



Commission for  
**Communications Regulation**

Response to Consultation and Draft Decision

### Interim Licences for the 900 MHz band

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All responses to this consultation should be clearly marked:-  
“Reference: Submission re ComReg 11/11” as indicated above, and sent by post or e-mail to arrive on or before 5pm on 18 March 2011 to:

**Ms. Sinéad Devey**  
**Commission for Communications Regulation**  
**Irish Life Centre**  
**Abbey Street**  
**Freepost**  
**Dublin 1**  
**Ireland**

**Ph: +353-1-8049600 Fax: +353-1-804 9680**

**Email: [sinead.devey@comreg.ie](mailto:sinead.devey@comreg.ie)**

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## Contents

1	Introduction .....	3
2	ComReg's 900 MHz Interim Licence Proposal .....	6
2.1	RESPONSES TO THE INTERIM LICENCE PROPOSAL .....	6
2.2	CONSUMER DISRUPTION .....	8
2.3	COMPLIANCE OF INTERIM LICENCE PROPOSAL WITH COMREG'S STATUTORY FUNCTIONS, OBJECTIVES AND DUTIES .....	14
2.4	MINISTERIAL POLICY DIRECTIONS .....	15
2.5	NON-DISCRIMINATION .....	16
2.6	PROPORTIONALITY .....	17
2.7	ARTICLES 106, 107 AND 3(1)(B) TFEU AND 4(3) TEU .....	21
2.8	GSM-ONLY OR LIBERALISED RIGHTS OF USE .....	25
2.9	DURATION OF PROPOSED INTERIM LICENCES .....	31
2.10	OTHER ISSUES RAISED – TIMING/CARVE-OUT .....	37
2.11	CONCLUSIONS .....	38
3	Draft Regulatory Impact Assessment .....	39
3.1	POLICY ISSUES TO BE ADDRESSED AND RELEVANT OBJECTIVES .....	40
3.2	REGULATORY OPTIONS .....	42
3.3	OPTION ASSESSMENT AND SELECTION .....	53
3.4	THE PREFERRED OPTION .....	55
3.5	ASSESSMENT OF OPTIONS AGAINST OTHER STATUTORY OBJECTIVES .....	56
4	Licence Conditions and Spectrum Fees .....	62
4.1	INTRODUCTION .....	62
4.2	LICENCE CONDITIONS (PART OF Q5 OF CONSULTATION 10/71) .....	62
4.3	SPECTRUM FEES (Q6 AND Q7 OF CONSULTATION 10/71) .....	63
5	Conclusions .....	76
6	Next Steps .....	81
6.1	SUBMITTING COMMENTS .....	81
6.2	NEXT STEPS .....	82
	Annex 1 - ComReg's Functions and Objectives in relation to Spectrum .....	83
	<i>PRIMARY OBJECTIVES AND REGULATORY PRINCIPLES UNDER THE 2002 ACT AND COMMON REGULATORY FRAMEWORK</i> .....	83
	OTHER OBLIGATIONS UNDER THE 2002 ACT .....	86
	POLICY DIRECTIONS .....	87
	OTHER RELEVANT OBLIGATIONS UNDER THE FRAMEWORK AND AUTHORISATION REGULATIONS .....	88
	OTHER RELEVANT PROVISIONS .....	89
	Annex 2 – Draft Decision .....	91
	Annex 3 – Draft Statutory Instrument (SI) .....	96
	Annex 4 – International Updates .....	132
	Annex 5 – Summary of Draft RIA in Tabular Format .....	137

## 1 Introduction

The purpose of this document is to set out the Commission for Communications Regulation's (ComReg) response to consultation and a draft decision on its interim licence proposal for the 900 MHz band, as originally consulted upon in Consultation 10/71<sup>1</sup>.

In Consultation 10/71 ComReg considered what would happen if it allowed each of Vodafone and O2's respective existing GSM 900 MHz licences to expire naturally in May, 2011 without implementing any appropriate interim measure(s), in advance of its proposal to jointly release 800 and 900 MHz spectrum. However, ComReg discounted this as a viable regulatory option<sup>2</sup>. On the basis that a final decision had yet to be made regarding ComReg's approach to the granting of new liberalised licenses in the 900 MHz band, ComReg considered that the overall interests of consumers would be better served, on balance, by granting so-called 'interim licences' to O2 and Vodafone on a GSM-only use basis for a limited period until such time as a final decision on ComReg's broader spectrum release proposals could be made. Amongst other factors rehearsed in Consultation 10/71, and elsewhere in this document, ComReg has noted that interim licences would promote the internal market by facilitating the joint release of liberalised 800 MHz and 900 MHz spectrum and providing better and fairer opportunities for effective long-term competition, by facilitating the potential entry by new operators. Furthermore, it would provide regulatory predictability in the market in relation to continuity of GSM consumer services amongst other matters.

In light of these considerations, ComReg set out its proposal to grant an interim licence to each of Vodafone and O2 (including in relation to applicable licence conditions and spectrum fees):

- interim spectrum rights of use would be granted on a once-off, fixed term basis<sup>3</sup>;
- interim spectrum usage fees to be based on licence fees in respect of the current licences held updated to current price levels;
- the GSM 900 MHz licence conditions currently applicable to each of Vodafone and O2 would be attached to their respective interim licences. Specifically
  - technology-specific criteria limiting licensees to the use of GSM-technology only;
  - specifying all or a subset of the same 36 GSM900 channels currently assigned to each operator; and
  - licence conditions reflecting the commitments made in the course of the original licensing procedure for Vodafone and O2's respective GSM 900 MHz licences.

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<sup>1</sup> In particular, questions 5, 6 and 7 of same.

<sup>2</sup> See section 3.2 of ComReg Consultation 10/71.

<sup>3</sup> For the avoidance of doubt, licences and all spectrum rights of use granted by ComReg under the interim licensing proposal described in Consultation 10/71 would fully and entirely expire at the latest one day prior to 800 MHz and liberalised 900 MHz spectrum availability (to be identified by ComReg) without any right of renewal, extension, or any other form of prolongation including issue of new GSM 900 MHz licences irrespective of whether the licensee is successful at obtaining 800 and/or 900 MHz spectrum.

ComReg's interim licence proposal should be viewed in the context of its broader spectrum release proposals for release of spectrum in the 800 MHz, 900 MHz and 1800 MHz bands (most recently set out in Consultation 10/105 in which ComReg proposed the inclusion of the 1800 MHz band in the earlier-proposed 800 MHz and 900 MHz award process).

With two GSM 900 MHz licences expiring on 15 May 2011, however, it is necessary to move forward and separately finalise ComReg's interim licence proposals prior to any final decisions on ComReg's broader spectrum release proposals so as to, amongst other things:

- safeguard existing competition in the mobile markets concerned and to protect end users from any potential disruption to services that would otherwise arise;
- ensure that all relevant processes relating to the interim licence proposal, including appropriate consultation upon the draft Regulatory Impact Assessment (RIA) and draft decision, are completed in a timely manner; and
- provide adequate regulatory predictability for affected parties.

ComReg will, in due course, publish its response to consultation and a draft decision in relation to its broader spectrum release proposals. Interested parties should note that the publication of this response to consultation and a draft decision on the interim licensing proposal at this stage and separately to ComReg's broader spectrum release proposals does not imply that ComReg has made any decisions on the latter, or that it will make any particular decisions thereon.

This document is structured as follows:

- **Chapter 2:** considers and sets out ComReg's response to submissions received to Consultation 10/71 in respect of the interim licence proposal;
- **Chapter 3:** sets out ComReg's draft RIA and assessment against other statutory objectives on the various alternative proposals put forward by respondents to Consultation 10/71;
- **Chapter 4:** sets out ComReg's proposals on relevant interim licence conditions and spectrum fees;
- **Chapter 5:** sets out ComReg's conclusions on the above;
- **Chapter 6:** sets out relevant next steps in relation to the interim licence proposal; and
- **Annexes:**
  1. ComReg's statutory function and objectives in relation to radio spectrum;
  2. Draft Decision on Interim Licence Proposal;
  3. Draft Statutory Instrument;

4. International Update (as relevant to the treatment of existing GSM 900 MHz and 1800 MHz licences); and
5. Summary of Draft RIA in Tabular Format

## 2 ComReg's 900 MHz Interim Licence Proposal

In Chapter 3 of Consultation 10/71, ComReg set out details of, and reasoning in relation to, its interim licence proposal (“**Interim Licence Proposal**”) and asked the following question in relation to same:

*Q5. Do you agree with ComReg's Interim Licence Proposal and proposed licence conditions for same? Please provide reasons for your view.”*

This chapter summarises and considers views put forward by respondents in relation to the overall interim licence proposal (noting that Chapter 4 will address views in relation to proposed licence conditions and spectrum fees).

It is not proposed to reiterate the important assumptions identified by ComReg when it set out its proposal nor its assessment of its proposal in relation to its statutory functions, objectives (including “regulatory principles” set out in the Amended Framework Directive) and duties (including relevant Policy Directions made by the Minister for Communications, Energy and Natural Resources (“the Minister”) under section 13 of the 2002 Act). These are set out in Chapter 3 of Consultation 10/71. ComReg continues to rely on that material and the following considerations assume familiarity with that material. However, where it appears necessary or appropriate, either to deal with new matters raised by respondents or in the interests of clarity, this document refers to or expands on some of that material.

It is noted that various views and alternative proposals were put forward in relation to a number of these assumptions (for instance, GSM-only interim rights of use of spectrum and proposed licence fees). These views, and ComReg's consideration of them are set out in the relevant sections of this document.

This chapter is structured as follows:

- analysis of comments on Interim Licence Proposal;
- compliance of Interim Licence Proposal with ComReg's statutory functions, objectives and duties;
- compatibility of Interim Licence Proposal with Articles 106, 107 and 3(1)(b) of the Treaty on the functioning of the European Union (TFEU) and Article 4(3) of the Treaty on European Union (TEU);
- GSM-only rights of use;
- duration of interim licences; and
- other issues raised.

### 2.1 Responses to the Interim Licence Proposal

Eleven interested parties submitted a response to question five. Ten of these supported, in general terms, ComReg's Interim Licence Proposal (noting again that some of these disagreed with certain aspects of the proposal).

Reasons cited by these interested parties supportive of the Interim Licence Proposal include that it would:

- ensure continuity of services to end users and avoid the material risk of serious disruption from loss of existing communications services to end users that would otherwise arise. In this regard, one interested party stated that:  
*“Users of mobile services attach enormous value to their continuous availability and the adverse impact on consumer welfare if disruption were to occur would be very high. A precautionary approach which effectively precludes the possibility of such consumer detriment is imperative in order to maximise benefits for end users”*;
- safeguard the existing strong level of competition. In this regard, this respondent stated:  
*“This is the case not only because the majority of end users of mobile retail services are customers of Vodafone and O2, and existing MVNOs compete on the basis of use of the MNO’s networks and current spectrum rights of use in the 900 MHz band, but also because two other operators – Meteor and H3GI - currently rely on national roaming agreements with Vodafone to provide services to many of their customers. Failing to grant Interim Licences to Vodafone and O2 would risk a substantial diminution of competition in the provision of mobile services to end users and could not be reconciled with the objective of promoting competition”*;
- provide regulatory certainty to the market ;
- using this method, 800/900 MHz spectrum will be opened to the market with the same timing conditions, and restrain the potential advantages given to the existing 900 MHz holders ;
- *“make sense from the point of view of practicality and the efficient management of spectrum resources generally. While the Interim Licence Proposal pushes back the date for spectrum liberalisation in the 900 MHz band, this is balanced by the availability of both the 800 MHz and 900 MHz block on a liberalised basis at the same time in early 2013”* ;
- *“[be] necessitated by the current exceptional circumstances that justify an urgent need to act<sup>4</sup> and more particularly because of ; and*
  - *the imminent expiry of the existing licences in May 2011;*
  - *the fact that the new, liberalised licences are extremely unlikely to have even been allocated prior to May 2011;*
  - *that the new licences will certainly not be ready to begin operating by May 2011 (even in the 900 MHz band) given the minimum lead times involved for any new licences, even in retuning existing networks (as acknowledged by Red-M and Vilicom);*
  - *the fact that in order to efficiently allocate sub-1GHz spectrum in the manner proposed, the new licences will not in fact be available until January 2013; and*

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<sup>4</sup> Regulation 20(8) Framework Regulations 2003.

- *the fact that therefore the only way to avoid massive disruption and ensure continuity of service to customers and of competition in the industry is to grant interim licences as proposed.*”

ComReg notes that these views would substantially accord with the reasons cited by it when putting forward the Interim Licence Proposal in Consultation 10/71.

On the other hand, it is noted that one respondent disagreed with ComReg’s proposal, and a further respondent considered that ComReg’s proposed approach to the release of the 800 MHz and 900 MHz band (including, in this regard, the Interim Licence Proposal) would not adequately encourage efficient spectrum-use.

Broadly speaking, these objections include that:

1. ComReg’s justification of the Interim Licence Proposal by reference to “consumer disruption” is flawed;
2. it would be contrary to ComReg’s statutory functions, objectives and duties;
3. it would give rise to breaches of the TFEU and the TEU – specifically, Articles 106, 107 and 3(1)(b) TFEU and Article 4(3) TEU; and
4. it would entrench the position of Vodafone and O2 and reduce competition in the Irish mobile market.

The following section focuses upon the first of these objections. The second and third objections are addressed later in this chapter and the final objection is addressed in the context of the draft RIA in Chapter 3.

## **2.2 Consumer Disruption**

### *2.2.1 Views of Respondents*

Four respondents - Vodafone, Eircom, O2, and Qualcomm – consider that the Interim Licence Proposal would ensure continuity of services to end users and avoid the material risk of serious disruption from loss of existing communications services to end users that would otherwise arise.

Vodafone states: *“Users of mobile services attach enormous value to their continuous availability and the adverse impact on consumer welfare if disruption were to occur would be very high. A precautionary approach which effectively precludes the possibility of such consumer detriment is imperative in order to maximise benefits for end users”.*

Vodafone states elsewhere in its response that it *“strongly agrees with ComReg’s proposal to maintain 900MHz spectrum rights of use for both Vodafone and O2 in the period between May 2011 and the date of availability of new 800 MHz and 900 MHz licences. Given the very limited time now remaining to expiry of Vodafone’s and O2’s current licences, the granting of Interim Licences is essential to ensure continuity of existing services to end users, to provide regulatory certainty to the market, and to safeguard the existing strong level of competition.”*



Eircom states: *“eircom accepts the need to put interim measures in place until broader national policy is resolved as the only proportionate solution to the pressing expiry of both Vodafone’s and O2’s 900 MHz licences. This will preserve continuity of service mitigating the near term risk of consumer and reduction in competitive forces ... ComReg must acknowledge the very real risk to business continuity inherent in its full band plan auction proposals and take proportionate measures to facilitate continuity of services of existing licensees.*

O2 states that the *“expiry of GSM licences in May 2011, without an appropriate procedure for licence renewal, is not in the interest of users. The granting of an interim licence is a proportionate measure to safeguard against that ...”*

Qualcomm states that it *“approves ComReg’s proposal to allow a transition period up to 2013 for 900MHz incumbents in order to guarantee the continuity of services to GSM customers.”* Qualcomm also strongly recommends ComReg to allow the deployment of UMTS900 as early as possible.

Hutchison 3G Ireland (H3GI) states that it *“does not agree that the risk of consumer disruption to Vodafone and O2’s customers justifies the Interim Licence Proposal”*. Reasons cited by it in support of this view included that:

1. Reliance on the risk of such disruption as a justification of this proposal *“ is in direct contrast to ComReg's approach elsewhere in the Consultation and in ComReg document 09/99 of less than a year ago”*.

