vodafone’s earlier arguments set out in its response to Consultation 14/88. Therefore all of ComReg’s corresponding views, as set out in Consultation 14/88 and previously herein, also apply to this point. ComReg would also note that while there clearly is some degree of comparative overlap between the two processes, ComReg has not relied on its approach to the 900 MHz interim licence process in identifying and assessing the options as part of this consultation process.

2.91 Indeed, contrary to Vodafone’s original demands for ComReg to provide certainty that it would grant 1800 MHz Interim Licences, ComReg did not propose the granting of any such licence until such time as it was clear that they were necessary and appropriate, having regard to the salient facts at that time.

Q4	Do you agree with ComReg’s approach in relation to the period between the expiry of Vodafone and O2’s respective GSM 1800 MHz licences and the proposed commencement date of licences for the “second time slice” in the 1800 MHz band? Please provide reasons for your view.
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2.4 ComReg's view on submissions received

ComReg has carefully considered all responses to Consultation 14/88 including, in particular, the points raised by Vodafone as set out and discussed in detail above, and this analysis informs the following chapters of this document.

Chapter 3

3 ComReg's final Regulatory Impact Assessment (RIA)

- 3.1 This chapter sets out ComReg's RIA on its proposal for putting in place a process that would allow Telefónica to apply for a GSM 1800 licence for the 6½ month period between 1 January 2015 and 12 July 2015 ("the GSM 1800 Interim Licence Proposal"). It has been prepared in accordance with "ComReg's RIA Guidelines"³⁶ and having regard to the RIA Guidelines issued by the Department of An Taoiseach in June 2009 ("the Department's RIA Guidelines"), and relevant Policy Directions issued to ComReg by the then Minister for Communications, Marine and Natural Resources under Section 13 of the 2002 Act on 21 February 2003 (the "Policy Directions").
- 3.2 ComReg's RIA Guidelines set out, amongst other things, the circumstances in which ComReg considers that a RIA might be appropriate. In summary, ComReg will generally conduct a RIA in any process that might result in the imposition of a regulatory obligation (or the amendment of an existing regulatory obligation to a significant degree), or which might otherwise significantly impact on any relevant market or on any stakeholders or consumers.
- 3.3 In the interests of continuing to ensure openness and transparency, and given that the expiration of Telefónica's GSM 1800 MHz Licence could significantly impact on the electronic communications sector and consumers in Ireland, this RIA on the GSM 1800 Interim Licence Proposal has been prepared.
- 3.4 As set out in ComReg's RIA Guidelines, there are five steps to this RIA. These steps are:
- Step 1: Identify the policy issue and identify the objectives;
 - Step 2: Identify and describe the regulatory options;
 - Step 3: Determine the impacts on stakeholders;
 - Step 4: Determine the impacts on competition; and
 - Step 5: Assess the impacts and choose the best option.
- 3.5 In this document, ComReg has adopted the following structure in relation to Step 3 and Step 4 – the impact on industry stakeholders is considered first,

³⁶ ComReg 07/56a – Guidelines on ComReg's approach to Regulatory Impact Assessment – August 2007.

followed by the impact on competition, followed by the impact on consumers. The order of assessment has no bearing on the respective importance of these matters but rather reflects a logical progression. For example, a measure which safeguards and promotes competition should also, in turn, impact positively on consumers.

3.1 Identifying the policy issues and objectives (RIA Step1)

- 3.6 As discussed in Chapter 1 of this document, prior to the Multi-Band Spectrum Award (“MBSA”) process which concluded in late 2012, there were three GSM licensees in the 1800 MHz band, namely Vodafone, Meteor and Telefónica. Vodafone and Telefónica each held a 15-year licences (each comprising GSM rights of use to 2 x 14.4 MHz of 1800 MHz spectrum) with the same expiry date of 31 December 2014. Meteor’s licence (also comprising GSM rights of use to 2 x 14.4 MHz of 1800 MHz spectrum at that time) commenced 6½ months later and so it expires on 12 July 2015.
- 3.7 In the MBSA process, ComReg sought to resolve a number of different objectives in a single award process. This included awarding liberalised rights of use in the 1800 MHz band as early as possible, while respecting the rights of existing GSM licensees in the 1800 MHz band, and facilitating the liberalisation of existing, GSM-only rights of use in the 1800 MHz band, as early as possible in accordance with obligations under EU law. To facilitate the former objective, ComReg decided to award spectrum rights of use in two Time Slices, with a commencement date for “Time Slice 1” of 1 February 2013 (shortly following completion of the MBSA award process) and a commencement date for “Time Slice 2” of 13 July 2015 (being the day following the expiry of Meteor’s GSM 1800 MHz licence and, approximately, 6½ months after the expiry date of Telefónica’s and Vodafone’s GSM 1800 MHz Licences).
- 3.8 The MBSA process included an early liberalisation option, whereby existing GSM licensees in the 1800 MHz band could bid to obtain liberalised rights of use in that band for the entirety of Time Slice 1. Telefónica, unlike Vodafone, was unsuccessful in this regard. This has resulted in the current situation whereby there is a 6½ month gap between the expiration of Telefónica’s existing GSM rights of use in the 1800 MHz band, on 31 December 2014, and the commencement of its 1800 MHz liberalised rights of use in the 1800 MHz band on 13 June 2015.
- 3.9 The options and relevant facts, as set out in this RIA, are assessed against ComReg’s statutory functions, duties and objectives, particularly in relation to:
- the promotion of competition³⁷, which include:

³⁷ ComReg has a broad discretionary power in relation to achieving this general obligation.

- ensuring that there is no distortion or restriction of competition in the electronic communications sector;³⁸
- promoting efficient investment and innovation in new and enhanced infrastructures;³⁹ and
- encouraging efficient use and ensuring the effective management of radio frequencies;⁴⁰
- promoting the interests of users in the community;⁴¹ and
- safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition.⁴²

3.10 The principal policy issues and objectives that ComReg considers to be relevant to this RIA are:

- whether a process be put in place to facilitate an assignment of interim GSM 1800 spectrum rights of use to Telefónica;
- eliminating the potential negative consumer disruption by ensuring the continued availability of GSM 1800 services on Telefónica's network; and
- the impact of ComReg's proposal on safeguarding competition.

3.2 Identifying the regulatory options (RIA Step 2)

3.11 ComReg considers that the two regulatory options available to it are:

- **Option 1:** Allow Telefónica's existing GSM 1800 MHz Licence to expire on 31 December 2014; or
- **Option 2:** Put in place a process to facilitate the assignment of GSM 1800 MHz spectrum rights of use to Telefónica for the period 1 January 2015 to 12 July 2015.

³⁸ Section 12(2)(a)(ii) of the 2002 Act.

³⁹ Regulation 16(2)(d) of the Framework Regulations.

⁴⁰ Section 12(2)(a)(iv) of the 2002 Act.

⁴¹ Section 12(1)(a)(iii) of the 2002 Act.

⁴² Regulation 16(2)(c) of the Framework Regulations.

3.3 Determining the impact on industry stakeholders, competition and consumers (RIA Steps 3 and 4)

3.12 This RIA considers the impact of ComReg's decision on two broad stakeholder groups:

- mobile network operators and MVNOs, including:
 - Hutchison/Telefónica for whom the issue of a 6½ month gap arises;
 - Vodafone and Meteor, for whom the issue of a 6½ month gap does not arise; and
 - MVNOs reliant on the Telefónica network.
- and consumers

3.13 However, as noted previously, ComReg has adopted the following structure in relation to Step 3 and Step 4 of the RIA – the impact on industry stakeholders is considered first, followed by the impact on competition, followed by the impact on consumers. The order of this assessment has no bearing on their respective importance but rather reflects a logical progression. For example, a measure which safeguards and promotes competition should also, in turn, impact positively on consumers.

3.3.1 Impact on stakeholders

3.14 As noted in Chapter 2, the acquisition of Telefónica by Hutchison Whampoa was completed on 15 July 2014, having been conditionally approved by the European Commission on 28 May 2014. For the purpose of this RIA, the interests of Telefónica and Hutchison are considered to be aligned and both operators are hereafter referred to herein as “Hutchison/Telefónica”, as appropriate. ComReg first considers the likely impact on, and views of, Hutchison/Telefónica. ComReg then considers the likely impact on, and views of, the two other MNOs in Ireland, Vodafone and Meteor. Finally, ComReg considers the impact on other industry stakeholders such as MVNOs.

3.15 From the perspective of Hutchison/Telefónica, Option 2 would allow for the continuation of current services to customers and the retention of the *status quo*.

3.16 Under Option 1, a service degradation/disruption would likely occur for all Telefónica customers, with significant disruption including the potential loss of service for certain subsets of that customer base. This could reduce the ability of Hutchison/ Telefónica to compete in the market and could lead to an increased likelihood of affected customers switching to alternative operators.

The service disruption and potential loss of customers could cause Hutchison/Telefónica's market share to fall over the period of the 6½ month licence gap, meaning that Hutchison/Telefónica might have to incur the costs of inefficient investment in order to mitigate the temporary loss of the 1800 MHz spectrum and thereby prevent any service disruption and any resultant loss of customers.

- 3.17 The service degradation/disruption would be due to no GSM 1800 MHz service being available during the 6½ month period and all GSM 1800 MHz traffic all having to be accommodated on Hutchison's other networks and, in particular, on the GSM 900 MHz network given the significant number the GSM-only customers. Telefónica submitted that while it could take certain measures⁴³ to mitigate against this service disruption and the likely resulting loss in market share, it did not believe that there was a feasible mitigation strategy available to eliminate or substantially reduce the impact of the loss of 1800 MHz spectrum for this period.
- 3.18 In considering the mitigation options reasonably available to Hutchison, it is necessary to consider their ability to sufficiently mitigate against service degradation/disruption and the extent that it could be implemented in a timely and cost effective fashion. Noting that the 6½ month period at issue is not a sufficiently long period and that substantial mitigation actions would likely be required to successfully address the service degradation/disruption issues, such investments would, therefore, likely be inefficient. More importantly, noting the previous experience of the duration of transition activities arising out of the MBSA process, ComReg believes it is unlikely that Hutchison could complete the necessary activities within the remaining term of Telefónica's GSM 1800 MHz licence and successfully mitigate the service degradation/disruption (see the discussion in Chapter under the heading ability of the combined entity to mitigate the spectrum gap).
- 3.19 Hutchison currently has 2 x 10 MHz of spectrum in the 1800 MHz band that covers the period 1 January 2015 to 12 July 2015. However, ComReg notes that this spectrum is unlikely to be available to mitigate the spectrum gap caused by the expiration of Telefónica's GSM 1800 licence as Hutchison has launched LTE services⁴⁴ using this spectrum on [REDACTED] sites, and with continued roll-out to [REDACTED]. The number of Hutchison customers using LTE 1800 services is in excess of [REDACTED] customers and reassigning this spectrum to GSM customers would compromise the commercial viability of Hutchison's LTE

⁴³ These include Voice Compression techniques, 3G Carrier addition, Additional RAN Sites and National Roaming.

⁴⁴ http://press.three.ie/press_releases/three-ireland-to-launch-comprehensive-4g-offers/

service reducing its ability to compete for customers on the basis of its LTE service⁴⁵. Consumers would also be delayed in reaping the benefit of improved competition for LTE services.

- 3.20 Hutchison's LTE service has been launched in the more populated areas (these areas are likely to be the areas where Telefónica's GSM 1800 spectrum is currently used) and Hutchison plans to roll out this LTE service to more places in the future.⁴⁶ This further reduces the feasibility of Hutchison being able to use its 1800 MHz spectrum to mitigate the licence gap caused by the expiration of Telefónica's GSM 1800 MHz licence.
- 3.21 Therefore, Hutchison/Telefónica clearly prefers Option 2 over Option 1 because it would avoid significant consumer disruption through the continued provision of GSM 1800 MHz services. It would also safeguard competition by maintaining the *status quo* and allow Hutchison/Telefónica to continue to operate and develop its GSM, UMTS and LTE networks based upon its long-term 1800 MHz spectrum rights of use in Time Slice 2.
- 3.22 From the perspective of Vodafone and Meteor, both MNOs could potentially prefer Option 1 since any disruption to customers reliant on the Telefónica network could result in more of those customers switching to Vodafone and/or Meteor than would otherwise be the case.
- 3.23 Notwithstanding this, ComReg notes that, in the past, both Vodafone and Meteor have supported ComReg's interim licence proposals in respect of the 1800 MHz band and the 900 MHz band.
- 3.24 For example, in relation to the 1800 MHz band, ComReg notes Vodafone's comments in its responses to previous consultations indicating its general support for the granting of Interim 1800 MHz Licences where, among other things, it stated that:

- *“[R]equiring operators to incur potentially significant costs in dealing with a temporary discontinuity in access to 1800 MHz spectrum arising from a flaw in the structure of ComReg's proposed auction approach cannot be regarded as efficient or consistent with ComReg's statutory objectives. Moreover the opportunity cost of granting Interim 1800 MHz licences, where required, is extremely low to non-existent as it would assigning rights of use for spectrum that would not otherwise be in use for the relevant 6½ month period. Indeed by permitting continued use of spectrum for delivery of*

⁴⁵ LTE was launched on the Hutchison's network (the “Three network” as it is referred to in Hutchison's submission) over three months after the commercial LTE launches of Meteor (26 September 2013) and Vodafone (14 October 2013).