In particular, H3GI states that is *“surprised by the adoption of such a view by ComReg and believes that ComReg's view is unwarranted given that in Document 09/99, following its ‘considered and reasoned analysis of the issue’ ComReg found that the arguments raised by the existing 2G licensees regarding the potential for consumer disruption were “significantly overstated”. Further and most notably, ComReg stated that:*

*‘in light of ComReg's position of providing fair, proportionate and non-discriminatory opportunities to incumbents and potential entrants alike to gaining liberalised 900 MHz spectrum, ComReg is of the view that arguments relating to the potential for customer disruption are by no means an adequate justification for spectrum retention by incumbent GSM licences’;*

2. *ComReg based the above view on its findings that: (i) the likelihood of O2 and Vodafone not winning any spectrum in a competitive award is very low; and (ii) there are mitigating factors available to O2 and Vodafone (eg use of alternative spectrum/roaming or MVNO agreement) in the unlikely event that they failed to win any spectrum, so that these operators have every incentive to ensure that their customers are not negatively affected if they fail to win spectrum;*
3. *In light of ComReg's strong view that the potential for consumer disruption was not significant elsewhere in Consultation 10/71 and Consultation 09/99, its*

*express reliance on the potential for consumer disruption to justify its revised proposals in Consultation 10/71 regarding the delay of 900 MHz release and liberalisation and the Interim Licence Proposal seems unjustified and absent proper foundation;*

4. *H3GI notes ComReg's statement at footnote 59 which states as follows:  
' ... requiring Vodafone and O2 to engage in technical (e.g. roll-out of additional 1800 MHz sites) and/or non-technical mitigation strategies (eg roaming agreement) in the time leading up to 800 MHz availability, as a result of not issuing proposed interim spectrum rights of use, is unlikely to be an efficient outcome in circumstances where each of these operators would be likely to gain access to liberalised 800 MHz and/or 900 MHz spectrum.'*;
5. *H3GI would again submit that in adopting the above view, ComReg is acting in a discriminatory fashion towards H3GI. ComReg has failed to recognise that, in preventing H3GI from having access to 900 MHz spectrum until 2013, the Interim licence Proposal will significantly effect [sic] the sustainability of H3GI's business;*
6. *Further, H3GI submits that ComReg is not entitled to prioritise its new somewhat unsubstantiated concerns regarding consumer disruption over its objective to ensure the effective and efficient management of spectrum under section 12 of the Act. H3GI submits that any consumer disruption (if an issue at all, as H3GI does not think there is a sound basis for these arguments) has become an issue because of ComReg's delay in releasing and liberalising 900 MHz spectrum. In prioritising dubious concerns regarding consumer disruption, ComReg is protecting the vested interests of Vodafone and O2 and their customers at the expense of competition and consumers at large;*
7. *H3GI submits that the Interim licence Proposal is discriminatory and unduly favours Vodafone and O2. Further it is unwarranted as Vodafone and O2 have had more than a sufficient period of time to make transitional arrangements in preparation for the expiry of their licences (eg migration of customers to 3G) to prevent consumer disruption arising. In particular H3GI notes that many of O2 and Vodafone's customers have 3G handsets and further that all 2G devices are 1800 MHz enabled;*

#### 2.2.2 ComReg's Response

In relation to **bullet points 1, 2, 3 and 7 above**, ComReg would respond as follows.

ComReg considers that the position it previously adopted in Consultation 09/14 and Consultation 09/99 on "consumer disruption" and the position it is now adopting in the context of the interim licence proposal are both appropriate in the particular circumstances in which they were proposed.

ComReg's position set out in 09/14 and 09/99 was set out in the context of a proposed auction where incumbent licensees (in this case, seeking administrative assignment of long term spectrum rights of use) would have been in a position to obtain, via a competitive spectrum award, the equivalent 900 MHz rights of use in advance of expiry of existing GSM 900 MHz rights of use<sup>5</sup> and where any such competition would be held sufficiently before the expiry of existing rights of use so as to allow reasonable time for various mitigation techniques, including those previously raised by ComReg (e.g. build-out of 1800 MHz sites, Mobile Virtual Network Operator (MVNO) / national roaming agreements etc) to be implemented in the event that incumbent licensees were wholly or partially unsuccessful at the competition (i.e. obtained no 900 MHz rights of use or only obtained such rights in respect of one (1)  $2 \times 5$  MHz block respectively);

On the other hand, the circumstances in which ComReg put forward the Interim Licence Proposal are materially different. In particular:

- ComReg is not in a position to finalise its decision making process on its broader spectrum proposals *and* hold a competition for the 900 MHz band in sufficient time prior to the expiry of Vodafone and O2's GSM 900 MHz licences in May 2011. This reflects both the extensive and complex nature of the issues raised during ComReg's consultation processes and, more recently, the need for ComReg to recalibrate and consult upon its proposals to take into account the major and earlier-than-expected development relating to 800 MHz spectrum availability, as well as the development regarding availability of Long Term Evolution (LTE) equipment for the 1800 MHz band;
- In addition, it is ComReg's view that the availability, and joint award, of liberalised 800 MHz and 900 MHz spectrum rights represents an alternative and proportionate measure for meeting its statutory objectives (see Consultation 10/71 and the draft RIA in Chapter 3);
- As such, but for the Interim Licence Proposal or like measure, Vodafone and O2 would not be in a position to obtain *any* 900 MHz rights of use in the interim period. This is a clearly different context to that in which these parties might have to "win back" equivalent spectrum-use rights in a competition of the type proposed originally so as to ensure no such gap in spectrum holdings;
- Moreover, even assuming that any competition for the 900 MHz band could be held prior to licence expiry, there would not be significant time between such a competition and the expiry of Vodafone and O2's licences for these operators to complete any necessary mitigation strategies if one or both were partially or wholly unsuccessful at obtaining 900 MHz spectrum rights of use. This contrasts with the earlier timeframes when ComReg set out its position in relation to consumer disruption in Consultation 09/14 and Consultation 09/99;
- Indeed, the difference in context is made clear at footnote 59 of Consultation 10/71, which is discussed below.

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<sup>5</sup> In this regard, H3GI correctly notes that ComReg based the above view on its findings that: (i) the likelihood of O2 and Vodafone not winning any spectrum in a competitive award is very low; and (ii) there are mitigating factors available to O2 and Vodafone (e.g. use of alternative spectrum/roaming or MVNO agreement) in the unlikely event that they failed to win any spectrum, so that these operators have every incentive to ensure that their customers are not negatively affected if they fail to win spectrum.

In relation to **bullet points 4, 5, 6 and 7** ComReg would respond as follows:

- At footnote 59 of Consultation 10/71 ComReg stated its view that it would be inefficient for Vodafone and/or O2 to engage in capital intensive mitigation strategies (for example, building out additional 1800 MHz sites) to address not having any GSM 900 MHz spectrum rights in the period between GSM 900 MHz licence expiry and proposed commencement of liberalised 800 MHz and 900 MHz rights of use. This is because these operators could subsequently be successful in obtaining liberalised 800 MHz and/or 900 MHz spectrum rights from 2013 in the currently envisaged competition;
- ComReg notes that in response to this point, H3GI asserts that ComReg would be acting in a discriminatory fashion towards H3GI and, in preventing H3GI from having access to 900 MHz spectrum until 2013, the Interim Licence Proposal will significantly affect the sustainability of H3GI's business. This point is dealt with in Section 2.5 below and in the draft RIA;
- ComReg does not consider that H3GI's response addresses the substantive issue. Rather, H3GI appears to be conflating concerns regarding ComReg's broader spectrum award proposals (including the issue of whether or not to jointly make available liberalised 800 MHz and 900 MHz spectrum rights) with the proposed grant of interim rights of use. For the avoidance of doubt, ComReg does not consider the Interim Licence Proposal to be discriminatory against H3GI and ComReg's reasoning for this view is set out in Section 2.5 below;
- ComReg notes that it is obliged to apply under the Common Regulatory Framework objective, transparent, non-discriminatory and proportionate regulatory principles by, *inter alia* "promoting efficient investment and innovation in new and enhanced infrastructures."<sup>6</sup> and it is obliged under Section 12 of the 2002 Act to take all reasonable measures which are aimed at *inter alia* "encouraging efficient investment in infrastructure and promoting innovation"<sup>7</sup>. As set out above, ComReg is of the view that, in the absence of the Interim Licence Proposal, Vodafone and O2 would need to engage in inefficient investment. ComReg considers that (i) H3GI has not advanced any countervailing argument in relation to this issue and (ii) H3GI has failed to demonstrate how this investment could be made efficiently.

Furthermore, ComReg notes that this respondent did not attempt to counter other reasons relied on by ComReg when it put forward the Interim Licence Proposal<sup>8</sup>, including:

- the avoidance of serious deterioration to existing competition in the mobile markets concerned if Vodafone and O2 were not to have access to GSM 900 MHz rights of use in the interim period and, consequently, ComReg's view that it is obliged to safeguard such competition from serious deterioration and protect end users until such time as the proposed joint award and availability of 800 MHz and 900 MHz bands on a liberalised basis can occur;

<sup>6</sup> Article 8(5)(d) of the revised Framework Directive

<sup>7</sup> Section 12(2)(a)(iii) of the 2002 Act

<sup>8</sup> These arguments are also relevant to ComReg's assessment of Qualcomm's proposals.

- by facilitating the proposed joint competitive award of rights of use of spectrum in the 800 MHz and 900 MHz bands, the Interim Licence Proposal would:
  - maximise new entry opportunities to the mobile markets concerned;
  - contribute to the effective management of radio frequencies by facilitating the joint award of liberalised-use 800 MHz and 900 MHz spectrum which, in ComReg's view, would be more likely to result in a more efficient spectrum allocation outcome than would otherwise be the case with separate releases of the 800 MHz and 900 MHz bands;
  - encourage the continued efficient use of 900 MHz spectrum, pending the outcome, implementation and crystallisation of the proposed spectrum-allocation process, by having the spectrum attached to each of Vodafone and O2's GSM 900 MHz licences used to provide GSM-only services for which there is clear, existing, and substantial consumer demand;
  - it would promote the internal market by facilitating the joint release of liberalised 800 MHz and 900 MHz spectrum that would provide better and fairer opportunities for effective long-term entry by operators in other Member States;
  - avoid undue effects on the sustainability of the businesses of industry operators during the time between May 2011 and the envisaged commercial commencement date of new liberalised-use 800 MHz/900 MHz licences (see Policy Direction No.4);
  - take into account the interests of all users of the radio frequency spectrum by:
    - safeguarding existing competition until full 800 MHz and 900 MHz spectrum-availability by avoiding an undue reduction in Vodafone's and O2's respective abilities to compete in the mobile markets concerned;
    - ensuring continuity of GSM consumer services to the customers of Vodafone and O2 until full 800/900 MHz availability;
    - maximising entry possibilities for potential entrants to these bands from within the State and from other Member States by facilitating the joint release of the 800 MHz and 900 MHz bands; and
    - providing early opportunity to prepare for liberalised use post-auction.

Rather, this respondent made claims of distortions to competition arising from the proposed joint availability of liberalised 800 MHz and 900 MHz spectrum in early 2013. For reasons set out in the draft RIA in Chapter 3, ComReg does not consider these claims to be particularly persuasive.

Furthermore, when viewed against the more likely and more significant effects to existing competition (and adverse impacts on wholesale users and end users) if Vodafone and O2 were not to have access to GSM 900 MHz rights of use in the interim period (and other reasons identified by ComReg and other interested parties)

ComReg considers that the weight of reasons and evidence supports implementing the Interim Licence Proposal (that is, the Interim Licence Proposal is objectively justified in itself).

## **2.3 Compliance of Interim Licence Proposal with ComReg's statutory functions, objectives and duties**

In Section 3.2 of Consultation 10/71, ComReg set out its assessment of the Interim Licence Proposal in light of its functions, objectives and duties. ComReg proposes to revisit that assessment only to the extent that related issues have been raised by respondents which question ComReg's proposed approach.

### *2.3.1 Views of Respondents*

In its response to Consultation 10/71, H3GI set out a detailed assessment questioning the compatibility of the Interim Licence Proposal with ComReg's statutory functions, objectives and duties. As many of H3GI's arguments appear to overlap, ComReg does not consider it appropriate to reproduce those arguments in any great detail here. Instead, ComReg has carefully considered H3GI's response and sets out below what it has identified as the core arguments raised by H3GI and addresses them accordingly. The full text of H3GI's arguments can be found in ComReg Document 10/103R.

In summary, H3GI contends that, contrary to Regulation 11 of the Authorisation Regulations and Section 12 of the Communications Regulation Act 2002, ComReg's proposal to delay the release and liberalisation of 900 MHz band and failure to release and liberalise currently unallocated 900 MHz spectrum gives rise to:

- a distortion of competition in the mobile market by favouring Vodafone and O2 at the expense of H3GI with an associated negative impact on consumer welfare;
- (b) a failure to ensure the efficient and effective use of radio frequency spectrum in Ireland;
- (c) a failure to adhere to Ministerial Policy Direction No. 3 dated 21 February 2003<sup>9</sup>; and
- A breach of the principles of non-discrimination and proportionality.

### *2.3.2 ComReg's Response*

ComReg addresses the issues raised in (a) and (b) above in the context of the draft RIA and addresses the remaining issues below.

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<sup>9</sup> Set out in Annex 1.

## 2.4 Ministerial Policy Directions

### 2.4.1 Views of Respondents

H3GI contends that ComReg's proposal to delay the release and liberalisation of the 900 MHz spectrum band to 2013 will severely impact on mobile broadband penetration in Ireland, which is contrary to ComReg's obligation regarding broadband rollout as required by Ministerial Policy Direction No. 3 dated 21 February 2003.

### 2.4.2 ComReg's Response

First, ComReg would point out that the three year objective described in this policy direction is now long expired. In any case, and as noted in Section 3.2.3 of Consultation 10/71, ComReg is of the view that the Interim License Proposal is in compliance with the above policy direction as it promotes the national objective regarding broadband rollout by facilitating the proposed joint release of 800 MHz and 900 MHz spectrum.

ComReg also notes that it is far from clear that a delay in 900 MHz award to coincide with 800 MHz spectrum availability would negatively impact on mobile broadband penetration contrary to the aforementioned policy direction. This policy direction is aimed at overall broadband penetration, both fixed and mobile, which continues to rise. Indeed, ComReg notes that mobile broadband penetration has continued to rise steadily without liberalised 900 MHz spectrum. ComReg has no reason to believe that this trend would not continue on until the availability of 800 MHz spectrum.

Further, a combined award process will also facilitate greater market entry and the provision of a greater range of broadband services in the medium to long term by increasing the amount of sub-1GHz available to any one undertaking which will of course, in turn, improve mobile broadband penetration. Moreover, as set out elsewhere in this document, even if fully liberalised interim licences were granted immediately on the expiry of Vodafone's and O2's licences, due to, amongst other things, their existing extensive GSM user base and the time required for the completion of any necessary retuning and relocation activities, ComReg does not believe it is likely that widely deployed high coverage 3G 900 MHz services would be available substantially in advance of January 2013. In addition, and in light of ComReg's proposed issue of preparatory (and potentially test licences), ComReg does not believe that a short delay in the availability of liberalised 900 MHz spectrum will have a materially negative effect on the availability of mobile broadband on a nationwide basis.

ComReg also notes that this policy direction is not intended to apply in a vacuum and should be read in light of the justifications given for delaying the award milestones (as set out by ComReg in Consultation 10/71) which would, in ComReg's view, outweigh any alleged and intangible impediment to mobile broadband penetration.

As such, ComReg does not agree that a short delay in the award of 900 MHz spectrum would run contrary to the aforementioned policy direction.

## 2.5 Non-discrimination

Discrimination consists in the application of different rules to comparable situations or the application of the same rules to different situations.

In Section 3.2.5 of Consultation 10/71, ComReg set out its reasons as to why it considered the Interim Licence Proposal to be non-discriminatory. Existing 900 MHz operators licensed for GSM, on the one hand, and other operators (or new entrants) in other frequencies, on the other, are not appropriate comparators for the purpose of considering discrimination in the present context and, to the extent that they might be argued to be comparable, there are clear, objective reasons for treating existing 900 MHz licensed operators differently to operators who do not have licences in this band.