⁴⁶ <http://www.three.ie/explore/4G/>

communications services of high social and economic value that would otherwise remain unutilised for the period the granting of Interim 1800 MHz licences would fulfil the statutory regulatory objectives of maximising the efficient use of spectrum and promoting the interests of end users.”⁴⁷

3.25 For the avoidance of doubt, while Vodafone has expressed somewhat contradicting arguments in its submission to this consultation (see below), ComReg considers that the same arguments made by Vodafone above apply in the present context.

3.26 In relation to an analogous matter, namely ComReg’s previous proposal to grant interim 900 MHz GSM rights of use to Vodafone and Telefónica, ComReg also notes the supporting comments made by both Vodafone⁴⁸ and Meteor in the past including for example Meteor’s statement that:

“We agree that it is appropriate that the interim licences of Vodafone and O2 be extended by short durations to ensure continuity of service for their customers.”⁴⁹

3.27 Notwithstanding the strong support expressed by Vodafone in the past for the grant of interim licences in both the 900 MHz and 1800 MHz bands, particularly where it was expected to be the beneficiary of such licences, ComReg acknowledges the strong opposition now expressed by Vodafone to the grant of such a licence in the 1800 MHz band to Telefónica on similar terms (i.e. Option 2).

3.28 In respect of Meteor’s likely preferences, ComReg notes that Meteor did not provide any response to the present consultation, and ComReg has no reason to believe that the reasons expressed in the draft RIA as to its likely preferences were inaccurate.

⁴⁷ Vodafone response to ComReg Document 10/105 as published in ComReg Document 11/10.

⁴⁸ Vodafone in the same process noted in a letter of 14 December 2012 in respect of the proposal to grant extensions to GSM 900 :

“We agree that the proposal to grant Extensions to the Interim 900 MHz Rights of Use of Vodafone and Telefonica O2 is fully justified given the need to avoid the clear and substantial negative impact on consumer welfare and competition that would arise from even a short term absence of availability of 900 MHz spectrum frequencies to the Licensees...”

Vodafone also believes that ComReg’s proposal and Draft Decision is non-discriminatory as all entities that are in an equivalent factual and legal situation are treated equally by the decision, and no artificial or unfair advantage is being conferred on the Interim 900 MHz Licensees relative to their competitors.”

⁴⁹ Eircom response to ComReg Document 12/127, 14 December 2012.

- 3.29 ComReg also notes that voice-call customers are unlikely to be able to recognise the source of network disruption when they make a call to a customer on the Telefónica network. As such, the customers of operators other than Hutchison/Telefónica could also experience consumer disruption in the interim period if an Interim 1800 MHz Licence is not granted.⁵⁰ Therefore, fixed and mobile operators other than Vodafone might see a benefit to Option 2 for this reason.
- 3.30 In respect of other industry stakeholders like MVNOs, while ComReg would expect those MVNOs reliant on the Telefónica network (Tesco Mobile Ireland (TMI) and Lycamobile), to also favour Option 2, it notes that neither MVNO responded to Consultation 14/88.
- 3.31 It is also possible that MVNO's currently reliant on the Hutchison network would have a preference for Option 2 over Option 1 since any potential re-arrangement of spectrum to cater for the loss of GSM 1800 MHz services, could result in a degradation, unavailability or delay to the other services (e.g. UMTS 900, LTE 1800 services etc.), provided on Hutchison's network.
- 3.32 Other MVNOs which would be unaffected by ComReg's proposal would likely have no preference over the choice of Option.
- 3.33 In light of the above, ComReg is of the view that all stakeholders other than Vodafone are likely to either prefer Option 2 over Option 1 or are neutral in their view on this proposal.

3.3.2 Impacts on competition

- 3.34 Option 1 would, in ComReg's view, result in significant distortions to existing competition if Hutchison was unable to adequately service its existing retail and wholesale customers for the 6½ month period from 1 January 2015 to 12 July 2015.
- 3.35 In summary, ComReg considers that there is no obvious downside to Option 2 in terms of impact on competition (see also ComReg's comments on the absence of State aid in Chapter 2 above) whereas Option 1 would distort competition in the following ways:
- in terms of retail competition, where Hutchison is unable to mitigate the licence gap, a large proportion of its customers would experience significant service degradation/disruption and would have a greater propensity to switch away than would be the case under normal

⁵⁰ This is highlighted by the fact that, for Vodafone and Meteor, a sizeable amount of off network mobile minutes are made up of calls to Telefónica customers being ██████████ and ██████████% respectively. Data obtained via ComReg questionnaires as used to compile Section 4 of the ComReg Quarterly Report 14/97.

market conditions. This could also disproportionately affect MVNOs on the Telefónica network whose customers are mainly pre-paid and more likely to switch. Where Hutchison must mitigate the licence gap through using its spectrum resources (see the discussion in Chapter 2 under the heading of the ability of the merger entity to mitigate the spectrum gap), this would significantly hamper investment in and competition for mobile broadband services than would otherwise be the case, with potential long term impact on competition in this segment of the market;

- Telefónica's ability to attract new retail customers would be considerably reduced compared to the current state of competition, reducing the current *status quo* competitive constraint; and
- in terms of wholesale competition, competition would be temporarily, but avoidably, reduced where existing or potential wholesale customers perceive the merged entity as offering a diminished wholesale service over the 6½ month time period.

3.36 Importantly, the above impacts on the competitive position of Hutchison (and MVNOs) only arises by virtue of the licence gap and are unrelated to the factors that normally bring about such changes in competition such as changes in price, choice, quality and innovation. ComReg discusses some of these issues in greater details below.

3.37 The expiry of Telefónica's GSM 1800 MHz Licence as envisaged under Option 1 could require Hutchison to dedicate some or all of its two liberalised blocks of 1800 MHz spectrum to the provision of GSM services. Such a scenario, however, would alter the nature of competition for the provision of LTE services. Vodafone currently has [REDACTED] active LTE subscriptions which accounts for a significant percentage of circa [REDACTED] % of the LTE market.⁵¹ ComReg notes that Vodafone has benefited from an 'early mover advantage' in the roll-out of LTE services. The uncertainty surrounding the merger has impacted Hutchison's LTE rollout and, in particular, it has hampered Telefónica in the launch of an LTE service in its two blocks of 800 MHz spectrum. ComReg would consider that any further restriction in the roll-out of LTE services by a competitor (due to the licence gap) could enhance Vodafone's position as the market leader for reasons unrelated to its competitive offering or the normal dynamic of competition in the market. As such, under Option 1 a short term 1800 MHz spectrum rights

⁵¹ At the time of writing, active LTE subscription data for Q2 2014 has been provided by Vodafone and Meteor for the purposes of ComReg's Quarterly Report. Data provided by Telefónica in its letter of 18 July 2014 also indicated that the number of Hutchison customers using LTE services is in excess of [REDACTED].

continuity issue could result in a much longer impact on competition in the market for mobile services.

- 3.38 As outlined in Chapter 2 above (under the heading the ‘ability of the merged entity to mitigate the spectrum gap’) in theory it may be possible for Hutchison to substantially modify or cease using its UMTS900⁵² network in order that additional 900 MHz spectrum could be made available for GSM900 purposes, such a scenario, however, even if implemented in practice, would still distort competition to the detriment of consumers particularly through the delayed roll out of UMTS 900 services.
- 3.39 The deployment of UMTS 900 can improve indoor coverage quality, and its greater propagation characteristics vis-à-vis UMTS 2100 make it especially useful for the rollout of 3G services in rural areas and the provision of enhanced UMTS indoor coverage. The rollout of UMTS 900 was provided for the first time through the grant of liberalised use licences acquired in the MBSA and UMTS 900 has been rolled out by [REDACTED] since then.⁵³ This rollout represents a significant improvement in the provision of 3G services across the state, particularly to those rural consumers currently not serviced by a 3G reception.
- 3.40 In 2013, Telefónica’s UMTS 900 coverage area covered [REDACTED] km² with [REDACTED] km² ascribed to rural areas.⁵⁴ For Hutchison, the UMTS 900 coverage area represented [REDACTED] km² in 2013 and is forecasted to rise to [REDACTED] km² in 2014.⁵⁵ The re-assignment of spectrum currently used for UMTS 900 to GSM services for a period of 6½ months, aside from the resulting inefficient investment, would result in a delay in the rollout of UMTS 900 and a reduction in competition for mobile broadband services in certain areas of the state. Such a scenario would occur in the context of 1800 MHz spectrum, clearly suitable for addressing the licence gap, remaining fallow.
- 3.41 Furthermore, it could constrain the flexibility of Hutchison to optimise its service to customers using a combination of different frequency bands. This would likely prevent a reduction in the cost of providing services and associated benefits which should be passed to consumers in the competitive market.
- 3.42 The licence gap would artificially alter the nature of competition in a way that is unrelated to the underlying efficiency of competitors. The normal focus of

⁵² UMTS 900 is the name for the deployment of the Universal Mobile Telecommunications System (UMTS) in the 900 MHz band.

⁵³ [REDACTED]

⁵⁴ Ibid footnote 53

⁵⁵ Ibid footnote 53

competition is to attract marginal customers with a higher price elasticity of demand. However, the expiry of Telefónica's GSM 1800 MHz licence, in the absence of an interim licence, would expose Hutchison to switching by customers with a lower price elasticity of demand than would be the case under normal market conditions. The anomalous nature of this impact on competition is particularly marked in light of the fact that its cause ceases to exist only 6 ½ months later, on the commencement of Telefónica's liberalised rights of use in the 1800 MHz band.

- 3.43 The pre-pay segment remains the largest mobile segment in Ireland accounting for 55.2%⁵⁶ of all subscribers and the impact on competition in this segment is likely to be considerably larger, particularly in the short run, because the extent of switching is likely to be higher than that of post-pay.
- 3.44 This also has important consequences for the wholesale customers on the Telefónica network, TMI and Lycamobile, who compete almost exclusively in the pre-pay market and have a pre-pay market share of over nearly 10%. For example, it has taken TMI over 6 years to build up a 6% market share, and much of the market gains won through competition could potentially be lost over a short period of time due to factors unrelated to their competitive offering or the normal dynamic of competition in the market.
- 3.45 While post-pay customers have fixed term contracts that disincentivise switching between operators during this period, a substantial proportion of the post-pay customer base is likely to come up for renewal during the 6½ month period. Furthermore, it is quite possible that post-pay customers whose contract expires after 12 July 2015 would also have an increased tendency to switch in light of service degradation/disruption experienced during the 6½ month period. As such, Hutchison/Telefónica could continue to lose customers even after the commencement of its liberalised 1800 MHz spectrum rights of use.
- 3.46 In addition, it appears that Option 1 would require Hutchison/Telefónica to engage in inefficient investment in infrastructure by requiring it to make otherwise unnecessary investments in an attempt to ameliorate temporary degradations/disruptions to consumer services. The mitigation strategies considered by Telefónica in its submissions to ComReg included additional RAN (radio access network) sites which, even if achievable over a short period, would be inefficient because such sites in most cases would not be required on the commencement of Telefónica's Liberalised Use 1800 MHz spectrum rights of use. In this regard, Telefónica noted that "*New sites developed for this purpose would not be part of O2's current network development plan, so would not be economically feasible in most cases*" (page 5, Telefónica May 2014

⁵⁶ Document 14/97, 11 September 2014.

submission). ComReg is of the view that requiring Hutchison to engage in avoidable and inefficient infrastructure investment would not comply with its statutory obligations and, in light of all of the foregoing, would likely further distort competition in the market. Instead, competition and, in turn, consumers would be best served through efficient investments aimed at improving current network services and expediting access to new mobile services such as LTE.

3.47 Option 2, on the other hand, would maintain the *status quo* for the minimum period necessary to avoid significant consumer disruption that would otherwise be caused by the licence gap, thereby avoiding any distortions of competition in the market place. It would leave all operators in the same position as they are now, exposed to the normal dynamics of competition in the market.

3.48 In light of the above, ComReg considers that Option 2 is preferable over Option 1 in terms of the impact on competition. In particular, ComReg sees no obvious downside to Option 2 in terms of the impact on competition (see also ComReg's comments on the absence of State aid in Chapter 2 above). On the contrary, ComReg considers that Option 2 best safeguards both retail and wholesale competition in the Irish mobile market, whereas Option 1 is likely to distort competition in a number of ways.

3.3.3 Impact on consumers

3.49 As noted previously, a measure which safeguards and promotes competition should also, in turn, impact positively on consumers. As discussed under the previous heading, ComReg considers that Option 2 is the option which, on balance, best safeguards and promotes competition in the Irish mobile market.

3.50 Consumers continue to place a high value on GSM services (voice and SMS text) and ComReg notes that mobile originating voice minutes accounted for 70.8% of all voice minutes in Q2 2014. In addition, the total number of SMS messages sent by mobile users in Ireland was over 1.87 billion in Q2 2014.⁵⁷

3.51 In the present context, there are likely to be a number of key preferences for consumers when assessing the preferable regulatory option. In particular, consumers are likely to prefer the option that:

- avoids significant degradation/disruption to existing services;
- avoids the need to unnecessarily switch operators; and
- promotes competition so as to maximise the long term benefits in terms of choice, price and quality.