ComReg is still of the view that the Interim Licence Proposal would not result in unlawful discrimination against H3GI (or any other party) for the following additional reasons:

- The Interim Licence Proposal is open to Vodafone and O2, and would have been extended to Meteor also, had its 900 MHz licence also been about to expire with similar imminence. There is, accordingly, no discrimination as H3GI (or a new entrant) is not being denied anything it could lawfully have used until 2013 anyway;
- ComReg is proposing to have full liberalisation of the 900 MHz band in 2013 (with preparatory licences available in the meantime) and is proposing to confine any existing user of 900 MHz to GSM-only use. Having full liberalisation of the 900 MHz band in 2013 is the approach ComReg is proposing to take with regard to compliance with the GSM Amendment Directive and such an approach is entirely reasonable, justified and appropriate<sup>10</sup>;
- ComReg considers that as the Interim Licence Proposal would be limited to GSM-only, it cannot be said to be discriminatory vis-à-vis H3GI (or any other party).
- Moreover, ComReg does not consider it likely that the availability of GSM-only 900 MHz spectrum, between May 2011 and January 2013, would enable H3GI to invest in a GSM network which would allow it to offer lower tariffs than those tariffs it currently applies on the basis of its national roaming agreement with Vodafone. In this regard, ComReg further considers that it is highly unlikely that any operator would *de novo* build a GSM network where

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<sup>10</sup> ComReg also notes that this view is consistent with the ruling by the UK Competition Appeal Tribunal's (CAT) ruling in Case 1154/3/3/10 Telefónica O2 UK Limited v Office of Communications (900 MHz Band), judgment of 7 October 2010.



the guaranteed spectrum right of use was less than two years and in light of the imminent liberalisation of the spectrum band. It is therefore reasonable to form the view that H3GI would only be interested in GSM-only 900 MHz spectrum if, as a result of the auction, it has the certainty of holding 900 MHz spectrum as of 2013. In this regard, it is noted that H3GI declined the offer of a GSM 900 MHz licence when it obtained its 3G licence and, indeed, has not sought GSM 900 MHz rights of use since then nor has it sought access to such rights of use throughout this consultation process. However, such an argument would prejudice the outcome of the auction award: H3GI has no extant or guaranteed future “right” to any spectrum and to confer such a future right on H3GI would comprise discrimination against other MNOs;

- ComReg notes that an administrative assignment of liberalised rights of use as proposed by H3GI would allow Vodafone, O2, Meteor and H3GI to develop market share before any new entrant could enter the market. Accordingly, H3GI’s proposal appears to be discriminatory *vis a vis* new entrants; and
- Compliance with the non-discrimination obligation is inherent in the test for the non-application of State aid and ComReg is firmly of the view that there is no State aid present in the Interim Licence Proposal (see Section 2.7 below).

Finally, ComReg rejects H3GI’s claim that it acknowledged, in Consultation 10/71, that it would, through the Interim Licence Proposal, be conferring an advantage on Vodafone and O2. ComReg merely noted such a view regarding advantage “*could be argued*” by some.

## 2.6 Proportionality

ComReg is bound by the principle of proportionality in considering the Interim Licence Proposal. In a statutory context, ComReg is required to ensure that:

- In carrying out its functions, measures taken by it are proportionate having regard to the objectives identified in Section 12 of the 2002 Act;
- In granting licences, for which there is a limited number, such grants must be made on the basis of selection criteria which are objective, non-discriminatory and proportionate and which give due weight to the achievement of the objectives identified in Section 12 of the 2002 Act; and
- More generally, in considering the relevant EU Directives transposed into Irish law and applying them, it must comply with proportionality as a general principle of EU law.<sup>11</sup>

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<sup>11</sup> A useful summary of the proportionality principle is contained in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023, at paragraph 13. which states:

“By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”

In Section 3.2.5 of Consultation 10/71, ComReg set out its reasons as to why it considered the Interim Licence Proposal to be proportionate. ComReg disagrees with H3GI's assertion that the Interim Licence Proposal would be disproportionate for the following additional reasons.

#### 2.6.1 Views of Respondents

Of the eleven respondents to the consultation, eight approve in general of the Interim Licence Proposal, two made no comment, while one disagreed with the proposal.

Of those eight who approve of the Interim Licence Proposal, some expressly state that they consider it to be a proportionate measure while others set out the reasons why they consider it to be necessary or appropriate. Some of their views and comments are set out below.

Eircom states the following:

*“eircom accepts the need to put interim measures in place until broader national policy is resolved as the only proportionate solution to the pressing expiry of both Vodafone's and O2's 900 MHz licences. This will preserve continuity of service mitigating the near term risk of consumer and reduction in competitive forces ...*

*eircom agrees that the circumstances of existing licenses in the 900 MHz band are different to those of other interested parties and consequently different treatment can be justified. In this regard ... ComReg must acknowledge the very real risk to business continuity inherent in its full band plan auction proposals and take proportionate measures to facilitate continuity of services of existing licensees.*

*eircom would also agree that it is appropriate that existing licences should be rolled over with no change of scope and hence should be restricted to the provision of GSM services, in accordance with the restrictions placed on Meteor.”*

Ericsson states that it *“makes sense from the point of view of practicality and the efficient management of spectrum resources generally. While the Interim Licence Proposal pushes back the date for spectrum liberalisation in the 900 MHz band, this is balanced by the availability of both the 800 MHz and 900 MHz block on a liberalised basis at the same time in early 2013”*.

O2 states that the *“expiry of GSM licences in May 2011, without an appropriate procedure for licence renewal, is not in the interest of users. The granting of an interim licence is a proportionate measure to safeguard against that ...”* O2 further sets out its view that ComReg has power in law to grant to the proposed interim licences.

Vodafone states that it *“strongly agrees with ComReg's proposal to maintain 900MHz spectrum rights of use for both Vodafone and O2 in the period between May 2011 and*

*the date of availability of new 800 MHz and 900 MHz licences. Given the very limited time now remaining to expiry of Vodafone's and O2's current licences, the granting of Interim Licences is essential to ensure continuity of existing services to end users, to provide regulatory certainty to the market, and to safeguard the existing strong level of competition."* Vodafone further states that it considers that the granting of Interim Licences is fully consistent with ComReg's statutory objectives.

Qualcomm states that it *"approves ComReg's proposal to allow a transition period up to 2013 for 900MHz incumbents in order to guarantee the continuity of services to GSM customers."*

UPC states that it has no objections to the Interim Licence Proposal (while also suggesting an alternative scheme which ComReg has considered). ESNB and RTE simply state that they agree with the Interim Licence Proposal.

RTE and Imagine made no comment on this issue.

H3GI argues that, as an alternative to the Interim Licence Proposal, it should be awarded  $2 \times 5$  MHz of the 900 MHz fallow spectrum for at least the interim period, and that the other three MNOs should be allocated a similar amount of spectrum in the 900 MHz band by way of administrative grant, which they could all use on a liberalised basis, leaving the remaining spectrum to be allocated by way of auction.

#### 2.6.2 ComReg's Response

ComReg notes in this regard that pursuant to Article 5(2) of the Authorisation Directive where licences are granted for a limited period of time they should allow for an appropriate period of time to allow for investment amortisation. In light of the level of investment that would be required by H3GI to deploy a 900 MHz network, ComReg believes that any such licence granted to H3GI would need to be substantially longer than 20 months.

ComReg does not believe that the administrative grant of a long term licence to H3GI would be proportionate. An administrative grant to H3GI at this time arguably presupposes that H3GI would be successful in the future auction for the long-term rights of use of the spectrum, whereas the outcome of that auction is of course unknown at this time and it would be unfair on all prospective bidders to prejudge that outcome. Further, awarding an interim 900 MHz licence to H3GI for a 20-month period has little practical value as no operator would be expected to invest in an expanded network for a 20-month period, with the risk of then having to relinquish the spectrum if it did not succeed in the auction for the long-term right of use of the spectrum.

In addition, as H3GI is a 3G-only MNO, such an approach would require that its early grant of 900 MHz spectrum be liberalised. In turn, all other existing 900 MHz licences would arguably have to be liberalised to avoid potential discrimination and distortion of competition amongst existing competitors. There are, of course, a number of other

negative aspects to such an approach which would have to be balanced against the benefits of a direct award to H3GI and/or the assignment of one liberalised block of 900 MHz spectrum to each of the Mobile Network Operator (MNOs). In particular:

- Such an approach would wholly, or at least materially, undermine the broader spectrum release process and the very significant benefits identified by ComReg (in Information Notice 10/59) as likely to accrue there from. A relatively short period in which the *status quo* would be preserved by limiting O2 and Vodafone to GSM-only use and during which H3GI would continue to operate in its existing frequency is a necessary and proportionate measure to enable ComReg to realise the benefits of its broader spectrum release proposals;
- H3GI's proposals are considered by ComReg and by its economic analysis as being materially less advantageous for the promotion of competition (or more damaging to competition) than the interim-licensing proposal, when viewed in the context of ComReg's broader spectrum release proposals. The required immediate liberalisation of all allocated 900 MHz spectrum (in order to 'level the playing field' after granting H3GI a liberalised  $2 \times 5$  MHz block) would entrench the position of existing MNOs and likely deter any potential new entrant (who would miss out on the early mover advantage conferred on the existing MNOs), particularly where they might only win 800 MHz spectrum, contrary to ComReg's statutory objectives under section 12 of the 2002 Act;
- Under the regulatory framework generally, ComReg is not required to protect competitors (i.e. H3GI) but, instead, to protect and promote competition. It is not at all certain that an administrative assignment of a liberalised  $2 \times 5$  MHz block of 900 MHz spectrum to existing MNOs would have as its object or effect the protection and promotion of competition. Unlike the interim award proposal, such an approach would clearly discriminate against all other potential new entrants to the 900 MHz band and would undermine the efficacy and the rationale of the auction process itself;
- It is always open to H3GI to seek to renegotiate its roaming arrangements if it is dissatisfied with costs or possibly to enter into different roaming arrangements with another MNO – indeed it is noted from one stakeholder's response to 10/105 that **[confidential material removed]**;
- It could also be argued that H3GI is in a better position to take advantage of liberalised 900 MHz spectrum, as the incumbent 3G only carrier, and might thus be put in a more advantageous position than the other MNOs were it awarded liberalised 900 MHz spectrum prior to 2013.
- The existing GSM licensees have argued that they would each need  $2 \times 10$  MHz of spectrum to maintain GSM services and roll out new 3G networks at 900 MHz. Under Option 4 of the draft RIA, discussed in Chapter 3 below, each existing licensee would be guaranteed  $2 \times 7.2$  MHz (their existing spectrum holding), and this only on a short term basis, until early 2013. Therefore, it is questionable how useful such a grant would be in practice to the existing GSM Licensees;
- ComReg is likely to require this fallow spectrum for potential re-location and re-tuning purposes in the lead-up to 800 MHz availability, thus ensuring efficient

and effective management of the spectrum in accordance with its obligations under section 12 of the 2002 Act;

- ComReg arguably has very little choice but to implement some sort of interim award to ensure that competition and services to end-users are protected. While H3GI has argued that this approach, if not modified to its preference, has significant negative implications for it, ComReg is of the view that, if it implemented H3GI's alternative approach, ComReg would risk being in breach of a number of its statutory obligations outweighing any benefits which might accrue from H3GI's approach; and
- ComReg further notes that no other satisfactory approach has been suggested by respondents to 10/71 and that ComReg and its consultants are not aware of any less burdensome approach to achieving ComReg's primary objectives of ensuring that competition and services to end-users are maintained and protected (please see draft RIA in Chapter 3).

As such, based on the proposals available to date, the interim licence proposal would satisfy the test and requirement of proportionality.

### *2.6.3 Conclusion*

For the reasons identified above, ComReg considers that the Interim Licence Proposal is compatible with its statutory functions and objectives.

## **2.7 Articles 106, 107 and 3(1)(b) TFEU and 4(3) TEU**

### *2.7.1 Article 106 TFEU*

#### *2.7.1.1 Views of Respondents*

H3GI submits that ComReg's current proposal amounts to a special right within the meaning of Article 106 TFEU.<sup>12</sup>

#### *2.7.1.2 ComReg's Response*

ComReg does not consider that the proposed Interim Licence Proposal (as set out in this document) would fall within Article 106 TFEU as it would not involve the granting of a

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<sup>12</sup> Article 106 TFEU provides that:

"In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular those rules provided for in Article 18 and Articles 101 to 109 "

Furthermore, H3GI states that the European Commission has elaborated on what constitutes a "special" right confirming that a right limited to two or more undertakings authorised to provide a service constitutes a special right where such rights are conferred without objective, proportional and non discriminatory criteria.

‘special right’ within the meaning of that provision. The proposed interim licences will be granted in accordance with objective, proportionate and non-discriminatory criteria which excluded MNOs, including H3GI, clearly do not satisfy. In this regard, ComReg refers to Section 3.2 of Consultation 10/71 and the relevant sections of this chapter.

Incidentally, ComReg points out that H3GI's claim is based on the assumption that H3GI is being deprived of the ability to exploit 900 MHz frequencies. This is not the case as the Interim License Proposal is a necessary and temporary step in order to allow effective competition between all interested bidders for the long term award of a large quantity of spectrum in the 800 MHz/900 MHz band. Thus, any assessment as to the existence or absence of special rights must also take into account the broader context within which the Interim License Proposal has arisen. ComReg also notes that H3GI supports an extended licence duration version of Option 4 of the draft RIA which also results in the award of a finite number of licenses, without H3GI acknowledging the possible creation of special rights.

## 2.7.2 Article 107 TFEU

### 2.7.2.1 Views of Respondents

H3GI is of the view that the Interim Licence Proposal and associated delay in making 900 MHz spectrum available, if implemented without the prior approval of the European Commission, will amount to an illegal State aid to each of Vodafone and O2 in breach of Article 107 TFEU.

### 2.7.2.2 ComReg's Response

Having regard to advice received on this issue, ComReg considers that the Interim Licence Proposal (as set out in this document) would not constitute State aid within the meaning of Article 107 TFEU.

As H3GI is aware, for a measure to be classified as State aid, the following **cumulative** criteria must be met: 1) there must be an intervention by the State or through State resources which entails a financial burden on the State; 2) the measure must confer a selective advantage on an undertaking carrying on an economic activity; 3) the measure must distort or threaten to distort competition; and 4) there must be an effect or potential effect on trade between Member States.

In the context of spectrum licensing, typically for criterion (1) to be satisfied, the State must forego some income from the grant of licenses that it would otherwise receive. As such, the mere grant of a licence, while being a State resource, does not engage Article 107(1). H3GI has failed to demonstrate how ComReg would be foregoing or waiving licence fees in pursuing the Interim Licence Proposal.

For (2) to be satisfied, the measure must confer a selective advantage on an undertaking carrying on an economic activity. In this regard, we note that the State measure must

favour certain undertakings compared to others which, in light of the objective pursued by the system in question, are in a comparable legal and factual situation. ComReg is of the view that the correct legal and factual situation giving rise to the necessary comparability is defined by reference solely to the provision of GSM services in Ireland. In this regard, only Vodafone, O2 and Meteor are in a comparable legal and factual situation in the light of the objective pursued by the system.

ComReg also notes that interim or transitional differential measures will not be regarded as giving rise to a selective advantage if they are justified on the basis of the general system of which it forms a part. In this light, ComReg is of the view that the issue of interim licences can be seen as forming part of a general system of licensing mobile network operators which has been in place since 1996 and which will continue in the future.

As such, contrary to H3GI's assertions, the Interim Licence Proposal clearly will not satisfy either of the first two State aid criteria set out above and it is therefore not necessary to discuss the third and fourth criteria.

ComReg notes that its position is not inconsistent with material in this connection presented by Vodafone in its response to Consultation 10/105.

### 2.7.3 Articles 3(1)(b) TFEU and 4(3) TEU

#### 2.7.3.1 Views of Respondents

H3GI also submits that the Interim Licence Proposal and associated delay in making 900 MHz spectrum available will place the State in breach of its obligations under the Treaty. In particular, it refers to Article 4(3) TEU which provides:

*"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

*The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*

Article 3(1)(b) TFEU states that the EU has exclusive competence in *"the establishing of the competition rules necessary for the functioning of the internal market"* so that pursuant to Article 4(3) TEU the State is obliged to assist the EU in this competency and refrain from jeopardising its achievement.

#### 2.7.3.2 ComReg's Response

As noted above, ComReg is of the view that the Interim Licence Proposal would not involve the granting of a 'special right' within the meaning of Article 106 TFEU or constitute State aid within the meaning of Article 107 TFEU and would therefore not interfere with the proper functioning of the internal market or jeopardise the attainment of EU objectives.