3.52 Telefónica submitted that "*the direct consequence of Licence expiry would be significant disruption to the service received by its customers*" and further

⁵⁷ Document 14/97, 11 September 2014.

submitted that this disruption would affect all of its [REDACTED] voice service customers.⁵⁸ Telefónica also noted that it continues to carry a significant amount of GSM traffic, with [REDACTED] voice calls carried on the GSM network each week. Around [REDACTED] of those calls are carried on the GSM 1800 Network.

3.53 The severity of the disruption faced by consumers depends on a number of factors including the available coverage band in use and handset compatibility. Telefónica submitted that:

- all [REDACTED] of its voice service customers who are within the current 1800 MHz coverage area would suffer moderate service degradation during peak hours;
- there are approximately [REDACTED] GSM-only devices active on the Telefónica Network. Most of these customers would suffer loss of service or significant degradation in quality;
- the customers most affected would be those [REDACTED] customers who hold GSM-only handsets in the 1800 MHz coverage area. These customers would be severely impacted during peak hours because their handsets are incompatible with 3G and are therefore unable to carry 3G voice calls; and
- furthermore, as GSM 1800 is generally used to provide additional capacity, it is likely that the Telefónica GSM 900 network does not have sufficient capacity to absorb the additional traffic resulting in severe disruption. Telefónica has deployed UMTS 900 to [REDACTED] sites. In those areas, the 900 MHz spectrum available for GSM has been reduced to approximately 2 x 5 MHz which has increased the requirement to maintain GSM 1800 MHz.

3.54 ComReg is of the view that the above analysis in respect of the network disruption and impact on consumers likely to be caused through the expiry of Telefónica's GSM 1800 MHz licence is reasonable and that significant consumer disruption including disruption to vulnerable users would likely arise under Option 1.

⁵⁸ Telefónica noted that the disruption would manifest itself in a number of ways with:

- *“dropped calls and call set up failure during busy hours and in some cases loss of service”*
- *“an impact on text and MMS messaging with delays experienced during busy hours” and*
- *“degradation to data and mobile broadband services, as 3G network capacity would be used for voice”.*

- 3.55 ComReg considers, therefore, that consumers are highly unlikely to prefer Option 1 over Option 2 due to the likely significant negative impacts to voice, SMS and data services. These negative impacts affect Hutchison/Telefónica, TMI and Lycamobile consumers directly given the reduced network performance. However, customers of other operators would also be negatively affected by the disruption when communicating or connecting with users reliant on the Telefónica GSM 1800 network.⁵⁹ As such, all consumers of electronic communications services (both mobile and fixed) are likely to suffer varying levels of service disruption.
- 3.56 In light of the above, ComReg is of the view that Option 2 is preferable to Option 1 from the point of view of all consumers.

3.4 Selecting the preferred option (RIA Step 5)

- 3.57 In light of the above, ComReg is of the view that the benefits of Option 2 far outweigh those of Option 1 in the context of ComReg's overarching objectives of promoting competition and the interests of end-users. In particular, ComReg notes that:
- with the exception of Vodafone, industry stakeholders were either in favour of Option 2 or expressed no view on the various options available; and
 - Option 2 is clearly preferable over Option 1 in terms of the impact on competition and consumers.
- 3.58 Furthermore, ComReg notes that Option 1 involves allowing the rights of use in the 1800 MHz spectrum (for which there is clearly an existing efficient use) to expire, such that the spectrum remains fallow for a period of time only to be taken up again by the same operator at the end of that period. In the absence of some other overriding consideration justifying ComReg taking this option, ComReg does not consider that this would comply with its obligations to encourage efficient use and ensure the effective management of spectrum.
- 3.59 In addition, ComReg notes that the preferred option generally accords with its statutory obligations in terms of objective justification, non-discrimination and proportionality. For example, as discussed in Chapter 2 above, ComReg considers that the grant of an interim licence to Telefónica would comply with the principle of non-discrimination.

⁵⁹ This is highlighted by the fact that, for Vodafone and Meteor, a sizeable amount of off network mobile minutes are made up of calls to Telefónica customers ██████████% and ██████████% respectively data obtained via ComReg from questionnaires used to compile Section 4 of ComReg Quarterly Report 14/97.

3.60 Furthermore, ComReg is of the view that the grant of an interim licence to Telefónica would comply with the principle of proportionality for the following reasons:

- an interim licence is clearly a suitable measure for avoiding the significant consumer disruption caused by a licence gap;
- an interim licence, as proposed in this consultation process, goes no further than is necessary to achieve that objective in that it would be granted under substantially the same conditions and at the same price (adjusted for inflation) as Telefónica's existing licence, i.e. it simply maintains the status quo for no longer than the duration of the licence gap;
- there is no better alternative for achieving the same objective. Simply allowing the licence to expire would not entirely, if at all, avoid the significant consumer disruption identified. For example, on the one hand, if Hutchison/Telefónica is unable to mitigate the licence gap, existing GSM customers on the Telefónica network would experience significant service disruption or degradation. Even if Hutchison/Telefónica were in a position to somewhat mitigate the licence gap at such short notice, this would likely still result in some disruption to GSM customers but, in particular, also disrupt its existing UMTS and LTE customers and the continued rollout of these services with consequential detriment to competition and end users; and
- finally, ComReg has not identified any obvious downside to Option 2 and considers that it would be intrinsically disproportionate to require Hutchison/Telefónica to either purchase liberalised 1800 MHz spectrum rights of use (as suggested as a possible option by Vodafone) or to incur the costs of putting in place mitigation measures for such a short period of time (resulting in both potential consumer disruption, inefficient investment and spectrum remaining fallow for which there is clearly an existing efficient use) on foot of unsubstantiated concerns raised by Vodafone.

3.61 For the reasons identified above, ComReg considers that, on balance, Option 2 would be the more appropriate regulatory option to adopt in the context of both the RIA analytical framework and its statutory powers, functions, objectives and duties.

Chapter 4

4 Details of Interim 1800 MHz Licence

4.1 Introduction

- 4.1 Chapter 4 of Consultation 14/88 discussed ComReg's proposals on the licence conditions to be applied to the Interim 1800 MHz Licence.
- 4.2 From the responses to consultation 14/88, ComReg notes that Hutchison supported ComReg's proposals while Vodafone did not provide any specific comments on ComReg's licence conditions proposals. In relation to Hutchison's response, ComReg notes that Hutchison submitted that ComReg's proposal was objectively justified and proportionate and among other things it stated that the process for calculating the licence fees seems appropriate under the circumstances as this is consistent with previous documents.
- 4.3 Noting the respondents' views above and ComReg's analysis and preferred option as discussed in Chapter 2 and 3 of this document, this chapter sets out ComReg's position on the licence conditions, including fees, for an Interim 1800 MHz Licence.

4.2 Interim 1800 MHz Licence conditions including fees

- 4.4 Noting the aim of retaining the *status quo* ComReg will set the Interim 1800 MHz Licence to contain the same conditions as in Telefónica's current GSM 1800 MHz Licence, which expires on 31 December 2014, with the exception that the existing fees will be updated to present-day prices in the manner discussed below.
- 4.5 In particular, this accords with the system of licence conditions for the use of radio spectrum for GSM-only operation and it is therefore appropriate to use that same system for an Interim 1800 MHz Licence.
- 4.6 ComReg will set the fees for the Interim 1800 MHz Licence by reference to the fees for Telefónica's current GSM 1800 MHz licence, as were prescribed by Regulation 8 of the Wireless Telegraphy (GSM Mobile Telephony Licence) Regulations, 1999 and 2003 (the "Regulations")⁶⁰, appropriately updated to present day prices using the Consumer Price Index ("CPI") published by the Central Statistics Office ("CSO"), with the indexation period starting from the commencement date of the GSM 1800 MHz licence on 1 January 2000.

⁶⁰ S.I. 442/1999 and S.I. 339/2003

- 4.7 Updating the licence fees payable is consistent with the approach taken in granting of the Interim GSM 900 MHz Licences and is also be in line with ComReg’s strategy statement for managing the radio spectrum⁶¹. ComReg has also remained cognisant of its statutory obligations and relevant obligations under EU Treaties which are relevant to the calculation and imposition of fees, and in particular, those obligations concerning State aid (see chapter 2 above).⁶²
- 4.8 ComReg is of the view that the licence fees for an Interim 1800 MHz Licence are to be calculated on a pro rata daily basis, based on the Interim 1800 MHz Licence being in effect for 193 calendar days.
- 4.9 In this regard, ComReg observes that Telefónica paid a once-off spectrum access fee (“SAF”) of €7,219,730.71 million for its current 15-year GSM 1800 MHz Licence and it also pays yearly spectrum usage fees (“SUFs”) ⁶³ of €1,371,312.00 for 2 x 14.4 MHz of 1800 MHz spectrum.
- 4.10 Table 2 below illustrates the calculation of the SUFs for 2 x 14.4 MHz of 1800 MHz spectrum for the period 1 January 2015 to 12 July 2015, based upon an overall CPI change of 39.10% between the period 1 January 2000 and September 2014.

Table 2: Calculation of the Interim 1800 MHz Licence fee for 2 x 14.4 MHz of spectrum based on a CPI change of 39.10% (September 2014 data).

Relevant considerations 2 x 14.4 MHz of 1800 MHz spectrum	Historical SAF and SUFs	Update to present day terms
SAF for 15 Years	IR£5.686m €7,219,730.71	
SAF for 1 Year	€481,315.38	€669,509.69
SUFs for 1 year	€1,371,312.00	€1,907,494.99
Total (SAF + SUFs) for 1 year		€2,577,004.68
Total (SAF +SUFs) for 193 days		€1,362,635.35
The Interim 1800 MHz Licence Fee		

⁶¹ In this regard, section 7.1.1 of ComReg’s Spectrum Strategy Statement (Document 11/89) states: “It will be increasing important for such fees to be updated on an annual basis to account for the general rate of inflation”.

⁶² Being to: (i) ensure the efficient use of the radio spectrum; (ii) ensure that any such fees are objectively justified, transparent, non-discriminatory and proportionate in relation to their purpose and shall take into account the objectives of ComReg set out in Section 12 of the 2002 Act; and (iii) in a manner which is not incompatible with relevant provisions under the EU Treaties.

⁶³ The level of the SUFs for 1800 MHz has remained unchanged over the lifetime of the GSM 1800 MHz licences. (See S.I 442/1999 and S.I. 339/2003).

4.3 The process to grant an Interim 1800 MHz Licence

4.11 ComReg will facilitate the granting of an Interim 1800 MHz Licence by adopting the same approach it used when it granted the Interim 900 MHz Licence (and extension). This means that ComReg will make specific regulations under the Wireless Telegraphy Act 1926 which will require the approval of the Minister for Communications Energy and Natural Resources.

4.4 Objective justification, proportionality and non-discrimination (of the specific licence conditions)

4.12 As noted previously, ComReg considers that its overall proposal to put in place a process whereby Telefónica can apply for and be granted an Interim 1800 MHz Licence is objectively justified, non-discriminatory and proportionate (see, for example, paragraphs 2.79 and 2.80 and Section 3.4 above). ComReg is of the view that the above licence conditions are also objectively justified, proportionate and non-discriminatory as discussed below.

4.13 For example, the imposition of the above licence conditions is objectively justified in that they accord with the system of licence conditions for the use of radio spectrum for GSM-only operation and contribute, in particular, to encouraging the efficient use and ensuring the effective management of spectrum.

4.14 In terms of non-discrimination, ComReg notes that, with the exception of some appropriate but minor amendments to licence fees, identical licence conditions will attach to the Interim 1800 MHz Licence as are currently considered suitable for Telefónica's existing GSM 1800 MHz licence. In addition, the approach used to update the existing licence fees is specifically tailored to ensure non-discrimination by ensuring that the Interim 1800 MHz Licence does not issue at an undervalue (see also the discussion on State aid Chapter 2).

4.15 In terms of proportionality, ComReg notes that simply maintaining the *status quo* in terms of licence conditions for no longer than is necessary to address the licence gap issue complies with the principle of proportionality. The imposition of more onerous licence conditions than those currently attached to Telefónica's existing GSM 1800 MHz Licence would have no objective basis (in terms of either achieving ComReg's statutory objectives or addressing the licence gap issue) and would therefore constitute a disproportionate approach to addressing the licence gap issue. Conversely, the imposition of less onerous licence conditions would go beyond what is necessary to address the

licence gap issue and would also fail to achieve ComReg's objectives in terms of the management of radio frequency spectrum.

4.16 In light of the above, ComReg is satisfied that the above licence conditions are objectively justified, non-discriminatory and proportionate.