ComReg is entirely aware of its obligations arising out of relevant Treaties and resulting from acts of the institutions of the Union.

In present circumstances, it is particularly aware of the specific obligations arising from the GSM Amending Directive and obligations arising under the 2002 Act, the Common Regulatory Framework<sup>13</sup> and relevant Treaty provisions relating to State aid.

In light of the potential benefits ComReg sees in a possible joint 800 MHz, 900 MHz and 1800 MHz spectrum award, ComReg considers the Interim Licence Proposal to be a fair, reasonable, justified and proportionate interim measure to facilitate the finalisation of its decision-making in this regard, and the holding of the proposed auction (and achievement of liberalisation of the 900 MHz and 1800 MHz bands in accordance with the Amending Directive). While ComReg has not yet determined that it will conduct a joint award of 800 MHz, 900 MHz and 1800 MHz spectrum, ComReg considers that this would appear to be a viable and beneficial option which may lead to the most efficient future use of the liberalised spectrum bands, and ComReg therefore considers it essential that this option should remain open at this time.

Absent any clearly identified breach of the EU State aid provisions, the GSM Amendment Directive, the other legislation under the Common Regulatory Framework, or the 2002 Act, it is not appropriate to refer to a breach of Article 3(1)(b) TFEU and/or Article 4(3) TEU. ComReg is of the view that H3GI has identified no breach by ComReg capable of engaging Article 3(1)(b) TFEU and/or Article 4(3) and ComReg is of the view that it is circular to rely on these provisions in isolation.

#### 2.7.4 Conclusion

For the reasons identified above, ComReg does not consider that the Interim Licence Proposal infringes the State's obligations under Article 106 TFEU, breach the EU State aid rules in Article 107 TFEU or breach the obligations conferred on it under Article 3(1)(b) TFEU and Article 4(3) of the Treaty on European Union.

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<sup>13</sup> The Common Regulatory Framework is described further in Annex 1.



## 2.8 GSM-only or liberalised rights of use

### 2.8.1 Views of Respondents

Vodafone disagreed with ComReg's proposal to grant Interim Licences on a GSM-only usage basis. Reasons put forward by Vodafone in support of its view include that:

1. It would *“have the effect of risking significant unnecessary delay in the refarming of the 900 MHz band for 3G use, and consequent deferral of the provision of enhanced mobile broadband services to end users”*;
2. *“ComReg has itself in section 2.4.4 of the consultation recognised that delaying liberalised use of the 900 MHz band could result in productive inefficiency and/or dynamic efficiency to the extent that it delays the provision of new services to consumers. DotEcon also recognises that even small delays to the availability of services are likely to have large welfare costs<sup>14</sup>”*
3. *“ComReg has not quantified or identified precisely the nature or magnitude of the competitive distortion which it claims would arise as a result. It cannot simply be the case that an existing operator is then able to use spectrum whilst another is not, since this would prohibit any liberalisation unless and until ComReg could be certain that spectrum were reallocated amongst all operators and all prospective new entrants. Nor can it be required that all operators must be actually able to refarm at precisely the same moment, since it is clearly contemplated that refarming should not depend upon the particular arrangements of individual operators”*
4. Instead, Vodafone *“submits that ComReg is required to consider the implications for competition in the round, having regard for whether other operators can avail themselves of other competitive responses to refarming and that, even if they cannot, any first mover advantage is sufficient to give rise to enduring competitive distortions which cannot otherwise readily be overcome through the subsequent release of additional spectrum or through other remedies”*
5. Vodafone then noted *“the view now taken by Ofcom in its recently published advice to the U.K. government setting out its updated assessment of consumer and competition issues relating to the liberalisation of the 900 MHz and 1800 MHz bands. Following a comprehensive analysis of the competitive implications of liberalisation in the U.K, Ofcom states:  
“Overall we now consider the risk and extent of any competitive advantage for O2 or Vodafone arising from liberalisation of the 900 MHz spectrum for UMTS to be low and significantly less than our analysis suggested in February 2009.”<sup>15</sup>*
6. *As a result Ofcom concludes:*

<sup>14</sup> ComReg Document 10/71a 'Award of liberalised spectrum in the 900 MHz and other bands: a report for ComReg', p27, paragraph 117

<sup>15</sup> Ofcom Document 'Advice to Government on the consumer and competition issues relating to liberalisation of 900 MHz and 1800 MHz spectrum for UMTS', paragraph 1.13, <http://stakeholders.ofcom.org.uk/consultations/spectrumlib/advice-to-government/>

*“Therefore, given our judgement that there is a reduced risk of a material competitive distortion and concerns over the leading alternative options, we consider that liberalising 900 MHz spectrum for UMTS in the hands of the current licensees, without imposing conditions (beyond essential technical requirements), is now likely to be the best option.”<sup>16</sup>*

7. *In relation to the requirement to complete a detailed assessment, ComReg has however failed to consider whether the release of 800 MHz spectrum in 2013 would be sufficient to address any concerns about distortion of competition, nor whether other operators might have other means to overcome such distortions (e.g. through the completion of appropriate roaming arrangements);*
8. *ComReg also argues that whilst early availability of the 900 MHz band may theoretically provide benefits from liberalisation, there are a number of complicating factors such as the need to undertake transitional measures which may in any event prevent the benefits of liberalisation being realised significantly in advance of 800 MHz spectrum availability.<sup>17</sup> Yet, as explained below, this argument would support a decision to liberalise and thereby meet the requirements of the Amending GSM Directive. If operators cannot in fact reform the spectrum then no distortion of competition can arise. And if no distortion of competition can arise, then ComReg has no basis for resisting the requirement to remove restrictions on liberalisation at the earliest opportunity;*
9. *In short, the burden of proof on this matter rests with ComReg and not with those seeking the removal of the existing restrictions. ComReg has failed to properly understand this and has, as a result, not undertaken the work that it would need to do to justify any delay in removing restrictions.”*

#### 2.8.2 ComReg’s Response

In relation to **bullet points 1 and 2** above ComReg would respond as follows.

ComReg does not agree that by issuing GSM-only interim licences that it would:

- risk significant unnecessary delay in the refarming of the 900 MHz band for 3G-use, and consequent deferral of the provision of enhanced mobile broadband services to end users; and/or
- result in significant productive inefficiency and/or dynamic efficiency to the extent that it delays the provision of new services to consumers.

First, ComReg notes that each of the existing GSM 900 MHz operators has previously submitted during the course of this consultation process that they would each require at least  $2 \times 10$  MHz of 900 MHz spectrum in order to provide UMTS and GSM services. Taking these submissions at face value, ComReg therefore does not accept that granting liberalised rights to  $2 \times 7.2$  MHz of 900 MHz spectrum, as part of the Interim Licence

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<sup>16</sup> Ibid, paragraph 1.14

<sup>17</sup> ComReg Document 10/71. p21

Proposal, would increase the rate of refarming the 900 MHz band for 3G use (with the consequential benefits identified by Vodafone).

Moreover, when the Interim Licence Proposal is viewed in the context of ComReg's broader spectrum release proposals, all winners of liberalised rights of use (including Vodafone and O2 if successful) would be in a position, through the proposed issue of preparatory licences, to commence planning, design and implementation of 3G and 4G networks in the 800 MHz, 900 MHz and 1800 MHz bands following the award and up until licence commencement in early 2013.

Furthermore, given the presence of incumbent operators in the 900 MHz and 1800 MHz bands and the potential need for some or all of these operators to relocate and/or retune their respective networks following the outcome of the proposed spectrum award, the interim period also provides an opportunity for existing operators to carry-out all necessary transitional activities and for all winners of liberalised spectrum to prepare for liberalised service commencement in 2013.

It should be emphasised that ComReg views the issuing of interim licences as an enabling step in support of the broader spectrum release process, which will deliver full liberalisation in a manner compatible with all of ComReg's statutory function, objectives and duties. Accordingly, while the final form of the broader spectrum release is not decided at this point, ComReg is of the view that a combined assessment of the potential effects of the interim licence process together with the broader spectrum release process is appropriate.

Moreover, Vodafone's proposal implicitly assumes that it would be successful in the proposed competition for long-term liberalised rights of use (as it is highly unlikely that *any* operator would invest the capital required for 3G 900 MHz network deployment on the basis of very short term (i.e. approximately-20 month) spectrum right of use). This means that Vodafone would only be interested in building out a 3G 900 MHz network in this time frame if, as a result of the auction, it had the certainty of holding liberalised spectrum as of 2013. However, such an argument would arguably prejudice the outcome of the auction award as Vodafone and/or O2 have no extant or guaranteed future "right" to any liberalised 900 MHz spectrum. Thus, in this context, the grant of liberalised spectrum rights to Vodafone and/or O2 could be seen by potential entrants as favouring these operators and, as such, could have the effect of harming competition in the spectrum competition and deterring potential entry.

In addition, readers are referred to the draft RIA for further discussion of the likely effects on consumer welfare and competition arising from ComReg's broader spectrum award proposal (in the context of which the Interim Licence Proposal should be viewed).

In relation to **bullet points 3, 4, 7, 8 and 9** above, these are discussed further in the draft RIA section in Chapter 3 while bullet points 8 and 9 are also considered below in this Chapter 2.

In relation to **bullet points 5 and 6** above, ComReg notes Vodafone’s reference to the recent position taken by Ofcom in relation to the liberalisation of existing 900 MHz and 1800 MHz licences in the UK.

ComReg has reviewed the relevant Ofcom material, including the reasons for Ofcom’s position, and considers that Vodafone’s argument seeks to apply the same conclusions (i.e. liberalisation of existing GSM 900 MHz licences) to what ComReg considers to be materially different circumstances. In particular, ComReg notes the following from Ofcom’s October *Advice to Government* in which Ofcom discusses the recent developments which have caused it to liberalise existing GSM 900 MHz licences<sup>18</sup>:

*“The merger of T-Mobile and Orange’s UK businesses to create Everything Everywhere provides them with a significantly larger total number of sites on which they can deploy 3G than either of the two operators were likely to have been able to do individually. This is the most significant development since its 2009 consultation because it potentially materially reduces the competitive advantage that O2 or Vodafone could realise from deployment of a UMTS900 network. In simple terms, the extra sites could off-set to some extent the lack of 900 MHz spectrum. In particular, Everything Everywhere recently announced that it intends to create a consolidated national network of around 18,000 sites, delivering both 2G and 3G services, providing 99.6% population coverage.”<sup>19</sup>*

In addition, Ofcom’s assessment of the potential for distortions to competition arising from liberalisation of existing 900 MHz licences noted that Everything Everywhere would have the largest market share in terms of total subscriptions and also for 3G subscriptions and included the following table:<sup>20</sup>

Based on 2009 subscriber numbers	2G & 3G	3G only
T-Mobile and Orange	42%	33%
O2	28%	24%
Vodafone	23%	23%
H3G	6%	19%

**Table 1:** UK 2G and 3G market shares (per Ofcom *Advice to Government*)

ComReg does not consider that similar conditions exist in Ireland, because there is considerably greater market share and 3G base station asymmetry in favour of

<sup>18</sup> Para 4.8 of Ofcom’s *Advice to Government* on the consumer and competition issues relating to liberalisation of 900 MHz and 1800 MHz spectrum for UMTS - *Advice to the Secretary of State for Business, Innovation and Skills*, dated 25 October 2010, available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/spectrumlib/annexes/government-advice.pdf>

<sup>19</sup> Ofcom also noted, at paragraph 5.13 of same, “We are therefore not starting from a position where the two holders of 900 MHz, Vodafone and O2, have stronger network capacity than their rivals. On the contrary, Everything Everywhere, and to a lesser extent H3G, are currently in a stronger position in terms of network capability for providing UMTS services”.

<sup>20</sup> On the basis that Everything Everywhere maintained a market share (in terms of subscriptions) that is equal to the sum of that of T-Mobile and Orange.

Vodafone and O2, which is shown in the table below. Further, ‘Everything Everywhere’ is a national network in the UK, operating in the 1800 MHz band only, and there is no comparable network or operational model in the State. Additionally, licence conditions are materially different between the UK and Ireland.

Operator	Share of total number of subscribers in Ireland (incl. HSDPA) <sup>21</sup>	No of 2G Sites <sup>22</sup>	No of 3G sites <sup>23</sup>
H3GI	6.2	N/A	719
Meteor	20.1	1106	714
O2	33.2	1591	979
Vodafone	40.5	2152	1268

**Table 2:** Irish share of subscribers and number of 2G and 3G sites.

Accordingly, ComReg does not consider the position taken by Ofcom on this matter in the UK to be particularly persuasive or instructive when viewed in the current Irish context.

In relation to **bullet points 8 and 9** ComReg would respond as follows:

- The joint report issued by ComReg’s technical consultants (contained in ComReg Document 10/71c) has demonstrated that transitional measures will be required while estimating the time involved in such a transitional period. Furthermore, and for the avoidance of doubt, ComReg does not consider that its proposed timeframe for liberalisation of the 900 MHz band is inconsistent with the requirements of the GSM Amending Directive. In this regard, ComReg notes:
  - the liberalisation of the 900 MHz band as initiated by the GSM Amendment Directive can be seen as a two-stage process: first, removing the general prohibition in order to make the band available for 3G, which the Irish implementing Regulations have done.<sup>24</sup> Second, addressing individual rights (most likely under Regulation 15 of the Authorisation Regulations), which process would occur between 2011 and 2013 reflecting the time required for transitional measures. In ComReg’s view, this two-stage interpretation is supported by the fact that many Member States have in fact removed a generally applicable barrier to the use of UMTS in the 900 MHz band, but only a few have, so far, granted individual rights to use UMTS in those bands;

<sup>21</sup> Total of 5,161,992 subscribers. Source: ComReg Quarterly Report (10/106), published 16 December 2010.

<sup>22</sup> Source: 2010 GSM licences. Data available from Siteviewer: [http://www.askcomreg.ie/mobile/mobile\\_sites%3b\\_base\\_stations\\_and\\_masts.36.LE.asp](http://www.askcomreg.ie/mobile/mobile_sites%3b_base_stations_and_masts.36.LE.asp)

<sup>23</sup> Source: operators’ submissions to Siteviewer for their respective 2010 3G licence renewal applications. Data also available from Siteviewer.

<sup>24</sup> European Communities (Public Pan-European Cellular Digital Land-Based Mobile Communications) Regulations 2010 (S.I. No. 195/2010).

- ComReg's approach is also consistent with the June 2009 views of the EU's Radio Spectrum Committee. The final version of its Working Document interpreted the term "make available" under the GSM Amendment Directive as:
  - "prepare all necessary steps so that the authorisation process can start if a potential user so requests and therefore letting potential users know that they will have the possibility to access a frequency band under specific conditions"* (page 4);
- this is what ComReg is proposing in its broader spectrum release proposal, being an award of liberalised 800 MHz, 900 MHz and 1800 MHz spectrum rights coming into effect in 2013, with preparatory/test licences to winners of liberalised rights of use effective following the award until commencement of said liberalised licences; and
- ComReg's approach is consistent with the approach adopted in the recent Competition Appeal Tribunal's (CAT) ruling in the O2 900 MHz case in the UK (see footnote 9 above), where the CAT ruled that an extant 900 MHz licence limited to GSM was not required under the GSM Amendment Directive to be immediately liberalised for 3G use.

### 2.8.3 Additional Points Relating to Liberalisation of Interim Licences

In addition, in Consultation 10/71 ComReg stated that it did not consider it would be proportionate to grant liberalised rights of use to address competition and consumer issues that would be specifically GSM-related. ComReg notes that this point was not addressed by respondents. Accordingly, ComReg remains of the view that it would not be proportionate to grant liberalised 900 MHz rights of use to address what are GSM-only consumer and competition issues, particularly where ComReg considers there may be a significant risk of distortions to competition (for spectrum rights and in downstream markets) from the grant of liberalised 900 MHz rights of use to Vodafone and/or O2.

Furthermore, ComReg considers that the issue of liberalised interim rights of use could be viewed as discriminatory treatment of the remaining existing operators and potential entrants, and runs a greater risk of giving rise to a distortion of competition than a GSM-only licence. For instance, if full liberalisation of interim licences were allowed, there would be greater and significant asymmetry in the position of O2 and Vodafone on the one hand and H3GI (and Meteor) on the other hand in relation to the 900 MHz band, without objective justification for the creation of such asymmetry such as consumer disruption risks.