Chapter 5

5 Final Decision (No. 13 of 2014)

5.1 This chapter sets out ComReg's final decisions based on the positions arrived at in the preceding chapters.

1. DEFINITIONS AND INTERPRETATION

In this Decision, save where the context otherwise admits or requires:

"1926 Act" means the Wireless Telegraphy Act 1926 (No. 45 of 1926), as amended;

"2002 Act" means the Communications Regulation Act, 2002, (No. 20 of 2002), as amended;

"Authorisation Regulations" means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations, 2011 (S.I. No. 335 of 2011);

"ComReg" means the Commission for Communications Regulation, established under section 6 of the Communications Regulation Act, 2002;

"Fees" means spectrum fees of €1,362,635.35 for 2 x 14.4 MHz of 1800 MHz spectrum for the Interim Licence Term;

"Framework Regulations" means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, (S.I. No. 333 of 2011);

"GSM" means an electronic communications network that complies with the GSM standards as published by the European Telecommunications Standards Institute, in particular but not limited to EN 301 502 and EN 301 511;

"GSM Mobile Telephony Service" means a mobile telephony service corresponding to GSM standards;

"Interim 1800 MHz Licence" means the licence described in Document 14/121;

"Interim Licence Regulations" means regulations corresponding to those described and outlined in Chapter 4 of Document 14/121.

"Interim Licence Term" means the period from 1 January 2015 to 12 July 2015 inclusive;

"Liberalised Use Licence" mean a Liberalised Use Licence granted under the 1926 Act in accordance with the Wireless Telegraphy (Liberalised Use and Preparatory

Licences in the 800 MHz, 900 MHz and 1800 MHz bands) Regulations, 2012 (S.I. No. 251 of 2012);

“**Minister**” means the Minister for Communications, Energy and Natural Resources; and

“**Telefónica**” means Telefónica Ireland Limited.

2. DECISION-MAKING CONSIDERATIONS

2.1 ComReg has made this Decision having regard to:

- (i) the contents of, and the materials and consultations referred to in, as well as the materials provided by respondents in response to, and in connection with, ComReg documents:
- a. 14/88; and
 - b. 14/121.

(which shall, where appropriate, be construed with this Decision), including, but without limitation, those relating, *inter alia*, to:

- the imminent expiry (on 31 December 2014) of a GSM 1800 MHz licence held by Telefónica under section 5 of the 1926 Act, pursuant to the Wireless Telegraphy (GSM and TACS Mobile Telephony Licence) Regulations, 1999 (S.I. 442 of 1999) as amended by the Wireless Telegraphy (GSM Mobile Telephony Licence)(Amendment) Regulations 2003 (S.I. 339 of 2003), permitting Telefónica to keep, and have possession of, install, maintain, work and use in a specified place in the State apparatus for wireless telegraphy for the provision of GSM services in the 1800 MHz band;
- the fact that 1800 MHz spectrum rights of use in Telefónica’s Liberalised Use Licence commence on 13 July 2015 and, in the absence of providing for interim measures for the Interim Licence Term, there would be a 193-calendar-day gap in Telefónica’s 1800 MHz spectrum rights of use;
- the need to avoid the undue effects on the sustainability of the business of operators and distortions of competition from 1 January 2015, and for duration of the Interim Licence Term, which could arise in the absence of providing for interim measures in that period;
- the need to avoid the significant disruption to existing GSM 1800 MHz services from 1 January 2015, and for the duration of the Interim Licence Term, which could arise in the absence of providing for interim measures in that period;
- the desirability of providing for interim measures for the Interim Licence Term preserving the status quo in spectrum assignments;
- the desirability of providing as much regulatory certainty and predictability as possible in the circumstances;
- countervailing considerations, and the limited nature thereof; and

- the decision to adopt this Decision overall being objectively justified, non-discriminatory and proportionate;
- (ii) the powers, functions, objectives and duties of ComReg, including, without limitation those under and by virtue of:
- a. the Communications Regulation Act, 2002, and, in particular, sections 10, 12 and 13 thereof;
 - b. the Framework Regulations, and, in particular, Regulations 16 and 17 thereof;
 - c. the Authorisation Regulations, and, in particular, Regulations 9, 10, 11, 12, 15 and 19 thereof;
 - d. Sections 5 and 6 of the 1926 Act;
 - e. the applicable Policy Directions made by the Minister under Section 13 of the Communications Regulation Act, 2002;

and noting that it has given all interested parties the opportunity to express their views and make their submissions, and has duly taken these into account, as well as having evaluated the matters to be decided, in accordance with its obligations pursuant to, *inter alia*:

- (i) Regulation 12 of the Framework Regulations; and
- (ii) ComReg's Guidelines on its approach to Regulatory Impact Assessment (ComReg Document 07/56a) and the RIA Guidelines issued by the Department of An Taoiseach in June, 2009.

3. DECISION

3.1 ComReg hereby decides that, subject to, and upon obtaining, the consent of the Minister to the making of Interim Licence Regulations, ComReg will make such regulations under section 6(1) of the Wireless Telegraphy Act 1926, prescribing relevant matters in regard to an Interim 1800 MHz Licence.

3.2 ComReg hereby decides that, upon application properly being made to it by Telefónica within the terms of the Interim Licence Regulations, and on payment of the Fees in respect of an Interim 1800 MHz Licence prescribed thereby, it will grant an Interim 1800 MHz Licence to Telefónica.

4. STATUTORY POWERS NOT AFFECTED

4.1. Nothing in this Decision shall operate to limit ComReg in its discretionary decision-making or the exercise, performance, carrying out or achievement of statutory powers, functions, objectives or duties conferred on it under any primary or secondary legislation from time to time.

5. EFFECTIVE DATE

- 5.1 This Decision is effective from the date of publication and shall remain in force until further notice by ComReg.

KEVIN O'BRIEN

CHAIRPERSON

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE 11 DAY OF NOVEMBER 2014

Chapter 6

6 Next Steps

- 6.1 Under Section 37 of the Communications Regulation Act, 2002, Regulations may not be made by ComReg under Section 6 of the Wireless Telegraphy Act 1926 without the consent of the Minister for Communications, Energy and Natural Resources. Following the publication of this Response to Consultation and Decision Document, ComReg will immediately request that the Minister approves the making of a Statutory Instrument under the Wireless Telegraphy Act 1926 to give effect to the interim 1800 MHz licensing decision set out in this document.
- 6.2 In relation to any further correspondence on matters relating to this document, ComReg hereby gives notice that it will publish all material correspondence received in this regard. Such information will be subject to the provisions of ComReg's guidelines on the treatment of confidential information.⁶⁴

6.1 Application procedure

- 6.3 An appropriate application procedure will be notified on ComReg's website, setting out how Telefónica should seek to apply for the grant of an Interim 1800 MHz Licence if it wishes to do so. It is envisaged that this application procedure will include the publication of an Interim 1800 MHz Licence application form on the ComReg website and it is envisaged that this will occur in early December 2014 at the latest. This application form will set out the closing date for the receipt of the completed application form and receipt of the full spectrum fees.

⁶⁴ ComReg's guidelines on treatment of confidential material (Document 05/24)

Annex 1: Glossary

A1.1 Definitions

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

3G Licence	A Licence issued under the Wireless Telegraphy (Third Generation and GSM Licence) Regulations, 2002 and 2003 (S.I. 345 of 2002 and S.I. No. 340 of 2003) for 3G services in the 2100 MHz band.
800MHz band	The frequency range 791 – 821 MHz paired with 832 – 862 MHz
900MHz band	The frequency range 880 – 915 MHz paired with 925 – 960 MHz

1800MHz band	The frequency range 1710 – 1785 MHz paired with 1805 – 1880 MHz
2100 MHz Band	1920 – 1980 MHz paired with 2110 – 2170 MHz, and 1900 – 1920 MHz
CPI	Consumer Price Index published by the Central Statistics Office.
GSM 900 MHz Licence	A Licence issued under the Wireless Telegraphy (GSM Mobile Telephony Licence) (Amendment) Regulations 2003 (S.I. 339 of 2003) for GSM use in the 900 MHz band.
GSM 1800 MHz Licence	A Licence issued under the Wireless Telegraphy (GSM Mobile Telephony Licence) (Amendment) Regulations 2003 (S.I. 339 of 2003) for GSM use in the 1800 MHz band.
GSM Licence	A GSM900 MHz Licence or a GSM1800 MHz Licence or an Interim GSM900 MHz Licence as the case may be an Existing GSM Licensee shall be construed accordingly.
Indexation	The adjustment of prices for inflation. The index of inflation that ComReg proposed to use is the Consumer Price Index (CPI) as published by the Central Statistics Office (CSO).
Liberalised Use Licence (or a Liberalised Licence)	A Licence issued under Schedule 1 of the Statutory Instrument 251 of 2012 which entitles the holder to use certain specific radio frequencies, subject to the terms and conditions set out therein.
Multi-Band Spectrum Award (MBSA) Process	The process to award spectrum in the 800 MHz, 900 MHz and 1800 MHz bands in accordance with the substantive decisions set out in Document 12/25 and the processes and procedures set out in the Information Memorandum (Document 12/52) as amended.
Spectrum Usage Fees (SUFs)	The annual Spectrum Fees associated with a Licence which a Winning Bidder / Licensee is required to pay over the duration of the Licence.

Time Slice	A time period for which licences are being allocated within the MBSA Process.
Time Slice 1	A time period from 1 February 2013 to 12 July 2015 (as may be amended by ComReg).
Time Slice 2	A time period from 13 July 2015 – 12 July 2030 (as may be amended by ComReg).

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

ComReg	Commission for Communications Regulation
DCENR	Department of Communications, Energy and Natural Resources
EC	European Commission
EU	European Union

A1.3 Primary and Secondary Legislation

SI	Statutory Instrument
2002 Act	The Communications Regulation Act, 2002 (No. 20 of 2002) ⁶⁵
Act of 1926	The Wireless Telegraphy Act 1926 (No. 45 of 1926) as amended
Authorisation Regulations	European Communities (Electronic Communication Networks and Services) (Authorisation) Regulations 2011 (S.I. No 335 of 2011)

⁶⁵ As amended by, inter alia, the Communications Regulation (Amendment) Act 2007, the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 and the Communications Regulation (Postal Services) Act 2011.

Framework Directive	Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended
Framework Regulations	European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No 333 of 2011)
The Minister	Minister for Communications, Energy and Natural Resources
Specific Regulations	Specific Regulations has the same meaning as set out in Regulation 2 of Framework Regulations 2011 (S.I. No. 333 of 2011)

A1.4 Glossary of Technical Terms

3G	Third Generation Mobile System (e.g. UMTS)
2G	Second generation mobile services (e.g. GSM)
CPI	Consumer Price Index
CSO	Central Statistics Office
ECN	Electronic Communications Network as defined under the Framework Regulations
Meteor	Meteor Mobile Communications or Meteor
GHz	Gigahertz (1,000,000,000 Hertz)
GSM	Global System for Mobile Communications
Hertz or Hz	Unit of Frequency
THREE	Hutchison 3G Ireland

kHz	Kilo Hertz (1,000 Hertz)
LTE	Long Term Evolution of 3G
MHz	Megahertz (1,000,000 Hertz)
MNO	Mobile Network Operator
MVNO	Mobile Virtual Network Operator (a licensed mobile operator with no spectrum assignment and with or without network infrastructure)
QoS	Quality of Service
RIA	Regulatory Impact Assessment
SUF	Spectrum Usage Fee
Telefónica	Telefónica O2 Communications (Ireland) Ltd
UMTS	Universal Mobile Telecommunications System.
Vodafone	Vodafone Ireland Limited

Annex 2: Non-confidential Telefónica Submissions (May and July 2014)

A 2.1 This annex sets out the non-confidential submissions (dated 7 May 2014, 14 July 2014 and 18 July 2014) provided by Telefónica to ComReg in support of its request that ComReg provide a process to eliminate Telefónica's 1800 MHz GSM licence gap.