### 2.8.4 Conclusion

For the reasons identified above, ComReg does not consider it appropriate to grant liberalised rights of use as part of its Interim Licence Proposal.

## 2.9 Duration of Proposed Interim Licences

In Section 3.2 of Consultation 10/71, ComReg set out a number of basic assumptions regarding how spectrum rights of use would be granted under the Interim Licensing Proposal, including that Interim Licences would:

- be granted on a once-off, fixed term basis;
- that such licences would be annually renewable during the fixed term as per the existing GSM 900 MHz Wireless Telegraphy Act licensing regime;
- licences and all spectrum rights of use granted by ComReg under the Interim Licensing Proposal would fully and entirely expire one day prior to 800 MHz and liberalised 900 MHz spectrum availability (to be identified by ComReg) without any right of renewal, extension, or any other form of prolongation including issue of new GSM 900 MHz licences irrespective of whether the licensee is successful at obtaining 800 and/or 900 MHz spectrum; and
- that it was envisaged that each of Vodafone and O2 would be required to sign a statement of agreement to that or similar effect.

ComReg received two responses relating to the proposed duration of Interim Licences.

### 2.9.1 O2 Submission

#### 2.9.1.1 Views of O2

One respondent, O2, agreed with ComReg's proposal that there should be a single commencement date for licences for new spectrum allocated in the 800 MHz and 900 MHz bands and stated that the logical and minimum required extension to be granted to Vodafone and O2 would be for the current spectrum ( $2 \times 7.2$  MHz each) until 2013. It additionally submitted that the duration of the interim licences should be modified (at least for  $2 \times 5$  MHz) to 2015 and, in this regard, referred to its proposal in response to Consultation 09/99.<sup>25</sup> Reasons cited by this respondent for this view, include that:

1. *"It would allow the expiry of these interim licences to coincide with the expiry of Meteor's current GSM licence thereby giving a common date for release/reassignment of the relevant spectrum."* It was also noted that a review of 900 MHz licences would seem to indicate that the trend throughout Europe where

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<sup>25</sup> Accordingly, this respondent requested that O2 and Vodafone be granted an interim licence which should be for:

- the currently assigned  $2 \times 7.2$  MHz from May 2011 to January 2013;
- reduced to  $2 \times 5$  MHz from January 2013 to 2015;
- on the assumption that ComReg would encourage Meteor to relinquish  $2 \times 2.2$  MHz of its current  $2 \times 7.2$  MHz from January 2013.
- According to this respondent, this would give a uniform availability sub-1GHz liberalised spectrum in ComReg's assignment process of:
  - 10 lots of  $2 \times 5$  MHz available from 2013 to 2010; and
  - 3 additional lots available from 2015 to 2030.

- 900 MHz licences expire is to grant extensions so as to ensure that all current licences expire concurrently (e.g. Netherlands, Spain, Switzerland, etc.);
2. *“It would address the imbalance inherent in allowing Meteor as the only GSM operator to enter an auction with the advantage of guaranteed 900 MHz spectrum until 2015 (described in greater detail in section 13 of O2’s 09/99 Response). The proposal for a reduction to 2×5MHz had been contingent upon being given sufficient advance notice to plan and implement network re-configurations necessary to reduce down to 2×5MHz”;*
  3. it was assumed by this respondent that ComReg will encourage Meteor to relinquish 2 × 2.2 MHz of its current 2 × 7.2 MHz from January 2013;
  4. *“It would ensure that all existing GSM operators had a minimum of 4 years from auction outcome to transition their networks in the event of loss of spectrum (considered by it to be a legal and practical requirement previously put forward in its response to Consultation 09/99)”;* and
  5. *“It would go some way towards dealing with O2’s identified legitimate expectation of licence continuation on a demonstrable need basis (albeit not fully addressing that legal right, and O2 hereby continues to reserve its position in that regard)”<sup>26</sup>;*

#### 2.9.1.2 ComReg’s response to O2 submission

In relation to **bullet point 1**, ComReg would respond as follows:

- whilst ComReg notes that co-termination of existing GSM licences has been adopted in a number of Member States, co-termination of interim licences with Meteor’s existing GSM 900 MHz licence is not, in ComReg’s opinion, necessary or justified in the context of ComReg’s broader spectrum award proposal because:
  - co-termination, in the present context, would not be proportionate as the consumer, competition and other reasons identified by ComReg (and respondents) in support of the Interim Licence Proposal relate only to the interim period between expiry of GSM 900 MHz licences in May 2011 and proposed commencement of liberalised 800 MHz, 900 MHz and 1800

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<sup>26</sup> O2 also stated, elsewhere in its submission:

*“In O2’s 09/99 Response in particular, and in previous responses, we detailed the basis upon which O2 is entitled at law (e.g., under the doctrine of legitimate expectation), to have its current 900 MHz licence extended or renewed in accordance with the undertaking given by ODTR (ComReg) in its 2001 Information Memorandum. We further detailed the legal basis upon which a spectrum allocation process that built in a risk that the existing operators would not obtain spectrum without giving a period of at least 4 years notice to those operators, constituted a breach of ComReg’s own obligations, functions and objectives. The present proposal does not address either of these issues. O2 considers that the concerns under these headings remain valid. In the circumstances O2 has no option but to reiterate those concerns by reference in particular to the relevant sections of O2’s 09/99 Response, and must fully reserve its rights in relation thereto, including to object to any ultimate Decision of ComReg. O2’s comments in this document in relation to ComReg’s current proposal are entirely without prejudice to O2’s position on these and other issues. Although O2 welcomes some of the proposals in ComReg’s latest consultation, that is insofar as the proposals have moved on from those in ComReg’s third consultation and not because they necessarily address the legal concerns that O2 has outlined in its previous responses.”*



MHz licences in early 2013 (following ASO). That is, it would be disproportionate to grant GSM rights of use until 2015 when Vodafone and O2 could obtain “replacement” liberalised 900 MHz rights usable from 2013. This is particularly so if part of this respondent’s proposal were for O2 and Vodafone to be granted an early liberalisation option (on the same basis as currently proposed for Meteor); and

- such an extension to 2015 would not be the most efficient or effective use of spectrum.

In relation to **bullet point 2**, ComReg would respond as follows:

- while ComReg acknowledges there to be a difference between the situation of Vodafone and O2, on the one hand, and Meteor on the other in relation to existing GSM 900 MHz rights of use in the period between 2013-2015, it notes that there are many differences between these particular operators. For instance, Vodafone and O2 entered the mobile market earlier than Meteor, have considerably higher market shares than Meteor, and would, under the Interim Licence Proposal, have longer GSM 900 MHz rights of use than Meteor (approximately 17 years compared to Meteor’s 15 years). In ComReg’s view, what is more relevant, in present circumstances, is whether any particular differences warrant differential treatment so as to avoid discriminatory treatment and/or material distortions to competition. In this regard, ComReg does not believe that Meteor’s licence right which runs until 2015, making it the only GSM operator that would have “guaranteed” GSM 900 MHz spectrum rights in ComReg’s broader spectrum proposals, would be unduly discriminatory to Vodafone and/or O2 or would give rise to material distortions to competition, particularly in the context of a proposed full band auction;
- furthermore, ComReg notes that having GSM-only 900 MHz rights, in a scenario where other operators have access to liberalised spectrum is likely to be a serious competitive disadvantage to Meteor (through the combination of existing GSM-only rights of use and the application of the then proposed 10 MHz 900 MHz spectrum cap) and was one of the factors which prompted ComReg to put forward the early liberalisation option.

In relation to **bullet point 3**, ComReg does not consider it reasonable, proportionate or objectively justified to require Meteor to reduce its existing spectrum holdings. In this regard, ComReg’s view is informed by, amongst other things:

- it would not appear to be necessary to require Meteor to relinquish this spectrum in order for ComReg to achieve its objectives and accordingly, any such requirement would be disproportionate;
- it would not be fair, reasonable or justified to curtail the quantum of existing rights in present circumstances where investment plans have, presumably, been based upon an assumption of the use of the entire spectrum assignment (2×7.2 MHz) over the entire duration (15 years), particularly where the other GSM 900 MHz operators would, under ComReg’s proposals, be granted an additional 2 years of GSM 900 MHz rights of use; and

- ComReg’s preference of respecting, wherever possible, existing rights of use (subject to the potential requirement to relocate existing GSM rights to ensure efficient co-existence with liberalised rights of use in the same band).

In relation to **bullet point 4**, ComReg responds as follows:

- for reasons previously expressed, ComReg considers the likelihood of existing GSM operators with expiring GSM 900 MHz, in a position to acquire equivalent rights of use prior to said expiry in an open competition of the type proposed, not gaining sufficient spectrum rights (in this case 2×5 MHz of 900 MHz spectrum) to be low; and
- in addition, ComReg engaged Red-M/Vilicom to independently assess the nature of activities, time and costs involved with an existing GSM 900 MHz operator “retuning” its network from a holding of 2×7.2 MHz to 2×5 MHz of 900 MHz spectrum (or “Scenario 2”). In this regard, ComReg refers to Red-M/Vilicom’s report (ComReg Document 10/71c) which, in summary, found that:
  - the worst case timeframes associated with Scenario 2 varies from 15 months to 2 years for 90% of the required new-build.<sup>27</sup> Where planning and contractual issues are involved, the report highlights that a timescale of 4 years could be likely; however, it emphasises that the absence of these sites is only likely to cause minor local quality of service issues. Therefore, on a network-wide basis, one could reasonably assume that any required new-build could be completed within a maximum of 2 years (again, leaving aside the ability of the affected operator to avail of other technical and non-technical means).<sup>28</sup>

In relation to **bullet point 5 (and related footnote)**, ComReg responds as follows:

- ComReg’s approach to, and position on, this issue was clearly set out in section 4.1 of its response to Consultation 09/14 and again in section 6.5 of its response to Consultation 09/99, and ComReg points out that its approach and position remains unchanged.

## 2.9.2 Vodafone submission

### 2.9.2.1 Views of Vodafone

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<sup>27</sup> Scenario 2’s findings are modelled for the worst case situation where an operator built 414 new greenfield 900 MHz sites. It is highly unlikely that an existing GSM operator would employ such a strategy as it has other technical and non-technical measures available its disposal. The use of these other measures would reduce the timeframes associated with this scenario. These other measures include the use of Advanced Multi-Rate (AMR) coding, the offloading of traffic onto the 1800 MHz and 2100 MHz networks, the installation of additional 900 MHz, 1800 MHz, 2100 MHz antenna on existing sites, the use of national roaming, the use of infrastructure sharing, etc.

<sup>28</sup> It is important to remember that these findings are the worst-case timeframes and based on a theoretical planning model and one would expect an operator to be more efficient and complete any necessary transition steps in a significantly shorter timeframe.

Vodafone, submitted that:

1. *“a specific end date for the proposed Interim Licences had not been set out by ComReg, and that termination of the licences is contingent on the circumstances appropriate for the implementation of the new licences (awarded as a result of the auction process envisaged as part of the licensing proposals set out in ComReg’s present consultation document) being in place”;*
2. *“basing the termination date of the Interim Licences on the realisation of the conditions required for optimal implementation of the new 800 MHz and 900 MHz licences, rather than an arbitrary end date by which time these conditions may not yet have been achieved, is the most appropriate approach”;*
3. *“there would be significant benefit in ComReg defining the minimum conditions that would be required to be met to enable new 800 MHz and 900 MHz licences to enter into force (and consequently trigger the expiry of the Interim Licences) efficiently.”* In that regard, it proposed the following conditions as being particularly important and necessary in order to maximise regulatory certainty for market participants:
  - (1) *“The conclusion of the award process for new 800 MHz and 900 MHz licences;*
  - (2) *Verification that spectrum in the 800 MHz band has been cleared for use by all the new 800 MHz licences awarded as a result of the auction process currently proposed for 2011;*
  - (3) *Satisfactory completion of necessary relocation and/or retuning of spectrum usage within the 900 MHz band by existing 900 MHz licensees so as to minimise the effect on the provision of existing communications services to end users and enable holders of new 900 MHz licences to take up their specified spectrum usage rights. (To avoid any potential for undue delay in implementation of these measures to unjustifiably defer the entry into force of new long term 800 MHz and 900 MHz licences, Vodafone considers that this condition would not necessarily have to be met where there was objective reason to believe that one or more of the existing licensees were not making all reasonable efforts to expedite the process);*
  - (4) *The conclusion of all and any legal proceedings that may be brought by any party in relation to final decisions by ComReg in relation to the Interim Licences and/or the proposed 900 MHz and 800 MHz spectrum award process; and*
  - (5) *The provision of sufficient advance notice to existing licensees of a specific expiry date of the Interim Licences. This would occur only after conditions 4 (in the event that legal proceedings were initiated) and 1 have been met in full and after confirmation that sufficient progress toward the achievement of conditions 2 and 3 had been achieved to ensure that they would be completed within the notice period. We consider that a minimum notice period of 3 months would then be required in this context. “*
4. Vodafone considered that *“the fulfilment of all of the above conditions would be necessary before effective availability of new 800 MHz and 900 MHz licences can*

*occur. These conditions are transparent and can also be objectively justified in terms of ComReg's other statutory objectives such as maximising benefits to end users and promoting/safeguarding competition";*

5. Vodafone asserted that *"the above timelines are to a significant degree under the control of ComReg as the timing of publication of the final Interim Licence Decision will be determined by it, and this will influence the timing of when the proposed minimum conditions will be met. The earlier the implementation of the Interim Licence Decision then the sooner the date of new 800 MHz and 900 MHz licence availability, and provision of advanced broadband services to end users, will occur. In this regard we would urge ComReg to prioritise the activity required to foreshorten these timelines";*
6. Vodafone further asserted, In relation to condition 4 that: *"it is clear that if legal proceedings are initiated in relation to the proposed Interim Licence Decision, the final decision on the 900 MHz and 800 MHz licensing process, or the outcome of the proposed spectrum award process, then relocation and/or retuning within the 900 MHz band could not be initiated until these proceedings were concluded. Timelines for completion of such steps would have to be extended accordingly, and the date for new 900 MHz and 800 MHz licence availability deferred to take account of any legal appeals were these to arise. It is appropriate and necessary that this, and the other proposed conditions should be explicitly taken account of in ComReg's Interim Licence Decision".*

#### 2.9.2.2 ComReg's Response to Vodafone Submission

In Consultation 10/71, ComReg proposed that GSM 900 MHz rights of use granted under the Interim Licence Proposal would *"fully and entirely expire one day prior to 800 MHz and liberalised 900 MHz spectrum availability (to be identified by ComReg) without any right of renewal, extension, or any other form of prolongation including issue of new GSM 900 MHz licences irrespective of whether the licensee is successful at obtaining 800 and/or 900 MHz spectrum. It is envisaged that each of Vodafone and O2 would be required to sign a statement of agreement to that or similar effect."*

ComReg notes that its proposal in Consultation 10/71 did not provide a specific end date and the reason for this was that the steps currently envisaged for securing 800 MHz availability (being primarily, in overview, the level of Digital Terrestrial Television (DTT) rollout/coverage and subsequent ASO) and therefore the proposed commencement date of liberalised 800 MHz and 900 MHz licences (as set out in Consultation 10/71), are not fully within ComReg's control.

At first glance, some of Vodafone's "minimum conditions" appear reasonable. However, ComReg does not agree that the expiry of proposed interim licences should be made subject to the fulfilment of these conditions. In this regard, ComReg notes:

- that some uncertainty, for now, remains in relation to certain of the conditions identified. ComReg is also aware of the potential for delay arising from certain aspects identified by this respondent;
- however, the situation in relation to many of these conditions has, and will continue to, become clearer;

- in such circumstances, it does not seem reasonable or necessary to “copper-fasten” the duration of proposed interim licences to the fulfilment of such conditions in this manner;
- further, in so far as concerns the effect of proceedings (if any), ComReg is strongly of the view that it is not for ComReg to pre-empt or fetter what, if anything, the courts would do by way of interim or other relief in the event of appeals. Such issues should fall to be considered, if at all, when an applicant with standing brings proceedings in which interim relief is sought and any such relief would be a matter for the court;
- in addition, ComReg considers that the inclusion of such conditions could possibly create perverse incentives for the recipients of the proposed interim licences: For instance, by delaying or frustrating transitional activities or the achievement of other conditions, so as to retain GSM 900 MHz rights longer than would actually be required; and
- in light of the potential for this respondent’s proposals to give rise to such incentives, which if acted upon would arguably be in its own interests and to the detriment of the market in general, ComReg would be concerned about the consequences of any undue delay, such as in relation to efficient spectrum use (being earliest liberalised use of the 800 MHz and 900 MHz bands following ASO), and delayed benefits to competition and consumers as a consequence.