7th May 2014

Mr. Kevin Kennedy
Commission for Communication Regulation
Abbey Court, Irish Life Centre
Lower Abbey Street
Dublin 1

1800MHz GSM Licence Gap

Dear Mr. Kennedy

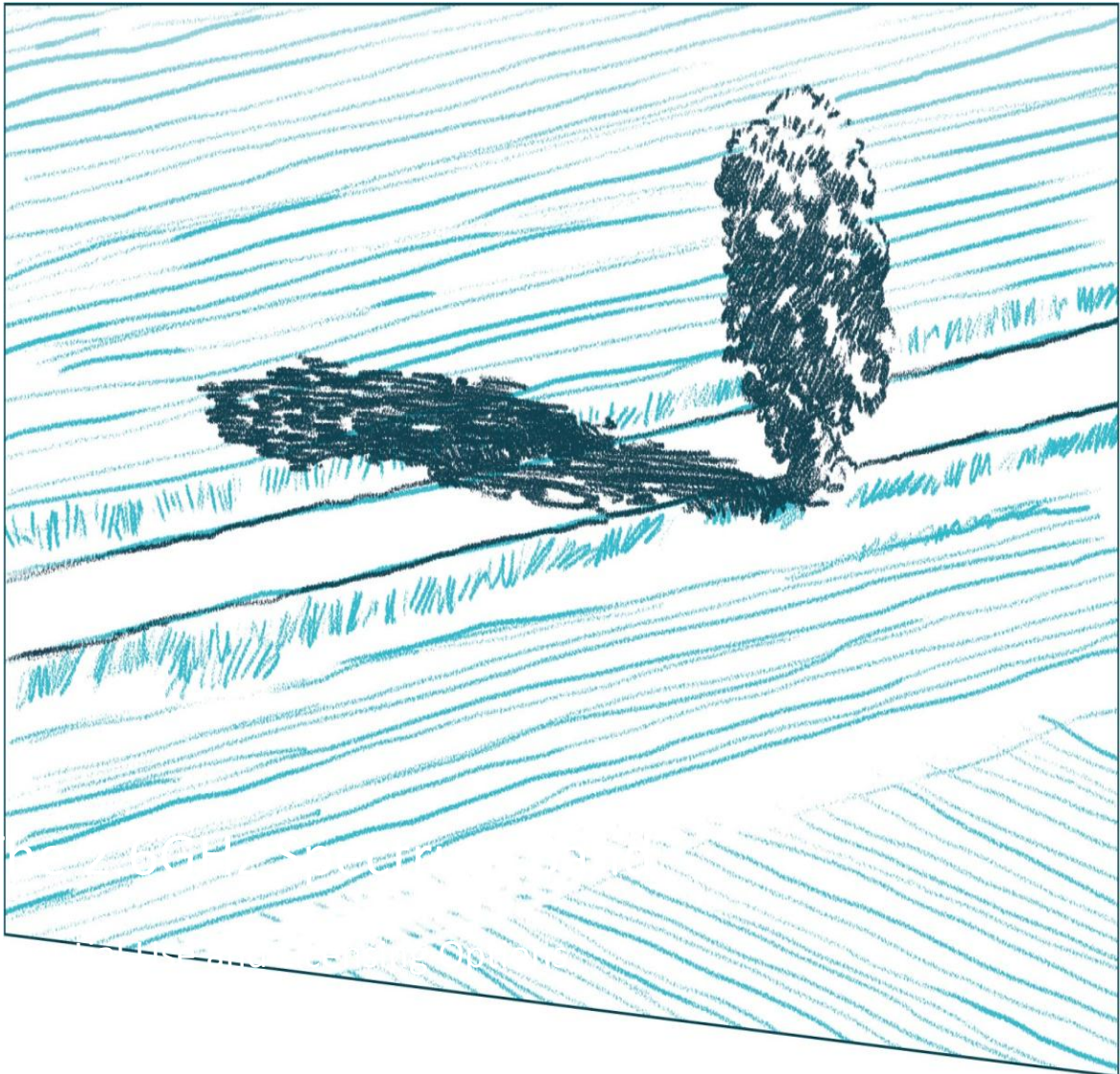
As you will be aware, Telefonica Ireland Ltd (O2) is currently licenced to use 2 x 14.4MHz of radio spectrum in the 1800MHz band for GSM services. That licence is due to expire on 31st December 2014. Telefonica also holds a Liberalised Use licence that was issued subsequent to ComReg's Multiband Spectrum Auction in 2012. That licence will permit the use of 3 Lots or 2 x 15MHz of spectrum in the same part of the 1800MHz band from 13th July 2015, leaving a gap in licence continuity of approximately 6.5 months.

O2 hereby requests ComReg to take whatever steps are necessary to eliminate this gap in licence continuity. This might be achieved by either extending the existing GSM licence, issuing an interim licence, or some other appropriate means. The attached document provides information supporting this request.

Yours Sincerely



Tom Hickey



**Request to ComReg for a Process to
Eliminate O2's 1800MHz GSM Licence Gap**

7th May 2014

Telefonica

1. Background

Telefonica Ireland Limited (O2) currently holds a GSM licence issued in accordance with SI 340 of 2003¹ to use spectrum in the 1800 MHz band for GSM services. The licence was originally issued for a 15 year period from 1st January 2000, and is due to expire on 31st December 2014.

The 1800MHz band has been logically divided into 15 Lots, and following ComReg's Multi-band Spectrum Award (MBSA) process in 2012, O2 relocated the position of its GSM equipment in the 1800MHz band so that it operates within Lots A, B, and C. O2 also holds a Liberalised Use Licence to use the spectrum in Lots A, B, and C; however this Liberalised Use Licence does not commence until 13th July 2013, leaving a gap in licence continuity of approximately 6.5 months.

ComReg carried out an extensive and detailed consultation process in advance of the MBSA. Those consultations considered a broad range of relevant issues, including: the expiry of 900MHz licences in 2011 and 2015; expiry of 1800MHz licences in January and July 2015; the allocation of spectrum in the 800MHz band for mobile for the first time; re-allocation of spectrum in the 900MHz and 1800MHz bands after expiry of GSM licences; and the grant of Liberalised Use Licences.

At the conclusion of the above consultations, ComReg issued its decision, and executed the MBSA. This process provided a mechanism for bidders to enter a competitive process and win rights to apply for Liberalised Use Licences. The MBSA provided for the grant of licences in two different time periods: Time Slice 1 (1/2/2012 to 12/7/2015), and Time Slice 2 (13/7/2015 to 12/7/2030). It also provided a mechanism whereby operators holding GSM licences could bid to convert those licences to Liberalised Use Licences in Time Slice 1. The mechanism did not, however provide a means by which O2 could obtain a GSM only licence or extend its existing GSM licence so as to avoid the gap or discontinuity from January to July 2015, other than by liberalisation of the existing licence throughout Time Slice 1. O2 highlighted this as a possible risk arising out of the MBSA before the award process commenced, and also sought reassurances subsequent to the process that a means would be put in place to allow O2 to obtain a licence so as to allow continued operation of its GSM 1800MHz network until the commencement of its Liberalised Use Licence in July 2015.

2. Request from O2

O2 now formally requests ComReg to provide a means by which it can be granted a GSM licence to operate the currently allocated 2 x 14.4 MHz of spectrum licenced to it in Lots A, B, and C of the 1800MHz band in the period from 1/1/2015 to 12/7/2015. O2 also requests that ComReg provide clarity on the process that might be used to achieve this in the short term as the date for expiry of the current GSM licence is now relatively close, and there is a need to eliminate the uncertainty.

¹ The Wireless Telegraphy (Third Generation and GSM Mobile Telephony Licence) (Amendment) Regulations, 2003

O2 does not wish to be prescriptive in relation to the means by which the required licence can be issued, however, in principle, the method used to extend the O2 and Vodafone GSM 900MHz licences in 2011 would seem to be appropriate and acceptable. It is understood that this might require the making of Regulations under the Wireless Telegraphy Act, similar to the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations 2011². Given the short term nature of the licence, O2 believes it is appropriate to either extend or renew the existing licence under its current terms, or to issue a new licence with substantially similar terms.

3. Current Use of the Spectrum

O2's network currently integrates a number of different service types and radio bands to optimise the service delivered to customers - 900MHz GSM, 900MHz UMTS, 1800MHz GSM, and 2100MHz UMTS. LTE on 800MHz is not generally accessible yet. O2 currently uses the 1800MHz band to provide a GSM service primarily in urban areas. [*Confidential section removed*]. The 1800MHz layer is used to provide capacity for voice callers, and basic data using edge. [*Confidential section removed*].

O2 is currently in the process of expanding its UMTS 900MHz coverage. Though this is primarily focused in areas where 2100MHz coverage is weaker, it nevertheless entails the compression of 900MHz spectrum used for GSM down to 2x5MHz with a consequent reduction in GSM capacity. This GSM capacity reduction is in part being met through the use of 1800MHz spectrum. [*Confidential section removed*].

The planning, design, and roll-out of the various bands and services in O2's network has been on the basis of use of 1800MHz both now and in the future. This affects aspects such as site selection; on-site equipment like radio base stations, aerials and combiners; but also the planning of capacity for services provided in other bands. It would not be possible to simply "fill-in" the gap in service that would be created by the absence of 1800MHz service. Such a network re-design and implementation could not be achieved in a matter of months, and would not adequately replace the service currently provided by the 1800MHz band.

Given the above considerations, O2 could not simply discontinue use of the 1800MHz band for a period of 6.5 months. Such action would have a serious impact on the quality of service received by O2's GSM customers in particular, but would affect all customers.

4. Consequences of No Licence

If O2 was required to cease use of the 1800MHz band, the direct consequence would be significant disruption to the service received by its customers. As stated above, approximately [*Confidential section removed*]. The effect of this change would manifest itself as congestion on O2's network with dropped calls and call set-up failure during busy hours, and in some cases loss of service. The most severely impacted would be the customers whose traffic is currently carried on the 1800MHz band; however there would be a wider impact on all voice and data customers. There would be an impact on text and

² S.I. No. 189 of 2011

MMS messaging with delays experienced during busy hours, in addition there would be degradation to data and mobile broadband services, as 3G network capacity would be used for voice service.

All of O2's 1.51m voice service customers would be lightly impacted at certain times, and would notice some degradation to their service. This would be as a result of attempts to make and receive calls from customers whose service is more severely impacted, and to some extent the effect of congestion on O2's network.

All [*Confidential section removed*] of O2's voice service customers who are within the current 1800MHz coverage area would suffer at least moderate service degradation during busy hours. This would include the customers whose traffic is currently carried on the 1800MHz band, but also customers within the relevant area whose traffic is also carried on the 3G network. This is a result of the "switching in" of additional traffic on the 3G network.

For those customers who hold GSM only handsets and are within the 1800 MHz coverage area, service would be severely impacted during busy hours. For these [*Confidential section removed*] customers, the 3G service is not available to carry voice calls, and the only network service available is 900MHz GSM, which does not have sufficient capacity to absorb the additional traffic. This is particularly the case where O2 is in the process of rolling out 3G service in the 900MHz band, leaving only 2x5MHz of spectrum used for GSM capacity service.

There are some actions that O2 could take in order to try to mitigate the impact on its service, including:

Voice Compression Techniques

Compression methods are available to allow the voice-call capacity per MHz of spectrum to be increased. These methods can be effective in extending the voice carrying capacity of a network in many circumstances; however this is within limits, and extensive use of compression brings a corresponding reduction in call quality. Given the relative quantity of 1800MHz spectrum in use by O2 to provide voice service, it would not be practically possible to compensate for its withdrawal by use of voice compression on other bands.

3G carrier addition

O2 could add additional carriers at 2100MHz in order to boost the voice carrying capacity of its networks. O2 already uses all three 3G carriers in its busiest locations, so this solution is not an option there. In other locations, the coverage provided by 2100MHz would not match that of 1800MHz so again the benefit is limited. While this mitigation activity could reduce the impact of secondary congestion on its 3G network in some locations, it would not provide any benefit for those customers who have GSM only handsets.

Additional RAN Sites

The addition of more radio access sites for 900MHz GSM could boost the GSM capacity of O2's network, however given the time required for development and

commissioning of new sites this option would have at best a limited effect to mitigate the impact. New sites developed for this purpose would not be part of O2's current network development plan, so would not be economically feasible in most cases.

National Roaming

O2 could request a national roaming solution from Vodafone or Meteor in order to provide additional GSM capacity to O2. Given that technical development would be required to enable this, O2 does not believe this solution would be feasible for a period of just 6.5 months. Neither would it be feasible for other operators to boost capacity on their networks for such a short period.

O2 does not believe there is a feasible mitigation strategy available to it to eliminate or substantially reduce the impact of loss of 1800MHz for the gap period. There would be a significant loss to O2 resulting from the poor customer experience, and its ability to win and retain customers would be damaged with consequent impact on competition. In addition O2 would incur substantial cost to try to mitigate the impact of the reduced service quality for the duration of the licence gap.

5. ComReg's Ability to Act

ComReg's functions and objectives relevant to this matter are set-out in several instruments including the Wireless Telegraphy Act³, the Communications Regulation Act⁴, and the framework package of regulations⁵.

Wireless Telegraphy Licences are issued under Section 5 of that Act, and in accordance with Regulations made under Section 6. ComReg has the competence to make Regulations under section 6, albeit subject to the consent of the Minister. The authorisation Regulations⁶ provide in Regulation 15 a general ability for ComReg to amend rights and procedures concerning rights of use for radio frequencies, provided that any such amendment may only be made in objectively justified cases and in a proportionate manner.

In 2011 ComReg obtained approval from the Minister and made the Interim GSM Regulations⁷. These Regulations provided for ComReg to continue or extend the original O2 and Vodafone 900MHz GSM licences for a limited duration after the original expiry date, so as to provide continuity of service until liberalised use licences commenced. O2 is of the view that comparable considerations apply at this time, and that it is possible for ComReg to either make similar regulations or to amend the existing Interim GSM Regulations.

³ Wireless Telegraphy Act 1926 (45 of 1926), (as amended)

⁴ Communications Regulation Act 2002 (20 of 2002), (as amended)

⁵ SIs 333,334,335,336,337 of 2011, the Framework Package

⁶ EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES) (AUTHORISATION) REGULATIONS 2011, (SI 335 of 2011)

⁷ WIRELESS TELEGRAPHY (INTERIM GSM MOBILE TELEPHONY LICENCE) REGULATIONS 2011, (SI 189 of 2011)

6. Requirement to Act

There are many compelling reasons why ComReg must act to provide a mechanism whereby O2 can obtain licence continuity in the 1800MHz band. In the first place, the gap has emerged as a result of the structure of the MBSA.