At the same time, ComReg appreciates the need for specificity and market certainty with respect to the proposed duration of interim licences. ComReg is also of the view that the time period covered by the interim licence should be of the shortest duration that is possible and practical taking account of all the relevant circumstances. Accordingly, ComReg is therefore proposing that interim licences would commence from May 16, 2011 and expire on 31 January 2013. This expiration date reflects ComReg’s present understanding of the likely availability of 800 MHz spectrum. This expiry date also takes account of and takes account of some of the scenarios outlined by Red-M and Vilicom in its report on retuning and relocation activities. In the event that any difficulties or delays arise then ComReg can address the impact of such difficulties/delays and corresponding remedial measures at the relevant time and having regard to the best information available at the time.

### *2.9.3 Conclusion*

For the reasons identified above, ComReg considers it appropriate to amend its position with regard to the duration of interim licences as set out in Consultation 10/71 and proposes that interim licences would commence from May 16, 2011 and, expire on 31 January 2013. ComReg is of the view that a fixed expiry date contributes to regulatory predictability.

## **2.10 Other Issues Raised – Timing/Carve-out**

ComReg notes the submissions to Consultation 10/71 and 10/105 and other correspondence received by it in relation to the potential “carve-out” of a decision

regarding the Interim Licence Proposal. ComReg has considered these views and these have informed ComReg's approach of separately addressing the Interim Licence Proposal.

## **2.11 Conclusions**

ComReg considers that the Interim Licence Proposal is compatible with its statutory functions and objectives.

ComReg does not consider that the Interim Licence Proposal infringes the State's obligations under Article 106 TFEU, breach the EU State aid rules in Article 107 TFEU or breach the obligations conferred on it under Article 3(1)(b) TFEU and Article 4(3) of the Treaty on European Union.

ComReg does not consider it appropriate to grant liberalised rights of use as part of its Interim Licence Proposal.

ComReg considers it appropriate to amend its position with regard to the duration of interim licences as set out in Consultation 10/71 and proposes that interim licences would commence from May 16, 2011 and, expire on 31 January 2013. ComReg is of the view that a fixed expiry date contributes to regulatory predictability.

### 3 Draft Regulatory Impact Assessment

This section sets out ComReg’s draft RIA on its Interim Licence Proposal, prepared in accordance with ComReg’s RIA Guidelines (as set out in ComReg Document 07/56a<sup>29</sup>) (“ComReg’s RIA Guidelines”) 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”).

ComReg issued guidelines on its approach to conducting a RIA in August 2007. ComReg’s RIA Guidelines set out, amongst other things, the circumstances in which ComReg considered that a RIA might be appropriate. In summary, ComReg indicated it would 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.

In the interests of continuing to ensure openness and transparency, and given that the outcome of this overall project may significantly impact on the electronic communications sector in Ireland, a draft RIA on options for interim measures to enable ComReg to come to a final conclusion on the overall project, has been conducted and prepared. Alongside comments on this entire document, ComReg invites interested parties to review this draft RIA and to submit any comments or information in relation to it that they believe ComReg should consider in finalising its decision on interim measures. In this regard, ComReg sets out in Chapter 6 of this document the next steps in this process. Annex 5 provides a comparison of the options analysed in this draft RIA in table format.

As set out in ComReg’s RIA Guidelines, there are five steps to this draft 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.

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<sup>29</sup> ComReg 07/56a – Guidelines on ComReg’s approach to Regulatory Impact Assessment – August 2007

### 3.1 Policy issues to be addressed and relevant objectives

#### 3.1.1 Policy Issues

The opportunity to combine the release of the 900 MHz spectrum band with the “Digital Dividend” 800 MHz spectrum band, the latter of which is expected to become available for use for electronic communications services in early 2013, affords the State a unique opportunity to enable the telecommunications sector in Ireland to both provide enhanced coverage and capacity at the current generation of mobile technology (3G/UMTS) and to deploy the next generation of mobile broadband networks (4G/LTE technologies) in the coming 2 years. Such a spectrum release would, under ComReg’s proposals, also include the 1800 MHz band, which is likely to be important primarily for providing capacity in high traffic areas, but also potentially as a substitute in its own right to the sub-1 GHz band. Whether or not to pursue these important opportunities and, if so, the details of how to bring this about, had to be the subject of detailed consultation processes and this has necessarily impacted upon the timing of ComReg’s deliberations.<sup>30</sup> Accordingly, it is clear that ComReg will not be in a position to issue new licences based on the above proposals by the date of expiry of Vodafone and O2’s respective GSM 900 MHz licences in May 2011.

ComReg now has to consider the issue of how best to address the expiry of Vodafone’s and O2’s GSM 900 MHz licences in May 2011. As noted in Consultation 10/71, allowing these licenses to expire naturally without some form of interim measures is simply not a feasible regulatory option as this would deprive millions of customers of a service on which they place a high value. ComReg is of the view that:

- the level of consumer disruption that could arise if Vodafone’s and O2’s licences were allowed to expire naturally; and
- the lack of viable mitigating steps the operators could avail of in the time available before such expiry,

makes prevention of large scale consumer disruption and the associated diminution in competition important policy objectives and significant factors in coming to the view that some form of interim measure is required.

As a general premise, ComReg wishes to stress that its general obligation to foster competition is subject to a broad discretionary power. There is no requirement that the assessment of the promotion of competition be made immediately after the award of the Interim License Proposal. It is perfectly legitimate for ComReg to determine that competition will in the medium to long term be better fostered as a result of the auctioning of a large quantity of 800 MHz/900 MHz spectrum and that the Interim License Proposal is a temporary intermediate step to achieve that goal. This is all the more so considering the fact that the market today is competitive. The assumption that the grant of an interim license of 2 × 5 MHz blocks to H3GI would necessarily be more pro-competitive than any other option, without even considering the implication

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<sup>30</sup> A number of important events occurred in mid-2010 including the Ministerial statement regarding ASO in July 2010, the BAI’s statement regarding commercial DTT in August 2010 and ComReg’s subsequent consultation document (Consultation 10/71) which was published in September 2010.



of such interim licence for the other operators is unsubstantiated and is in fact predicated on a preconceived vision of what the competitive outcome should be.

Thus, ComReg is faced with the policy issue of how to address these expiry related concerns and at the same time allow it to bring forward its final proposals for the award of the relevant spectrum bands in a timely fashion with the expected date of early 2013 for 800 MHz availability in mind. ComReg is considering all the proposed options, including its own proposal set out in Consultation 10/71 and those that have been put forward by stakeholders in response to Consultation 10/105, before making its final decisions on how to award spectrum rights of use in these bands in the currently-envisaged time period of 2013 to 2030. An important element in considering what is a facilitating measure is that the option chosen does not prejudice or prescribe ComReg's final decision. Thus, the policy issue is how to deal with the imminent expiry of Vodafone's and O2's 2G rights of use in a way that does not materially distort competition in the relevant mobile markets or the final decisions on its broader spectrum release proposals which ComReg has yet to make. In essence, ComReg must seek to retain the viability as an option of a full band spectrum award, without predetermining it.

### *3.1.2 ComReg's Statutory Functions, Objectives and Relevant Duties in Relation to Radio Spectrum*

ComReg's statutory functions, objectives and relevant duties in relation to Ireland's radio frequency spectrum are set out in **Annex 1** to this document.

These functions and objectives and the degree to which these may be met under each of the different options, are discussed in more detail in the following Section 3.2. The end of this chapter then assesses the different options against those statutory objectives and duties that do not fall within the RIA analytical framework.

### *3.1.3 Objectives in the context of the RIA analytical framework*

The focus of the draft RIA is, as noted above, to identify the impact of the proposed measure on stakeholders (principally being existing operators (including MVNOs), potential new entrants and consumers) and competition and, in so doing, highlight the option that achieves ComReg's functions and objectives in the most proportionate manner.

Of themselves, the various RIA guidelines provide little guidance on how much weight should be given to the positions and views of each stakeholder group. Accordingly, ComReg has been guided by its objectives which it is obliged to seek to achieve when exercising its functions.

There is a natural overlap with the achievement of some of ComReg's statutory objectives, in particular in relation to the critical one of the promotion of competition,

which includes as ‘sub-criteria’, amongst other things, ensuring that there is no distortion or restriction of competition in the electronic communications sector<sup>31</sup>, ensuring that users derive maximum benefit in terms of choice, price and quality<sup>32</sup> and encouraging efficient investment in infrastructure and promoting innovation. Accordingly, the impact on stakeholders and on competition is considered in the draft RIA in the context, and against the backdrop, of these objectives.

## 3.2 Regulatory Options

This section sets out the options evaluated in this draft RIA as facilitating measures for the release of the 800 MHz, 900 MHz and 1800 MHz bands for the period of 2013 until 2030. These include the Interim Licence Proposal put forward by ComReg in Consultation 10/71 and those put forward by interested parties in response to that consultation. Since, for reasons of imminent and unavoidable consumer disruption mentioned in Section 3.1.1 above, the ‘do nothing’ option, as considered in Consultation 10/71, does not appear to be a practical option. Accordingly, ComReg has not reviewed this scenario as an option in this draft RIA.

Additionally, H3GI proposed that long term administrative grants of one  $2 \times 5$  MHz block at the minimum reserve price to each of Vodafone, O2, Meteor and H3GI, be made in mid-2011. For reasons set out in response to previous consultations and because it has not completed the consultation process in respect of the grant of rights of use in the period 2013 to 2030, ComReg is of the view that it would be inappropriate to administratively assign long-term rights of use at this time. Nonetheless, Option 4, set out below, reflects this proposed option with the term of such licences modified to that of the proposed interim licences.

In summary, these options are:<sup>33</sup>

- **Option 1:** being ComReg’s Interim Licence Proposal, which is to issue GSM-only interim licences (in respect of  $2 \times 7.2$  MHz of 900 MHz spectrum) to Vodafone and O2 that would operate from 16 May 2011 until 31 January 2013;
- **Option 2:** proposed by O2 and being a variant of Option 1, such that interim licences would be issued on a GSM-only basis to Vodafone and O2 that would

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<sup>31</sup> Section 12(2)(ii) of the Communications Regulation Act, 2002.

<sup>32</sup> Section 12(2)(iv) of the Communications Regulation Act, 2002.

<sup>33</sup> ComReg notes that other proposals were received from Qualcomm, Meteor and UPC:

- Qualcomm looked to have the benefits of liberalisation brought forward from 2013;
- Meteor proposed a mediated industry settlement in its response to Consultation 09/99 and 10/105; and
- UPC had no objections to Option 1. UPC also made suggestions as to how to facilitate any final auction by offering bidding credits to operators that terminate their licences early.

ComReg has considered these proposals in the preparation of this document and will further consider these proposals in its response to consultation on its broader spectrum release proposals, noting that ComReg’s proposed decision on interim licences is without prejudice to the adoption by ComReg of any of these or other proposals.

operate from 16 May 2011 until the expiry of Meteor's 2G licence in 2015 (i.e. co-termination of existing GSM 900 MHz licences);

- **Option 3:** proposed by Vodafone and being a further variant of Option 1, such that interim licences (in respect of  $2 \times 7.2$  MHz of 900 MHz spectrum) would be issued on a liberalised basis. In interpreting this proposal, ComReg assumes that this proposal would also include the liberalisation of Meteor's existing GSM 900 MHz licence on the basis of ensuring that there is no distortion to competition or discrimination; and
- **Option 4:** proposed by H3GI<sup>34</sup>, being a variant of Option 3 such that there would also be a grant of an interim license to H3GI in respect of one  $2 \times 5$  MHz block on a liberalised basis, where H3GI's assignment would be either block A or B. ComReg has, for the purposes of the draft RIA, interpreted H3GI's proposal to mean a short-term administrative assignment of liberalised rights of use (i.e. May 2011 to January 2013) so as to enable a fair and reasonable comparison with other proposed interim measures.

It is noted that Options 1 and 2 are quite similar in their main features, with the exception that Option 2 potentially delays the liberalisation of 3 additional blocks in the 900 MHz band from 2013 to 2015 (being those blocks currently occupied by Vodafone and O2's existing 900 MHz assignments) compared to Option 1.

Although not previously canvassed by ComReg in its earlier consultations, ComReg notes that its currently proposed broader spectrum proposal (as set out in Consultation 10/71 and Consultation 10/105) could in principle be modified so as to provide the potential for earlier liberalisation of the 900 MHz band than has been previously proposed, on assumptions including that:

- all transitional activities required to be completed by all existing licensees in the 900 MHz band could be completed prior to both 31 January 2013 and 800 MHz availability;
- all holders of rights of use in respect of the 800, 900 and 1800 MHz bands (whether the rights are then current or contingent or prospective) approving of, or at a minimum not being in such a position to show that they would suffer any disadvantage as a result of, such earlier liberalisation; and
- appropriate spectrum fees would be determined for the period relating to the earlier 900 MHz liberalised rights of use.

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<sup>34</sup> H3GI proposed that each of the four MNOs be granted access to  $2 \times 5$  MHz of liberalised 900 MHz spectrum immediately in mid-2011 by way of administrative grant, with each operator having the opportunity to bid for additional spectrum whether 800 MHz or 900 MHz by auction in 2011. H3GI also noted that, if it were granted one block of  $2 \times 5$  MHz in the unencumbered 900 MHz blocks (Block A or B), then it would "not have any issue" with the use by existing 2G licence holders of their existing 900 MHz spectrum for 3G purposes up to the award of licences secured at auction in 2013.

As these matters would be determined by the outcome of the proposed auction (in particular, whether there could be a licensee with only 800 MHz liberalised rights of use) and events subsequent to that (being the speed at which all transitional activities could be completed by 900 MHz licensees), it is not possible to conclusively state at this point in time whether and, if so when, earlier availability of liberalised 900 MHz rights would occur.

Options 3 and 4 are also very similar, with the exception that Option 4, by including an assignment of equivalent liberalised 900 MHz rights of use to H3GI, could be seen as involving a less distortive effect on *existing* competition in the mobile markets than Option 3 (which would potentially favour existing GSM 900 MHz operators). In this regard, ComReg notes the requirements of the GSM Amendment Directive (and the 2002 Act and Common Regulatory Framework) with respect to ensuring no material distortions to competition and ComReg's stated position to not liberalise existing 900 MHz rights of use because of the competitive distortions that would likely arise. ComReg further notes that the potential impacts of Options 3 and 4 should be viewed not just with respect to existing competitors, but also with respect to potential competitors/competition from within Ireland and from other Member States (in accordance with ComReg's obligations to, amongst other things, promote competition and to promote the internal market).

ComReg notes that paragraph 4 of Article 5(2) of the Authorisation Directive provides:

*“Where Member States grant rights of use for a limited period of time, the duration shall be appropriate for the service concerned in view of the objective pursued taking due account of the need to allow an appropriate period for investment amortisation.”*

The interim licences are being proposed in furtherance of a number of ComReg's objectives including *inter alia*: facilitating the broader spectrum release process; the avoidance of severe consumer disruption, and the avoidance of distortion of competition. As ComReg is proposing to issue the interim licences only to operators with existing infrastructure to provide GSM services in the 900 MHz band, it is not envisaged that there is any need to allow for investment amortisation. In these circumstances, ComReg is of the view that granting the licences for the shortest period that is reasonably required in light of the objectives being pursued is the most proportionate solution.

It is noted that the grant of interim licences until 2015 and, *a fortiori*, the grant of liberalised rights of use under Options 3 and 4 would go beyond addressing the policy issues identified by ComReg as justifying the interim licence proposal (broadly, GSM consumer and competition concerns that would arise if Vodafone and O2 were to not have access to GSM 900 MHz spectrum in the interim period). On the other hand these options could potentially provide the benefits associated with early liberalisation of some or all of the 900 MHz band, relative to Options 1 and 2. However, Options 3 and 4, by involving administrative assignment of liberalised rights of use for the 2011-

2013 period, could cause the disadvantages associated with administrative assignment of liberalised spectrum as set out by ComReg in previous consultations (e.g. see Section 9.1.5 of Consultation 09/99). Accordingly, in ComReg's view, the potential benefits of early liberalisation of some or all of the 900 MHz band offered by Options 3 and 4 should be weighed against a potential knock-on impact on long term competition in the mobile markets (and, indeed competition during the competitive assignment of liberalised licences) or indeed a potential distortion in favour of 900 MHz licensees over 800 MHz licensees.

Having identified and described each of the options, the next step is to analyse each option in turn. This analysis in a RIA focuses on two factors – the impact on stakeholders and the impact on competition. While each option is assessed in a tabular form in Annex 5, the next section outlines ComReg's views on the key issues that arise in terms of impacts on stakeholders and competition.

### 3.2.1 Impact on Stakeholders – Key Issues

As noted above, there are three stakeholder groups which ComReg must consider, being:

- existing operators (including MVNOs);
- potential new entrants; and
- consumers.

#### 3.2.1.1 Impact on existing operators

Vodafone has expressed a preference for Option 3 over Option 1, presumably on the basis that, contrary to its previous statements<sup>35</sup>, it now believes it can manage to run both 2G and UMTS services at 900 MHz using its current  $2 \times 7.2$  MHz allocation by carrying more 2G traffic on its 1800 MHz network. ComReg notes that Option 3 would enable Vodafone to consolidate its leading position in the mobile 2G market and leverage off of this into the 3G market.

O2 would prefer Option 2 to Option 1 and implicitly would appear to prefer both of these to either Options 3 or 4. Of these latter two options, O2 would likely have incentives to prefer Option 3 as it would limit operators with liberalised spectrum to those operators that currently hold 900 MHz rights of use and therefore limit the level of competition that it might otherwise face from new entrants to the 900 MHz band.

Meteor's preference as between the Options 1 and 2 is less clear. However it should be recognised that Meteor supported Option 1, although stating its ultimate preference in responses to consultation 09/99, 10/71 and 10/105 is for a mediated industry solution. In its recent response to Consultation 10/105, eircom Group strongly opposed Option

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<sup>35</sup> Page 42 of Vodafone's response to Consultation 08/57, available at the following - [http://www.comreg.ie/\\_fileupload/publications/ComReg0914s.pdf](http://www.comreg.ie/_fileupload/publications/ComReg0914s.pdf); and [confidential material removed]

4<sup>36</sup> on the basis that, in its view and as stated previously by other respondents, as all 2G operators at 900 MHz would require  $2 \times 10$  MHz, Option 4 would deliver a strong first mover advantage to H3GI and hence distort competition.

H3GI's preferred option is Option 4. Under this option it would obtain access to a block of 900 MHz spectrum on a liberalised basis at the same time as the other MNOs. Given H3GI's comments to earlier consultations, such as to Consultation 08/57, Option 3 would be its least favoured option given that all of its 3G competitors would be provided with the competitive advantages associated with 900 MHz spectrum. H3GI argued against Option 1 on the basis that this was a distortion of competition in favour of Vodafone and O2. H3GI further argued that its ongoing reliance on its roaming agreement with Vodafone means that, relative to the counterfactual of Option 4, it would be less well off as it would have ongoing roaming fees to pay under Option 1. At the same time, it has to be presumed that the decision to enter into the roaming agreement was a commercially sound one whereby the benefits of attracting more customers onto H3GI's network outweighed the related roaming costs. **[confidential material removed]**. For Option 4 to be meaningful it would have to be the case that:

- H3GI would be almost immediately able to roll out advanced services using the 900 MHz band upon receipt of the rights of use (compared to the position of having a preparatory licence and potential test licence under Option 1 in the period between 2011-2013); and
- It would do so in advance of the knowledge that it was successful at securing any such spectrum on a long term basis by way of the proposed broader spectrum release process.

At the same time, as set out above, ComReg notes that there could be the potential of earlier liberalisation of the 900 MHz band under Option 1. This could provide to H3GI the possibility of reducing its reliance on national roaming, assuming that it acquired the relevant spectrum usage rights for the longer 2013-2030 period. ComReg also notes the confidential response of one stakeholder that points out **[confidential material removed]**.

While none of the MVNOs submitted a response in relation to 10/71, in light of their responses to consultation 09/99 it is apparent that any disruption to the capacity available to Vodafone or O2 at 900 MHz would impact negatively on their operations.

In summary, the views of existing operators on the various options would seem to be highly divergent.

#### 3.2.1.2 Impact on Potential New Entrants

Of the four options, potential new entrants would be highly likely to see Option 1 as the best option. This is because it would facilitate the continuation over a minimal

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<sup>36</sup> Page 5 of eircom Group's response to Consultation 10/105.

period of the *status quo* without potentially granting existing operators a first mover advantage in rolling out and commercially providing 3G services using the 900 MHz band. In ComReg's opinion, the mobile market and especially the 3G market is likely to become much more of a "mass market" when the 900 MHz spectrum is liberalised, and any incumbency (first mover) advantages provided under options 3 and 4 are likely to be difficult to overcome, as experience with 2G services in Ireland has shown. For this reason potential new entrants would not likely be in favour of either Options 3 or 4.

In addition, to the extent that Options 3 or 4 would involve a new entrant gaining access to liberalised rights of use from 2011, then such a grant, before any new entrant could have any network in place, would not be of any material benefit over and above the benefit provided by the proposed issue of preparatory licences to same.

### 3.2.1.3 Impact on Consumers

In the present context, there are likely to be a number of key preferences for consumers when determining the ideal regulatory option. These are:

- consumers are likely to prefer options which avoid significant disruption to services that they use and avoid significant expenditure, for instance on new handsets;
- consumers are likely to prefer options which provide enhanced services, which essentially translates into earlier deployment of 3G and 4G services on the 800 MHz, 900 MHz and 1800 MHz bands than not; and
- in relation to the second bullet point, consumers are likely to prefer options which provide enhanced services in such a way that promotes competition so as to maximise long term benefits in terms of choice, price and quality.

#### *Avoiding significant disruption to existing services*

In relation to the first bullet point, ComReg notes that consumers place a high value on the services that they currently consume. As was pointed out by many respondents to earlier consultations, consumers overwhelmingly value 2G services and potential disruption with respect to these services, if both Vodafone and O2 could not offer services using the 900 MHz band in the interim period, would be considerable. In this regard, it is noted that all of the four options as presented should ensure that no significant disruption to existing services would occur.

#### *Earlier liberalisation*

Consumers would likely prefer that the benefits of liberalisation were delivered earlier (noting that such benefits would only be passed on in any appreciable way if the competitive dynamic is, at minimum, maintained).<sup>37</sup>

Depending on the auction outcome Option 1 has the potential to deliver earlier liberalisation in a way that has the potential to also increase competition. Option 4 could deliver liberalised use earlier for particular operators who are best placed to exploit the advantages of advanced services at 900 MHz. However, such a capacity to deliver advanced services at 900 MHz immediately cannot be assumed given the necessity of using full  $2 \times 5$  MHz blocks for such services and the need to maintain services to the large proportion of consumers that still only wish to use 2G services (through much smaller 900 MHz holdings dedicated for the purpose or through migrating traffic to a operator's 1800 MHz network). These difficulties were highlighted by some operators in previous consultations. In particular, all three operators in the 900 MHz band indicated that they would need two  $2 \times 5$  MHz blocks of 900 MHz assignments to supply both 2G and advanced services at the same time. In addition, O2 noted the high likelihood that they would need to continue to service their 2G customers using 900 MHz spectrum up until at least 2015. Vodafone also noted that it is not possible to reduce the number of channels dedicated to 2G traffic (even in sparsely populated areas) without a significant adverse impact on consumers of 2G services. Moreover, to the extent that rolling out advanced services at 900 MHz in the short term requires sunk investments these will not likely be undertaken in advance of the knowledge that the operator was successful in acquiring spectrum (and in what bands) from 2013 to 2030.

Another relevant factor to consider in this assessment is consumers' installed base of compatible equipment. In this regard, Qualcomm estimated that in 2010 over 55% of phones sold in Western Europe were 2G-only phones.<sup>38</sup> In addition, H3GI noted that almost all handsets sold now and indeed for the last 2 years support 3G 900 MHz.<sup>39</sup>

In light of the above, ComReg notes that whilst Options 3 and 4 could be seen as potentially providing for earlier liberalisation than Options 1 and 2, the available information, including that provided by existing GSM 900 MHz operators themselves, raises serious doubts about whether Options 3 and 4 would, in reality, provide for earlier high coverage competitive deployment of 3/4G services. In addition, ComReg notes that Option 1 could be possibly modified to provide for earlier liberalisation of the 900 MHz band (again noting the assumptions identified earlier).

#### *Earlier liberalisation and promotion of competition*

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<sup>37</sup> In the present context, it is ComReg's view that options which provide for earlier liberalisation than not and in such a way that promote competition are more likely to take account of the national objective regarding broadband rollout (being widespread availability of open-access, affordable, always-on broadband infrastructure and services for businesses and citizens).

<sup>38</sup> As shown in Figure 3 of Qualcomm's response to Consultation 10/71, available at the following - [http://comreg.ie/fileupload/publications/ComReg\\_10103.pdf](http://comreg.ie/fileupload/publications/ComReg_10103.pdf)

<sup>39</sup> Page 15 of H3GI's response to Consultation 10/71



Consumers would also benefit from the impact that early liberalisation would have on the costs of delivering high speed mobile data services so long as the competitive dynamic was such that these savings would be passed on. This would lead ComReg to prefer options that would ensure competition would not be reduced from current levels by any decision to liberalise.

Although Options 3 and 4 could potentially provide for earlier liberalisation of part of the 900 MHz band than Options 1 and 2, the available information raises serious doubts about whether Options 3 and 4 would, in reality, provide for earlier high coverage and competitive deployment of 3/4G services.

ComReg acknowledges that under options 3 and 4 operators might be in a position to deploy a small number of 3G cells in the 900 MHz band relatively quickly. ComReg is of the view that while such an outcome might be welcomed by operators it would not appear to provide significant distinct benefits for consumers in general.

Moreover, for the reasons set out in Section 3.2 below, ComReg considers that Option 1 would better preserve competition, both in any competitive process to award spectrum rights of use for the 2013 to 2030 period and in the downstream retail market from now until 2030 without the unnecessary delay to liberalisation provided for under Option 2.

#### *Conclusions – impact on consumers*

In summary, consumers would likely prefer options that avoid significant disruption to existing services and which deliver the benefits of early liberalisation through the most competitive market possible.

Acknowledging there is a certain degree of tension between early liberalisation and the risk of degraded 2G services the overarching position appears to be that consumers will tend to want to see an essentially seamless transition from 2G to competitive 3/4G deployment at the earliest possible date with little or no intervening degradation of service or expenditure by the consumer.

ComReg notes that such a transition would appear to be most easily achieved when the additional 800 MHz spectrum becomes available in early 2013. Also at this time a higher proportion of handsets would be 3G capable.

Although Option 4 could potentially deliver liberalisation benefits earlier than Option 1, a number of factors would strongly suggest to ComReg that it would be difficult, from a consumer's perspective, to see Option 4 as a clearly better option in actually delivering earlier liberalisation relative to Option 1 even in the short term. These factors include:

- the timescales likely involved in deploying UMTS services at 900 MHz (noting the counterfactual of preparatory licences under ComReg’s broader spectrum award proposals);
- the amount of spectrum stated to be required by existing operators to provide GSM and UMTS services simultaneously in contrast to the amount of spectrum that would be available to these operators under Option 4;
- the likely need for operators to know the outcome of any process to award spectrum for the 2013 to 2030 period in advance of making sunk investments; and
- the possibility of earlier liberalisation of the 900 MHz band under Option 1 (noting assumptions previously identified).

Furthermore, Option 1 has the potential to bring about the benefits of liberalisation earlier than 2013 but in a way that would likely allow competition to be preserved or even enhanced relative to Option 4. On a longer time perspective, Option 1 dominates Option 4 if a competitive auction process is used to award liberalised rights of use because it would avoid the latter option’s serious potential for a distortion to competition due to its impact on potential new entrants.

Option 2 and Option 4 would be more difficult to compare as the benefits of early liberalisation would be clearly enjoyed for some years in advance of the 2015 date. However, this would come at some potential welfare loss in terms of potentially dissuading new entry and entrenching current market players. Option 3 would likely be the least preferable option from a consumer's perspective because it would immediately reduce competition both in the market and in any competitive process to award spectrum rights of use. The apparent discrimination in favour of particular operators would all but guarantee that operators contemplating new entry would revise their decisions while also placing H3GI at a competitive disadvantage.

### *3.2.2 Impact on Competition*

ComReg’s role to encourage efficient use and ensure effective management of spectrum<sup>40</sup> has the objective of promoting competition. In this section ComReg considers the relative merits of each option by reference to its effect on competition both in any competitive process to award spectrum rights of use for the 2013 to 2030 period and in the downstream retail market from May 2011 until 2030.

In ComReg’s opinion, Option 1, which reflects the Interim Licence Proposal set out in Consultation 10/71 (with the potential for earlier liberalisation of the 900 MHz band as noted previously), would be the best option in terms of maintaining the level of competition in any competitive process for the assignment of spectrum rights of use for the 2013 to 2030 period (if this were to be chosen as the preferred option). Option 1 leaves all operators, including potential new entrants, in the same position as they are now for any competitive or comparative process to award long term spectrum

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<sup>40</sup> Section 12(2)(a)(iii) Communications Regulation Act 2002.

usage rights. This is in contrast with any option for the interim period that involves administrative assignment of liberalised rights of use to existing market players. Any such option would discriminate against potential new entrants and reduce, potentially substantially, their willingness to pursue entry into the Irish market.

Ensuring that potentially efficient new entrants are not dissuaded from entering the process is also critical for ensuring that competition in the downstream retail market is maximised over the medium and longer term. New entrants that are more efficient than incumbent operators, will increase market share by offering more innovative services at lower prices. This will, in turn, increase the competitive stress felt by the other firms in the market, who will in turn react by striving to offer better services at keener prices. The potential benefits over the period to 2030 are substantial.

H3GI, in favouring Option 4, submits that Option 1 would distort competition and entrench the position of Vodafone and O2. ComReg disagrees with H3GI's contention that the Interim Licence Proposal, in and of itself, (and when viewed in the context of ComReg's broader spectrum release proposals for the 800 MHz, 900 MHz and 1800 MHz bands) would do so. An important reason for ComReg's view in this regard is that, for reasons set out in this document, ComReg continues to consider that interim licences should be granted on a GSM-only basis. As evidenced by H3GI's historic and current behaviour and views, it seems to have no interest in acquiring GSM rights of use for the 900 MHz and/or 1800 MHz band. Moreover, ComReg considers that it has addressed to an appropriate extent the roaming issue raised by H3GI to support its submission (see also further commentary below). ComReg is also concerned that choosing Option 4 over Option 1 might even affect competition in a way which is detrimental to H3GI's position on the market. The following passage from H3GI's submission to Consultation 10/71<sup>41</sup> regarding the time it would take to plan, design and implement a 900 MHz network is important to note in this regard:

*“O2 and Vodafone have designed their network around 900 MHz spectrum. In urban areas this is not relevant as the spacing between sites is dictated more by capacity requirement than the propagation characteristics of the spectrum. In rural areas where the capacity requirement is lower the site spacing is dictated by coverage requirements which are defined by the propagation characteristics of the spectrum. H3GI will require extensive Radio Planning and design work to accommodate 900MHz. O2 and Vodafone also have existing 900MHz antenna systems in place. They will be able to plug UMTS 900 MHz equipment into their existing antenna system and start providing services immediately. In contrast, H3GI will be required to either rig new antennas to support 900 MHz or replace its existing antennas with multi band antennas to deploy 900 MHz. This will require interaction with landlords and may require planning permission. GSM works at both 900 MHz and 1800 MHz and the 3 other operators all hold spectrum in both bands.” (emphasis added)*

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<sup>41</sup> Submission contained in ComReg document 10/103R.