While it is acknowledged that ComReg had a number of different objectives that it sought to resolve through the single award process, nevertheless it was the selection of two Time Slices and the commencement date for Time Slice 2 that created the possibility of the current licence gap. Prior to the commencement of the MBSA, three different licences were due to expire: Vodafone and O2 1800MHz GSM licences on 31st December 2014; and Meteor's 900MHz and 1800MHz GSM licence on 12th July 2015. ComReg chose to commence Time Slice 2 to coincide with the expiry of Meteor's GSM licence rather than the expiry of Vodafone and O2's 1800MHz licence, which meant there was no option to continue operation under a GSM licence until commencement of Liberalised Use licences in Time Slice 2.

It was possible to bid to obtain a Liberalised Use 1800MHz licence in Time Slice 1, however only by converting the remaining term of the GSM licence. It was not possible to obtain a licence to provide continuity from the expiry of O2's existing GSM 1800MHz licence to the commencement of Time Slice 2. This scenario was examined by ComReg when considering whether to include 1800MHz spectrum in the MBSA, and at that time ComReg did not rule out the granting of interim licences in the 1800MHz band⁸. In the MBSA, O2 placed bids to obtain access to Liberalised Use 1800MHz spectrum in Time Slice 1, nevertheless the 6.5 month gap emerged from the process.

O2 highlighted its concerns to ComReg that the MBSA structure could create a licence gap in advance of the MBSA, and in response, ComReg committed to considering this issue if such a licence gap actually emerged⁹. Subsequent to the MBSA process, O2 has also highlighted the requirement for an interim licence or licence extension to ComReg on several occasions, and ComReg again committed to consider the matter closer to the actual licence expiry¹⁰.

There are three unassigned blocks of spectrum in the 1800MHz band (I, J, and K) which will remain unassigned for the remainder of Time Slice 1. ComReg recently offered these lots for award on a Liberalised Use Basis through a public process in accordance with document 13/104. ComReg did not receive any valid applications for use of these lots, demonstrating that there is no un-met demand for 1800MHz Liberalised Use spectrum in time Slice 1.

It is the opinion of O2 that there is no viable alternative use for Lots A, B, and C from January 2015 to July 2015. That Lots I, J, and K remain unassigned following ComReg's recent application process proves that there is no viable use for a short-term Liberalised Use licence in the 1800MHz band in Time Slice 1. It is not feasible for a new operator to use the three lots for such a short duration. Only the other three licensed network operators currently possess network equipment capable of operating in the 1800MHz band, and they

⁸ ComReg Document 10/105 (section 3.5)

⁹ ComReg Documents 12/50 (section 6.4), 12/25 (section 4.6), and 11/60 (Paragraph 4.129)

¹⁰ ComReg Documents 13/05 (section 2.3.2), 13/70 (section 4), 13/88 (section 2.3)

would need to make modifications to their network equipment in order to operate in Lots A, B, and C. Given that Lots I, J, and K remain unassigned, O2 believes there is no feasible case whereby any other operator could utilise Lots A, B, and C during the O2 licence gap in preference to I, J, and K, - so if the spectrum is not licensed to O2 for GSM use, then it will remain fallow during the gap period. If it is licensed to O2 then its use will avoid consumer disruption, competition impairment, and loss to O2, all of which are efficient use of spectrum.

ComReg is required to ensure the efficient management and use of the radio frequency spectrum in Ireland in accordance Regulation 23(1) of the Framework Regulations, and with a direction under section 13 of the 2002 Act. Policy Direction 11¹¹ requires that *“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”*. The mitigation strategies available to O2 would have limited effect to eliminate the impact on customers, and in addition would require significant investment by O2 which would be otherwise unnecessary. The spectrum is available, O2 has a network ready and available to use that spectrum, and given that there is no feasible alternative demand for the spectrum, any procedure other than licensing of the lots to O2 would not only constitute inefficient use of spectrum, but also would cause inefficient investment by O2. Given that the most efficient use can be made of the radio spectrum by the grant to O2 of a GSM licence to continue operation of its GSM service, and that this action will also minimise disruption to end users, O2 believes that ComReg is compelled to put in place an appropriate process to facilitate the grant of this licence.

Regulation 23(1) also requires ComReg to ensure that the allocation and assignment of radio frequencies is based on an objective, transparent, non-discriminatory and proportionate decision-making process. ComReg has published several consultation documents prior to the MBSA award in 2012, also prior to the 1800MHz application process under document 13/104, and additionally in the documents leading to ComReg’s decision regarding H3G’s 1800MHz licence in document 13/70. Both ComReg’s and O2’s opinion regarding the 1800MHz gap have been published in those documents and interested parties have had ample opportunity to comment on them. Nevertheless, ComReg might decide that some further consultation is required prior to making its final decision on this matter. If that is the case, then O2 would point out that the items under consideration are narrow in scope, and can be adequately considered in a consultation of short duration. Given that even a short consultation could require 6 weeks to deliver a decision (which is significant in the current circumstances) there is a need to progress the matter now.

The grant of a GSM licence extension or of an interim licence is objectively justified in this case. Given the circumstances that have brought about the current requirement; that it could not have been avoided by O2; that O2 is the only viable user for the spectrum in the gap period; the disruption to subscribers if O2 was required to withdraw its GSM 1800MHz service for a 6.5 month period and the impact that would have on competition; and the loss

¹¹ Directions by the Minister for Communications Marine and Natural Resources to the Commission for Communications Regulation under s. 13 of the Communications Regulation Act 2002, 21st February 2003

to O2 itself; the provision of a process by which O2 can obtain a licence covering the gap period is objectively justified.

Provision of a mechanism or process by which a licence can be issued does not discriminate in favour of, or against any party. No other licensee has found itself in the same position. The requirement has, in part, arisen as a result of the unique outcome of MBSA process. The only relevant situation which is comparable arose in 2011, when the Vodafone and O2 900MHz GSM licences expired. In that case interim licences were issued to provide for continuity of service.

The provision of a process whereby O2 can be issued with a licence extension or interim licence is proportionate, as it is the only action which can adequately resolve the licence gap. The requirements placed on O2 to obtain such a licence, and the conditions that would apply to the licence would also need to be proportionate in order to satisfy this requirement.

7. Timing

ComReg has most recently expressed its position in document 13/88 which was issued in advance of a proposed award of three lots of spectrum in the 1800MHz band where it states that:

“ ComReg is currently of the view that it is not a position to reasonably assess this issue until after the conclusion of the proposed Award Process and the outcome of the merger control assessment of the proposed acquisition of Telefónica Ireland by Hutchison Whampoa. Notwithstanding this, ComReg expects to be in a position to make a decision on this matter significantly in advance of licence expiry”

The proposed Award Process referred to above has now concluded. In addition, the merger control assessment of the proposed acquisition of O2 by Hutchison Whampoa is in the concluding stages and the outcome is expected to be known shortly.

O2's reliance on its 1800MHz licence has been explained above in section 3. It would not be possible to avoid the disruption to customers that would be caused if O2 was to find itself without use of the 1800MHz band in January 2015, however if the decision was known early, at least steps could be taken to try to mitigate some of the harm.

There remains less than 8 months to the date when O2's current licence is due to expire. We are now at the point where O2 needs to have clarity on this matter. Network re-configuration takes several months to plan and implement, and the closer we get to expiry, the less effectively would O2 be able to mitigate the harm. O2 requires ComReg to provide the process and timelines by which the issue can be clarified. ComReg has previously stated that it would “ . . . continue to review the situation and, if necessary, will issue a consultation on proposals aimed at addressing material issues arising from this temporal gap in sufficient time prior to Telefónica's 1800 MHz licence expiry”. O2 is of the view that the time to address this matter has now arrived.

In relation to the proposed acquisition of Telefónica Ireland by Hutchison Whampoa, O2 is of the view that at this time the conclusion of that matter will not affect the requirement for ComReg to issue an interim licence or licence extension. If the acquisition does not proceed, then O2 will need to obtain a licence to “close the gap”. If the acquisition does proceed, then a licence will still be required to close the gap, as it is required for GSM service in blocks A, B, and C. Given that Three Ireland and O2 operate separate networks, and based on public information that Three has launched LTE services using its two blocks (D & E), it is not believed that any 1800MHz spectrum held by Three Ireland could provide a substitute solution.

Other Considerations

O2 carried out a re-engineering process in early 2013 in order to change position within the 1800MHz band and provide continuity of assignments from Time Slice 1 to Time Slice 2. If O2 does not hold a licence that provides continuity through the two Time Slices, then it will have been a pointless exercise carrying out the relocation at that time, and the cost associated with carrying out the relocation at that time will have been avoidable.

Given the limited scope of choices available to ComReg, and the detailed consultation and correspondence that has already been exchanged on the matter, O2 believes there would be no point in carrying out a separate Regulatory Impact Assessment. It would not provide any clarity.

Modification of this Application

O2 reserves the right to supplement or amend this request as required in future.

14th July 2014

Mr. Kevin Kennedy
Commission for Communication Regulation
Abbey Court, Irish Life Centre
Lower Abbey Street
Dublin 1

1800MHz GSM Licence Gap

Dear Mr. Kennedy

I refer to my letter of 7th May regarding the gap in continuity in the 1800MHz licence of Telefonica Ireland Ltd. You will be aware that Telefonica Ireland is to be acquired by Hutchison Whampoa; that the merger control process has been completed; and that acquisition is to be executed in the coming days.

While ComReg is considering how to address the O2 licence gap, it can be anticipated that a question might be asked as to whether the 1800MHz spectrum currently allocated to Three Ireland could be used by the O2 network during the gap period. This matter has been considered, and I can confirm that it is not a possible solution for a number of reasons:

- O2 currently uses the three assigned lots of 1800MHz spectrum for the provision of GSM service, primarily in urban areas.
- Three Ireland has launched its 4G service using its two assigned 1800MHz lots, again primarily in urban areas, so this spectrum is not available in the areas where O2 has the greatest requirement.
- In addition it would not be possible for O2 to re-engineer its GSM 1800MHz network from the current three lots to just two lots of 1800MHz within the time remaining.

We look forward to hearing from ComReg on the next step in this process. The date for expiry of the original O2 licence is now relatively close, and we need to obtain certainty as to the continued use of the current spectrum as a matter of priority.

Yours Sincerely



Tom Hickey

18th July 2014

Mr. Kevin Kennedy
Commission for Communications Regulation
Abbey Court, Irish Life Centre
Lower Abbey Street
Dublin 1

1800MHz GSM Licence Gap

Dear Mr. Kennedy

I write further to previous correspondence regarding the gap in licence continuity for the 1800MHz spectrum assigned to Telefonica Ireland Limited. Following the completion of the acquisition of Telefonica Ireland by Hutchison Whampoa and further analysis completed, I can provide further information regarding two items: Three's current use of 1800MHz, and actual usable capacity in the border area.

In my letter of 14th July, I outlined that the Telefonica Ireland network uses 1800MHz for GSM service primarily in urban areas, and that Three Ireland was in the process of rolling out its LTE service using 1800MHz, again primarily in urban areas.

Confidential Text Removed

As previously stated, this confirms that the 1800MHz spectrum assigned to Three Ireland is not available for use to help mitigate the network and customer disruption that would occur if Telefonica Ireland was required to cease use of 1800MHz during the licence gap.

Outside of the main urban centres, the Telefonica network also depends heavily on the current 1800MHz band to provide coverage in areas close to the border with Northern Ireland. The ComReg/Ofcom MoU on spectrum sharing sets out an arrangement for sharing of the spectrum between networks on both sides of the border so as to avoid interference. The practical effect of this sharing arrangement is that only 4.8MHz of Telefonica Ireland's 900MHz spectrum, and only 5.6MHz of Telefonica Ireland's 1800MHz spectrum is available to use for GSM service in the border area. Any reduction to the 1800MHz spectrum in use during the licence gap would have the consequence of reducing coverage and capacity for Telefonica's GSM service with the resulting loss of service for customers.

Yours Sincerely



Tom Hickey

Annex 3: Hutchison and Vodafone non-confidential submissions

A 3.1 This annex sets out the non-confidential submissions.

Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row
Dublin 2

Registered Number: 316982
Place of Registration: Republic of Ireland



2nd October 2014

Mr. Kevin Kennedy
Spectrum Development Manager
Commission for Communications Regulation
Abbey Court, Irish Life Centre
Lower Abbey Street
Dublin 1

Dear Mr Kennedy

ComReg Document 14/88 1800MHz Licence Gap

I refer to ComReg document 14/88 which is a consultation and draft decision regarding the 1800MHz GSM licence operated by Telefonica Ireland Ltd. This response is provided on behalf of both Hutchison 3G Ireland Ltd ("Three"), and Telefonica Ireland Ltd ("O2"). Where necessary the separate networks are referred to as the Three Network and the O2 Network.

The attachment to this document provides an update to ComReg on the current use of the 1800MHz spectrum on the O2 Network, customer dependence, and roll-out of new technology. It also provides some short comment on the specific questions asked in the consultation document.

Finally, it is important to note that there remains less than three months to the date of expiry of the O2 GSM licence. It is already too late for effective mitigating action to be taken to reduce the consumer disruption that would occur if this licence simply expired. This must be taken into consideration by ComReg, and it is now imperative that the uncertainty regarding the licence status is eliminated as a matter of urgency.

Yours Sincerely

A handwritten signature in blue ink, appearing to read 'Tom Hickey'.

Tom Hickey

ComReg Document 14/88 - Interim 1800MHz Rights of Use

Networks Update

In its documents of 7th May and 18th July, O2 and Three have already provided information to ComReg regarding current use of the 1800MHz band on the O2 Network, and also use of other bands on both the O2 Network and the Three Network. While that information remains substantially current, there has been some marginal change in the intervening time, and the following information is provided as an update to ComReg. ComReg will note that the requirement for an interim licence remains.

The number of locations where LTE is operational on the Three Network has increased to [Confidential Section Removed] with continued roll-out. These sites are substantially in the same areas where the O2 Network uses GSM 1800MHz, and as a result there is no possibility to use the 1800MHz spectrum assigned to Three for GSM during the licence gap period.

The O2 Network has now deployed UMTS service in the 900MHz band to [Confidential Section Removed]. In those areas, the 900MHz spectrum available for GSM has been reduced to approximately 2x5 MHz, which has increased the requirement to maintain GSM service in the 1800MHz band. [Confidential Section Removed]. Approximately one third of those calls are carried on the GSM 1800MHz network.

There are approximately [Confidential Section Removed] GSM only devices still active on the O2 Network. Most of those customers would suffer loss of service or significant degradation in quality of service if the O2 network was required to cease providing GSM 1800MHz at short notice.

ComReg's Proposal

Three Ireland and O2 agree with ComReg's proposed process for granting an Interim 1800MHz licence to O2. This is the most appropriate course of action in the current circumstances. The proposal is non-discriminatory as no other licensee has been in the exact same circumstances. The nearest analogous situation occurred in 2011 when ComReg issued Interim GSM Licences to Vodafone and O2, and the approach proposed is consistent with that decision.

The proposal is objectively justified, as is evidenced by ComReg's analysis of the O2 documentation. Three believes it is proportionate as the solution proposed is no more and no less than is required to avoid the consumer disruption that would be inevitable if the licence gap remained. The process for calculating licence fees seems appropriate under the circumstances, and as ComReg point out, this is consistent with previous decisions.

Three would caution that the proposed process requires a decision by ComReg, the consent of the Minister, and the making of Regulations before ComReg can grant any licence. ComReg needs to progress rapidly through these activities so as to ensure that a licence can be in place on time.

ComReg's Questions

Q.1 Do you agree with ComReg's preliminary assessment of Telefonica's submissions? Please provide reasons, evidence and other relevant material in support of your view.

Yes, ComReg has correctly analysed and assessed the information provided by O2 and Three in their documents of 7th May and 18th July. ComReg has correctly identified the consumer disruption, reduction in wholesale and retail competition, and avoidable loss to O2 that would result if the licence gap remained.

Q.2 Do you agree with ComReg's views and analysis set out in its draft Regulatory Impact Assessment? Please provide reasons, evidence and other relevant material in support of your view.

Yes, Three agrees with ComReg's Regulatory Impact Assessment. ComReg has correctly identified that there are only two practical options: Option 1, the licence expires and the gap remains, or Option 2, a process is put in place to allow the licence gap to be filled.

ComReg has correctly identified the impact of Option 1 on stakeholders:

- consumers who would suffer service disruption
- MVNO service providers who would suffer disruption to their service and consequential loss
- O2 who would suffer service disruption and loss
- Vodafone and Meteor, both of whom have previously expressed views in favour of avoiding short term discontinuity

Option 2 avoids these outcomes and is of most benefit to the stakeholders. As ComReg has stated in paragraph 3.47, Option 2 accords with ComReg's statutory objective of encouraging the efficient use and ensuring the effective management of spectrum by making available rights of use which could be used to provide services to consumers. Under Option 1 customers would suffer considerable harm due to significant disruption to existing services while rights to use for spectrum capable of alleviating that harm would remain unused.

Q.3 Do you agree with ComReg's Interim 1800 MHz licence proposals as set out in chapter 4? Please provide reasons, evidence and other relevant material in support of your view.

Yes, as stated above Three and O2 Ltd agree with ComReg's proposal.



Vodafone response to Comreg Consultation and Draft Decision: Interim 1800 MHz Rights of Use for Hutchison/Telefónica

Reference: ComReg 14/88

ComReg 14/88 Interim 1800 MHz Rights of Use for Hutchison/Telefónica

Consultation and Draft Decision: Response by Vodafone Ireland Limited

Q.1 Do you agree with ComReg’s preliminary assessment of Telefónica’s submissions? Please provide reasons, evidence and other relevant material in support of your view.

Introduction

Vodafone Ireland Limited (“Vodafone”) does not agree with ComReg’s preliminary assessment of Telefónica’s submissions and urges ComReg to reconsider the course of action it proposes in response to that submission, for the reasons and in the manner set out below.

Rushed Consultation

Vodafone notes ComReg’s statement that, following this Consultation, it will not consult further prior to deciding on Hutchison/Telefónica’s request for the extension of the right to use 1800 MHz spectrum. Vodafone will therefore not have an opportunity to comment on any further deliberations by ComReg on this matter. Specifically, given Vodafone’s comments below, Vodafone can only comment on the application and assessment presented in the consultation document. If ComReg receive consultation responses or further information including correspondence or meetings which provides to ComReg information not contained in the application from either Telefonica or Hutchison Whampoa then such information should form part of a new application by Hutchison/Telefonica in relation to extension of the right of use in 1800 MHz.

In Vodafone’s view, the request by Hutchison/Telefónica raises significant questions of general application and an issue of the compatibility of the proposal with the State aid rules. The Consultation is also flawed by the failure to consider other relevant and viable options. These issues need to be resolved before any decision is taken that might involve the allocation of rights to use spectrum. The process should not be rushed.

Given ComReg’s proposed approach (with which Vodafone disagrees), Vodafone reserves its position and confirms that its comments in this response can only be regarded as comments on the material supplied so far in connection with the Consultation.

ComReg’s Confusing Priorities

Hutchison/Telefónica’s 1800 MHz request must be assessed in the context of the acquisition of Telefónica Ireland Limited (“Telefónica”) by Hutchison 3G UK Holdings Limited (“Hutchison”), (the “Transaction”).

That Transaction was entered into by the parties on 22 June 2013, notified to the European Commission on 1 October 2013 and completed on 15 July 2014. It was cleared by the Commission, subject to conditions, on 28 May 2014. ComReg’s assessment of the Hutchison/Telefónica 1800 MHz request must take account of the fact that Hutchison had committed to acquire, and was legally bound to complete the acquisition of, Telefónica since June last year (that is to say more than fifteen months ago).

Vodafone’s view is that the Transaction fundamentally and adversely affects arrangements for the allocation and use of radio spectrum in Ireland. For that reason, Vodafone has requested ComReg, under its radio spectrum management function, urgently to open a review of the effects of the Hutchison/Telefónica Transaction and to consider whether it is

necessary to take appropriate measures (including mandating the sale or lease of rights to use). Vodafone also requested that ComReg should not take any steps under the assignment aspect of its radio spectrum management function that might prejudice its ability to adopt appropriate measures if it later determines such measures are necessary.

Vodafone has explained its position concerning the Transaction (at ComReg’s request) in a detailed submission dated 31 July 2014. Vodafone’s request for review has gone unanswered for two months and ComReg has not taken any steps in relation to the impact of the Hutchison/Telefónica Transaction on radio spectrum arrangements.

This Consultation is the first regulatory intervention related to the Transaction by ComReg since the conditional clearance of the Hutchison/Telefónica Transaction on 28th May and, rather than reviewing the impact of the Hutchison/Telefónica Transaction on radio spectrum arrangements and considering the necessity of appropriate measures, ComReg is proposing to grant additional rights to use to Hutchison/Telefónica.

In light of this, Vodafone must seriously question the internal ordering of priorities within ComReg which leads it to conduct a review and publish a 56 page Consultation on foot of a request from an operator (which no longer exists as an economically independent undertaking) seeking to obtain an outcome that will benefit only that operator (and its owner) and that focuses on a harm which, as will be explained below, could not only have been mitigated but entirely eliminated by foresight and prompt action on the part of the operator’s new owner.

In Vodafone’s view, ComReg should reject Hutchison/Telefónica’s 1800 MHz request, reorder its priorities and proceed immediately to conduct the review requested by Vodafone in its 31 July 2014 submission.

ComReg Must Examine the Proposed Allocation to Hutchison/Telefónica for Compliance with the State Aid Rules

Radio spectrum is a scarce resource controlled by the State. Any allocation by ComReg of the right to use spectrum which involves a selective advantage being conferred on an operator gives rise, at least prima facie, to the possibility that the beneficiary of that spectrum allocation is in receipt of State aid. A selective advantage¹ will arise where a State resource is allocated in circumstances that do not conform to market practice. In the present case, there is a directly comparable market practice that should assist ComReg in assessing whether State aid might be involved.

First, in the recent Multi Band Spectrum Auction (“MBSA”), Vodafone bid for the right to use the relevant 1800 MHz lots, primarily in order to avoid a time gap.

The significant price paid by Vodafone for this auction lot, [REDACTED], was paid specifically to avoid the expense and disruption of making the network adjustments associated with a time gap. Although Vodafone’s use of this spectrum lot also became liberalised as a result of the auction, in practice liberalisation has had no benefit – the value of the bid reflected the value of avoiding the time gap.

To assign the same benefit to Hutchison/Telefónica without a competition and at a much lower price is unfair and undermines the outcome of the MBSA process. It gives rise to at least a prima facie concern that a selective advantage indicative of the presence of State aid is being provided to Hutchison/Telefónica.

¹ Vodafone notes that ComReg uses the phrase “selective advantage” on page 28 of the Consultation and seeks to explain why the grant of spectrum would not be a “selective advantage”. There is no suggestion on the part of ComReg in that part of the Consultation that it is seeking to make an argument concerning the application of Article 107 TFEU; however, for the avoidance of doubt, Vodafone observes that the argument ComReg makes, namely that the grant is part of a system of general application, in addition to being incorrect (because the measure obviously favours one operator alone) does not in any way reduce the risk that the proposed measure involves State aid.

Secondly, Vodafone is currently engaged in a process of refarming its GSM 1800 usage to a smaller quantity of spectrum in order to prepare for future LTE usage. This process is both expensive to Vodafone and disruptive to its customers – but Vodafone accepts those costs because the refarming is a necessary step in delivering the most advanced network to customers. If Vodafone had an allocation of spectrum of the type requested by Hutchison/Telefónica, it could avoid many of these costs.

ComReg's proposal in favour of Hutchison/Telefónica in the 1800 MHz band will allow that operator simultaneously to develop an LTE 1800 network and have the benefit of an undisturbed usage of 1800 MHz blocks to maintain its GSM service. ComReg's proposal will allow Hutchison/Telefónica to avoid significant costs which its rival Vodafone, not benefitting from an allocation of additional 1800 MHz spectrum, will incur. The causal link between the costs avoided by Hutchison/Telefónica and the measure proposed by ComReg is clear. Hutchison/Telefónica is obtaining an advantage that was not the result of the MBSA and which is not available to its rivals. The economic value of the advantage, in Vodafone's assessment, is likely to exceed any applicable *de minimis* threshold.

Vodafone reserves all its rights in relation to the compatibility of the proposed measure with the State aid rules. However, it suggests that best administrative practice requires that ComReg immediately confer with the Directorate-General for Competition in the European Commission concerning the compatibility of its proposed measure in favour of Hutchison/Telefónica with the State aid rules. Failure to do so runs the risk, in Vodafone's view, of placing Ireland in violation of Article 107 TFEU.

In addition, Vodafone reserves its right to request that ComReg reopen the pricing arrangements in respect of 1800 MHz spectrum on foot of the MBSA to correct any element of overpayment when account is taken of the effective cost of any 1800 MHz spectrum allocated to Hutchison/Telefónica on foot of the proposed measure.

The Inconsistency of the Hutchison Position on Interim Right to Use is Unchallenged

Vodafone notes that Hutchison objected strongly to the interim 900 MHz allocations during the MBSA process, arguing that:

- the allocation of interim rights to use by administrative grant rather than by competitive award was contrary to Article 107 TFEU;
- ComReg's proposal was rewarding the failure of Vodafone and O2 to plan for the expiration of their rights to use;
- consumer harm resulting from the loss of spectrum in the 900 MHz band could be mitigated by migrating customers to other spectrum bands.
- 1800 MHz has similar propagation characteristics to 2100 MHz¹

In Vodafone's view, it is not possible to reconcile Telefónica's request with these propositions which were advanced in the recent past by its parent, Hutchison.

No submission by Hutchison/Telefónica that Vodafone has seen in connection with the Hutchison/Telefónica's 1800 MHz request provides any explanation as to why Hutchison/ Telefónica now appears to adopt views that diverge fundamentally from those it expressed with vehemence during the MBSA process. Before it proceeds any further and in the interests of consistency in its administrative practice, ComReg must require Hutchison to explain how it reconciles its position during the previous interim process with the request now made by its affiliate Telefónica.

¹ See Hutchison Whampoa response to ComReg dated 18/3/11 published in document 11/27

Hutchison and Telefónica in Ireland are part of the same economic undertaking

ComReg's analysis is fundamentally undermined by its failure to take adequate account of the fact that Hutchison and Telefónica in Ireland are part of the same economic undertaking. Telefónica has not been an independent operator in the Irish electronic communications markets since at least the completion of the Transaction (on 15 July 2014) and more likely since 28 May 2014 when the European Commission cleared the transaction. It might be argued (and Vodafone reserves its position in this regard) that Telefónica's ability to act independently in the market was substantially impeded from the signature of the sale and purchase agreement with Hutchison on 22 June 2013.

Vodafone notes that, according to ComReg, the current Consultation is based on submissions by Telefónica made shortly before the conclusion of the European Commission review (7 May 2014) and after the Commission clearance (14 and 18 July 2014). Given the timing of the "Telefónica" request, ComReg seriously errs by repeatedly presenting Telefónica as if it is an independent undertaking operating at arm's length from Hutchison and by failing to take account in its assessment of the obvious fact that the Hutchison/Telefónica undertaking in Ireland is a single undertaking.

The air of unreality surrounding the Consultation is enhanced by the absence of any submission by Hutchison (which after all owns Telefónica) and of any evidence that ComReg has sought to press Hutchison on the necessity of the requested spectrum allocation in light of the overall spectrum holdings of the Hutchison/Telefónica undertaking.

Given that the correct assessment is that the Hutchison/Telefónica undertaking in Ireland is a single undertaking, the questions that ComReg should ask are whether that undertaking has sufficient spectrum resources to deal with the harm identified by Telefónica and whether the Hutchison/Telefónica undertaking has taken sufficient measures to mitigate, from its own resources, the harm Telefónica purports to identify. ComReg's failure to ask these questions fundamentally undermines its proposed response to the Telefónica request.

Hutchison Has Had Plenty of Time and Opportunity to Mitigate the Spectrum Gap

Hutchison, which controls the Hutchison/Telefónica undertaking in Ireland, has been aware of the potential spectrum gap addressed in the 1800 MHz request for some considerable time and has had plenty of opportunity to develop a strategy to mitigate or, more correctly, eliminate the problem, especially when account is taken of the abundance of spectrum it holds following the Transaction. The issue of the potential gap was discussed by ComReg during its process to sell the unsold 1800 MHz lots more than a year ago, and it was clear from the outcome of the MBSA process. ComReg has failed to take account of this in its assessment, focussing instead on the Telefónica part of the Hutchison/Telefónica undertaking as if it was an independent market operator.

Hutchison has known of the Telefónica 1800 MHz gap since it began its process of acquiring Telefónica, a process which started much more than a year ago. Foresight and prompt action by Hutchison could have eliminated the necessity for any request for intervention by ComReg. ComReg's priorities and the exercise of its spectrum allocation powers should not be determined by the failure of operators to manage their spectrum resources prudently and effectively

Hutchison/Telefónica Has Abundant Spectrum Resources

In Vodafone's view, ComReg's assessment is fundamentally flawed by its failure to take proper account of the abundant spectrum resources available to the Hutchison/Telefónica undertaking and the length of the time available to that undertaking to resolve the problems associated with the impending 1800 MHz gap.

The Hutchison/Telefónica undertaking has abundant, and certainly sufficient, spectrum resources, including spectrum in the 1800 MHz band, to resolve the short term problem identified by Telefónica. In Vodafone’s submission, it is not necessary for ComReg to exercise its spectrum allocation powers to resolve this problem and ComReg has failed properly (or at all) to consider the alternatives open to Hutchison/Telefónica from its own resources to resolve the gap.

Hutchison has access to two lots of 1800 MHz liberalised spectrum which it decided to use for LTE, even when it was committed to acquire Telefónica and was aware of the impending gap. Hutchison also has access to Telefónica’s two lots of 800 MHz and to three lots of 900 MHz where LTE could be developed. In addition, the Hutchison/Telefónica undertaking has six lots of 2100 MHz spectrum which, as Hutchison has acknowledged, has similar propagation characteristics to 1800 MHz. ComReg’s Consultation notes that Telefónica considers it would not be feasible for it to re-engineer its GSM 1800 MHz network to fit into the two 1800 MHz blocks owned by Hutchison. However, there is no consideration given to migrating non-GSM handset customers to 2100 MHz or making use of the three lots of 900 MHz spectrum also available to Hutchison. Sufficient spectrum is available to Hutchison/Telefónica to fill the gap. Further allocations are not necessary. ComReg’s assessment is fundamentally flawed due to its failure properly to take account of or consider the range of options open to Hutchison/Telefónica to resolve the gap.

Concluding remark

If Hutchison/Telefónica persists in asserting that it cannot fill the gap through its existing spectrum portfolio, then Vodafone’s suggestion is that ComReg should rerun the auction of the unsold lots of liberalised 1800 MHz spectrum.

Vodafone believes giving Hutchison the opportunity to purchase competitively in an auction the spectrum it claims it lacks in the 1800 MHz band would be a more compliant and transparent process than the proposed administrative allocation.

Do you agree with ComReg’s views and analysis set out in its draft Regulatory Impact Assessment? Please provide reasons evidence and other relevant material in support of your view.

Introduction

Vodafone does not agree with ComReg’s views and analysis set out in its draft Regulatory Impact Assessment (“RIA”). The RIA is undermined by ComReg’s failure to consider obvious and valid alternatives to resolve the problem, by reliance on assumptions rather than facts and on weak evidence and by the inadequacy of its reasoning in relation to its statutory obligations.

There Are Other Options

In Vodafone’s view, the RIA is flawed because ComReg has failed to identify correctly the options available to address the expiration of Telefónica’s three lots of GSM spectrum. ComReg has identified a binary choice (expressed as two options) which is, simply put, either to award an extended right of use or not to award an extended right of use.

In Vodafone’s assessment, there are two other options which are obvious and which ComReg should have considered; ComReg’s failure to consider any options other than the binary choice it sets itself undermines the validity of its RIA.

As a third option, Vodafone says ComReg should consider whether the combined spectrum held by Hutchison/Telefónica post-Transaction provides a sufficient basis, without ComReg’s regulatory intervention, to resolve the gap problem Hutchison/Telefónica faces. In Vodafone’s view, Hutchison had sufficient time to find solutions for this gap and to have a plan in place to address any deficiency well in advance of December 2014.¹ Even a cursory review of the spectrum resources available to Hutchison would show that it has ample spectrum in other closely related bands which could be deployed to mitigate any perceived consumer harm. This includes the two lots of liberalised 1800 MHz spectrum that Hutchison was allocated in the MBSA and which it has decided to dedicate to LTE. In addition, Hutchison had the opportunity in January 2014 to purchase the unsold lots of 1800 MHz spectrum; Hutchison didn’t even respond to ComReg’s invitation (a relevant fact that ComReg seems to have overlooked in its Consultation).

In Vodafone’s view, this third option of assessing the combined Hutchison/Telefónica spectrum post-Transaction is essentially complementary to Vodafone’s 31 July submission to ComReg calling for a ComReg review of the post-Transaction spectrum arrangements across the sector to determine whether they are efficient and in conformity with the statutory framework.

As a fourth option, Vodafone says ComReg should consider rerunning the auction of the unsold 1800 MHz lots, which had an inconclusive outcome at the start of this year. This would allow Hutchison, if it believed there was a deficiency in its spectrum portfolio, to have another opportunity to apply and compete for one or more liberalised blocks of 1800 MHz spectrum. There is sufficient time before the end of the year to conduct this auction; the process is set out in the information memorandum (ComReg document 13/104) and ComReg personnel have retained the expertise gained in the earlier auction.

Compliance with ComReg’s Statutory Obligations in Relation to Spectrum Management

At paragraph 4.4 of its Consultation, ComReg states that it has reached the preliminary view that the granting of an Interim GSM 1800 MHz licence to Telefónica would be “an objectively justified, proportionate and non-discriminatory regulatory measure”, having regard to ComReg’s statutory functions, objectives, duties and powers. Vodafone finds that the Consultation contains very little reasoning on ComReg’s part to support this conclusion. What reasoning there is essentially contained in the Draft RIA which, as Vodafone has explained, is vitiated by a failure to consider any options other than accession to or refusal of Hutchison/Telefónica’s request. Other options are not even identified.

In Vodafone’s submission, the proposal to grant an interim right to use to Hutchison/Telefónica cannot be considered objectively justified and proportionate until ComReg has confirmed, by thorough investigation and analysis, that there is no other option, not reliant on the use of public resources, to resolve the problem that Hutchison/Telefónica has presented. That level of scrutiny has not been undertaken. As ComReg is aware, Vodafone’s firm view is that Hutchison/Telefónica has plenty of “fixes” possible from within its abundant spectrum resources. ComReg cannot conclude that the proposed regulatory intervention is objectively justified and proportionate until it has explained why Hutchison/Telefónica cannot resolve its own problem itself.

Vodafone also submits that a measure which so obviously confers an advantage on one operator must at least be subject to a heightened level of scrutiny to ensure it complies with the non-discriminatory criterion. That scrutiny is absent from the Consultation. In Vodafone’s submission, the proposed measure discriminates in favour of Hutchison/Telefónica because Hutchison/Telefónica gains access to scarce and valuable spectrum on an advantageous basis not available to other operators and by means of a special, individualised administrative measure. The discriminatory nature of the

¹ In fact Hutchison made a similar argument in response to ComReg’s consultation on interim licences on 900 MHz and went on to argue that ComReg was rewarding the failure of others not to plan for expiration of licences

measure tends to be confirmed by one of the primary justifications relied on by ComReg for the adoption of the measure: ComReg says that the grant of the interim right to use is justified because a reallocation of existing Hutchison/Telefónica spectrum “to GSM customers would compromise the commercial viability of H3G’s LTE service reducing its ability to compete for customers on the basis of its LTE service”. Other operators have not had the option of cushioning themselves against the costs of switching to LTE through a tailored and individual grant of right to use spectrum. The proposed measure provides Hutchison/Telefónica with an advantage not available to its rivals.

Weakness in Factual Analysis and Selective Quotation

As far as the factual basis on which ComReg relies for its conclusions in the RIA, Vodafone has serious concerns that ComReg appears in the RIA (specifically paragraphs 3.18 & 3.19) to be second guessing Hutchison’s spectrum needs and to be relying on information from websites as opposed to a rigorous assessment of the spectrum alternatives available.

Vodafone notes that in paragraph 3.23 of the RIA ComReg has selectively extracted quotes from Vodafone to support its preferred option. For the avoidance of doubt, Vodafone agrees with these statements and would no doubt have agreed to an extension to address a spectrum gap if circumstances had continued as envisaged at the time those comments were made. The reality, ignored by ComReg in the RIA, is that Hutchison now controls spectrum awarded to two operators in the MBSA, to an extent significantly in excess of the caps set by ComReg in the MBSA and which represents 38% of total spectrum below 1 GHz and 48% of total spectrum above 1GHz.

Reliance on Erroneous Analogies with the Earlier Interim Extensions

Throughout the Consultation and specifically in paragraph 3.49 concerning the RIA, ComReg seriously errs in suggesting that the extension of the duration of existing interim GSM 900 MHz rights of use during the MBSA process is “analogous” (paragraph 3.25) or “comparable” to the situation in which Hutchison/Telefónica finds itself. In the earlier situation during the MBSA process, Vodafone had no other adequate alternative spectrum resources on which to rely for continuity of service. Hutchison can use its existing abundant resources to continue service. Secondly, the necessity for the extension of the rights of use during the MBSA process arose due to an external factor, namely the protracted consultation period, not as a result of the operational choices and lack of foresight of the operators concerned.

Q.3 Do you agree with ComReg’s Interim 1800 MHz licence proposals as set out in chapter 4? Please provide reasons, evidence and other relevant material in support of your view.

Vodafone has explained above the basis for its serious concerns about the manner in which ComReg has conducted its assessment of the Telefónica request. Due to the fundamental flaws in that assessment, Vodafone submits that ComReg cannot lawfully proceed to adopt the measure proposed. In particular, ComReg has failed to assess the impact of the sale of Telefónica and consequent transfer of control of significant portions of spectrum to Hutchison. It appears to Vodafone that no proper assessment was made by ComReg of the overall spectrum holdings now controlled by Hutchison. No proper consideration was given to the ability that Hutchison/Telefónica has to eliminate the gap problem from the abundant spectrum resources within its control.

In Vodafone's view, the submission by Telefónica is not reflective of market realities and cannot lawfully form the basis for the exercise by ComReg of its statutory spectrum allocation powers. Vodafone submits that, rather than rewarding Hutchison for its lack of foresight, ComReg should use its limited resources to initiate and pursue the review that Vodafone requested in its submission of 31 July 2014. There is a much greater public interest in ensuring that spectrum is efficiently used across all operators than in responding to requests for privileged treatment from the operator which already has acquired control over the largest allocation of spectrum. If Hutchison persists in its request, ComReg should simply organise a competitive auction for the remaining unsold blocks of 1800 MHz spectrum (an option which also presents the distinct advantage of ensuring compliance with the State aid rules).