Given the considerable time that would appear to be required by H3GI to plan, design and implement a 3G 900 MHz network, it follows that H3GI may not be in a significantly better position if it were awarded liberalised rights of use from mid-2011 rather than a preparatory licence of the type proposed in Consultation 10/71 at or around the same time under Option 1 (both on the assumption that H3GI was successful in obtaining liberalised rights of use under the proposed auction or any alternative scheme selected for the assignment of such rights). This is particularly so given that no investment would likely take place until the auction results were known as there would be a significant sunk cost component to such investment under Option 4. In addition, H3GI would appear not be in a position to reduce its reliance upon its existing roaming agreement with Vodafone to any great extent until it had planned, designed and implemented a 900 MHz network of sufficient scale regardless of the Option chosen.<sup>42</sup>

It therefore follows that Option 1 (when viewed in the context of ComReg's broader spectrum release proposals) would not likely distort competition as contended by H3GI.

ComReg is of the opinion that Option 2 would simply postpone the benefits of liberalisation for over two additional years without any improvement in competition over Option 1. Indeed, this approach would go beyond addressing the policy issues identified by ComReg as justifying the interim licence proposal in the first place, with the obvious risk of extending those disadvantages associated with administrative assignment (including distortion of competition) as set out by ComReg in previous consultations, for a further two year period.

As noted previously, Options 3 and 4 are very similar, with the exception that Option 4, by including an assignment of equivalent liberalised 900 MHz rights of use to H3GI, could be seen as involving a less distortive effect on *existing* competition in the mobile markets than Option 3 (which would potentially favour existing GSM 900 MHz operators). In this regard, ComReg notes the requirements of the GSM Amendment Directive (and the 2002 Act and Common Regulatory Framework) with respect to ensuring no material distortions to competition and ComReg's stated position to not liberalise existing 900 MHz rights of use because of the competitive distortions that would likely arise. ComReg further notes that the potential impacts of Options 3 and 4 should be viewed not just with respect to existing competitors, but also with respect to potential competitors/competition from within Ireland and from other Member States (in accordance with ComReg's obligations to, amongst other things, promote competition and to promote the internal market).

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<sup>42</sup> It might also be noted that the extent to which operators have deployed modern base station equipment, such as the Ericsson RBS6000 (in document 10/71C at paragraph 6.2.2 Red-M/Vilicom note that this equipment can be upgraded from 2G to 3G use by the insertion of plug-in modules) will have a substantial effect on the length of time required to achieve actual 3G deployment at 900 MHz. In this context it appears probable that Vodafone and O2, while having to cope with capacity constraints, would be in a position to deploy high coverage 3G services more rapidly than H3GI. This could, of course, have distortive effects on competition were Option 4 chosen over Option 1.

Option 3, by affording Vodafone, O2 and Meteor a first mover advantage over H3GI and potential new entrants in the provision of advanced services over 900 MHz spectrum, would likely seriously distort competition in advanced services (with knock on effects on competition in the downstream mobile market as a whole) and would likely have a strong dissuasive effect on potential new entrants from within Ireland and from other Member States. It was claimed by one operator that Option 3 would not create any competitive distortion. As noted above, ComReg does not believe this to be the case and, on the contrary, Option 3 could well have the most distortive effect on competition out of the four options.

Option 4 has the potential to harness the level of competition that exists in the mobile broadband market to deliver the benefits of liberalisation earlier. However, this potential only exists to the extent that existing operators are similarly well placed to roll out UMTS advanced services. If this is not the case then competition could be distorted relative to Option 1. In this regard, ComReg's comments above in relation to the deployment of modern base station equipment might be considered. Further ComReg's general strategy, often stated, has been to seek to use market-based competitive award mechanisms for determining the assignment of spectrum rights, and such an administrative assignment of liberalised rights of use as proposed in Option 4, would be at odds with this strategy.

As is the case for Option 3, the benefits of earlier liberalisation under Option 4 might come at the cost of dissuading new entrants from seeking to enter for the longer 2013 to 2030 period due to the incumbency (first mover) advantage afforded to existing MNOs. Only where ComReg could be certain that the current MNOs are the optimal 900 MHz rights holders for the next 19 years could this concern reasonably be ignored (this point applies equally to Option 3). This is something that no regulator can know. Option 1 would, in contrast, ensure that a competitive outcome is delivered for the 2013 to 2030 period and, as previously noted, it does not, in fact, rule out the possibility of liberalisation of the 900 MHz band earlier than 2013 (again noting some of the assumptions regarding early liberalisation above).

ComReg therefore considers that Option 1 would have a less distortive effect on competition than the other three options, both in any competitive process to award spectrum rights of use for the 2013 to 2030 period and in the downstream retail market from now until 2030.

### **3.3 Option Assessment and Selection**

In the final consideration of the options, it is important to consider transitional issues. If current holders of rights of use are successful in obtaining liberalised spectrum rights for the 2013 to 2030 period, there are likely to be transitional activities required of them before they could make use of such liberalised rights of use ("relocation" and "retuning" as discussed by ComReg in Consultations 10/71 and 10/105). Transition is time-consuming and given the expiry of Meteor's rights of use in 2015 there may even

need to be additional transition potentially at that time. This was something that was considered when devising the draft proposal on auction mechanisms, which is currently the subject of open consideration by ComReg. For this reason, operators will likely want to take the opportunity to use the preparatory licences, and to the extent that ComReg can make them available, test licences, that are associated with Option 1 to ensure that their network is fully up and ready before the 2013 date. This has advantages for consumers in that operators can guarantee better the quality of service on its entire network before it commercially switches on services.

In looking between the options it is clear that the decision really lies as between Option 1 and Option 4. There is a potential trade-off between these options. Option 1 could deliver advanced services potentially as quickly as Option 4 and would also encourage new entry, which is critical to delivering effective competition and innovation over the much longer period until 2030. Option 4 could be seen to more certainly bring forward the benefits of liberalisation. However, the likely reality is that no substantial moves will be made in this regard in advance of the final award of spectrum usage rights for the longer term and given the lack of widespread compatible equipment in consumers' hands, any potential foreshortening of the period until advanced services are actually rolled out in the 900 MHz band may be negligible.

In any case, even if such services were delivered earlier, the benefits of these are likely to be passed on to consumers only to the degree that competition between current operators is not negatively impacted. To the extent that any existing operator cannot immediately roll out these services they become a less efficient competitor. Importantly, Option 4 has the potential to reduce competition in any proposed auction (which has been ComReg's currently preferred option) by carrying with it the strong potential to reduce interest in the Irish market by potential new entrants (by being seen to favour existing operators). This brings with it a serious potential loss to user welfare over the period of 2013 to 2030. It may also give an equal allocation of spectrum when a market-cleared result could be uneven, thereby potentially creating inefficiency and competitive distortion. All things considered, any apparent benefits of earlier liberalisation provided by Option 4 over Option 1 could be almost entirely negated by the costs of both reducing competition between existing players (for example, if all players are not equally ready to realise the benefits of liberalisation) and the dynamic inefficiency induced by dissuading more efficient new entry.

In light of the statutory objective of ensuring the efficient use of spectrum so as to promote competition over the whole period from today until 2030, it would seem to ComReg that Option 1 provides a much better chance that this is achieved with only a small probability that advanced services would be delayed (by, realistically, a maximum of a number of months relative to Option 4 noting the benefits of Option 1's associated preparatory and test licences), and even then it would likely be rolled out on only a patchy basis. Importantly, Option 1 best preserves the viability of the option for ComReg to proceed with its broader spectrum release proposals later in the year, if it so chooses.

A final element to consider is the impact of the Ministerial Directions. These highlight the importance of the roll out of broadband on a balanced regional basis, the sustainability of the undertakings and that the interests of all users of radio spectrum are served.

Option 1 is designed as a facilitating measure to enable the early roll out of advanced mobile broadband services using spectrum in the 800 MHz, 900 MHz and the 1800 MHz bands, where consumers' interests are protected in the meantime and by ensuring that new entrant operators will not be dissuaded. No undertaking in the industry should have its sustainability called into question by the choice of this option over the other options, especially as it represents the continuation of the *status quo*. Sustainability of the operator in these circumstances is a matter of how fit and efficient a competitor is. The long-term sustainability of each of the current operators in the market is likely to be strongly influenced by their success or failure in an award process for liberalised spectrum. As no operator would be guaranteed spectrum under Option 1 each would enter the competitive award process fully aware of the position it would be in if it was unsuccessful in gaining access to liberalised spectrum. **[confidential material removed]**

The promotion of competition is an overarching objective of ComReg with regard to managing spectrum rights of use. As has often been cited in the Irish Courts, promoting competition is not the same as promoting individual competitors. Finally, the roll out of broadband on a balanced regional basis will be facilitated through the ultimate process whereby spectrum rights of use will be granted to operators on a long term basis. Doing so under conditions which encourage competition will help to provide a competitive spur to widespread availability of advanced mobile broadband. The current consultation is an interim step in this regard.

### 3.4 The Preferred Option

In light of the above, ComReg is of the view that, on balance, Option 1 on interim measures is the most proportionate of the options considered in this draft RIA and, accordingly is the preferred option for the reasons already given, including that it:

- effectively eliminates the adverse effects on consumer services and competition that would otherwise likely occur in the event that Vodafone and/or O2 were not to obtain GSM 900 MHz rights of use in the period between licence expiry and proposed commencement of liberalised 800 MHz, 900 MHz and 1800 MHz licences in 2013;
- would enable the full liberalisation of the 900 MHz bands to occur by early 2013 (and potentially earlier than 2013), while minimising any potential for competition to be distorted;
- would, in conjunction with ComReg's proposed preparatory licences and test licences, give all winners of liberalised rights of use between 12 - 18 months during which to roll out new networks and prepare for the launch of new services for consumers;

- would facilitate ComReg’s broader spectrum release proposals on fair, open and non-discriminatory terms; and
- would best meet ComReg’s objective of the promotion of competition and its regulatory obligations in relation to the awarding of spectrum rights of use, by minimising potential market distortions (such as by creating a first mover advantage for incumbent operators).

In summary, ComReg’s proposal, Option 1, represents the option which should deliver the greatest benefits to all stakeholders and competition in the market, while minimising the risks of distortions to competition.

### **3.5 Assessment of Options against other statutory objectives**

The preceding draft RIA considered a number of options potentially available to ComReg within the context of the RIA analytical framework as set out in ComReg’s RIA Guidelines (i.e. impact on consumers, impact on industry stakeholders and impact on competition).

However, reviewing these options also required and involved an analysis of the extent to which the various options would serve to facilitate ComReg in achieving certain of its statutory objectives in the exercise of its functions. In particular, it involved an analysis of the extent to which the various options would serve to promote competition, and enable ComReg to ensure that, amongst other things, users would derive maximum benefit in terms of choice, price and quality, to ensure that there would be no distortion or restriction of competition in the electronic communications sector, whilst at the same time encouraging efficient investment in infrastructure and promoting innovation.

ComReg has considered each of these options with regard to all statutory objectives, criteria and Policy Directions. This section considers, to the extent not already dealt with as part of the draft RIA, whether, and to what extent, the various options would appear to meet those objectives, criteria and/or Directions that appear to ComReg to be relevant to the Interim Licence proposal. These objectives, criteria and Directions include:

- contributing to the development of the internal market, including having due regard to international developments;
- promoting the interests of users/citizens within the Community;
- promoting efficient investment and innovation in new and enhanced infrastructures;
- promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods; and
- taking into account of the interests of all users of the radio frequency spectrum.

#### *1. Contributing to the development of the internal market*



In ComReg's opinion, the following aspects are of particular relevance to the application of this statutory objective in present circumstances:

- 1 the extent to which an option would result in full and earliest liberalisation of the 900 MHz band in a manner which would not distort competition;
- 2 the extent to which an option would promote the establishment and development of trans-European networks and the interoperability of pan-European services, in particular by facilitating, or not distorting or restricting, entry to the Irish mobile market by Electronic Communication Services (ECS) providers based or operating in other Member States; and
- 3 the extent to which ComReg has had due regard to international developments, including consideration of activities of other Member States in relevant matters, in selecting an option and considering any regulatory action required by ComReg in respect of such an option.

### *1.1 Full and earliest liberalisation without distortions to competition*

In relation to the first element, it is ComReg's view that full and earliest liberalisation of the 900 MHz spectrum band would contribute to removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level by falling within the aims of the GSM Amendment Directive<sup>43</sup>, the main purpose of which is to reduce restrictions on the use of the 900 MHz band and obtain the benefits of harmonised use of the 900 MHz band across Europe.

On the basis of its findings in the draft RIA, ComReg is of the opinion that Option 1 would best provide for the earliest liberalisation of the band in a manner that would not distort competition because, for the following reasons in particular:

- whilst Options 3 and 4 could be seen as potentially providing for earlier liberalisation than Options 1 and 2, available information before ComReg, including that provided by existing GSM 900 MHz operators themselves, raises serious doubts about whether Options 3 and 4 would, in reality, provide for earlier high coverage and competitive deployment of 3/4G services. In addition, as Option 2 could potentially delay liberalisation up to 2 years longer than Option 1, accordingly, Option 1 would be the better option;
- Options 3 and 4, relative to Option 1, would likely distort or restrict competition by discriminating against one existing mobile operator and potential new entrants (in the case of Option 3) and against potential new entrants (in the case of Option 4).

### *1.2 Promote the establishment and development of trans-European networks and the interoperability of pan-European services*

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<sup>43</sup> Directive 2009/114/EC

ComReg notes the overlap between this objective and the objective of promoting competition in the provision of Electronic Communication Networks (ECN) and ECS. This is because to enable the establishment and development of trans-European networks requires that operators from other Member States seeking to develop such networks must be given a fair and reasonable opportunity to obtain spectrum rights of use required for such networks and particularly in respect of access to critical spectrum rights of use. As such, options which would restrict or distort competition or otherwise unfairly discriminate against potential entrants (such as through administrative assignment of liberalised rights of use to critical spectrum to incumbent operators) would not, in ComReg's opinion, be likely to meet the requirements of this sub-objective.

In this regard, ComReg refers in its draft RIA to the likely impact of the different options on competition and, in particular, finds that Option 1 would likely be most preferred by potential new entrants because it should minimise the likelihood of existing operators gaining a first mover advantage at rolling out and commercially providing 3G services using the 900 MHz band. Moreover, ComReg notes that options 3 and 4, which have the potential to provide incumbent operators (already having considerable advantages over such entrants, for example, by way of existing infrastructure, customer base etc) with a first mover advantage in the provision of 3G services using sub-1GHz spectrum may disincentivise or otherwise reduce the likelihood of entry by mobile operators from other Member States.

### *1.3 Having due regard to international developments, including consideration of activities of other Member States in relevant matters*

In relation to this aspect of promoting the internal market, ComReg continues to cooperate with other NRAs, including by closely monitoring developments in these jurisdictions so as to ensure the development of consistent regulatory practice and the consistent application of the GSM Amendment Directive and relevant aspects of the Common Regulatory Framework.

For instance, ComReg would refer to its "international updates" as contained in Annex 4 of this paper and its previous consultation papers and its recent assessment of availability of equipment for the 1800 MHz band. ComReg's assessment of these developments in the present context, noting that the position taken by other Member States can be considerably influenced by, amongst other things:

- existing licences and their remaining term;
- competition in the marketplace; and
- domestic legislation and policies,

is that its proposed approach to interim licences and its broader spectrum release proposals are consistent with the approaches taken by other Member States. Moreover, for reasons set out elsewhere in this document, ComReg considers that its proposed approach is entirely consistent with the purpose and intent of the GSM Amending Directive – being earliest liberalisation of the 900 MHz band without creating distortions to competition.

ComReg notes in this connection that “having due regard to” means just that, and it does not mean that there is a necessity to strictly adhere to international developments, which may point in a number of different directions, or that appropriate and relevant distinctions ought not to be brought to bear on ComReg’s approach in this jurisdiction where these are objectively justified.

*2. Promoting the interests of users/citizens within the Community*

The impact of the various options on users from a more general perspective, and in the context of ComReg’s objectives in the promotion of competition, has been considered in the context of the draft RIA and it is not proposed to consider this matter further here. The majority of the measures set out for this statutory objective are, in ComReg’s view, more relevant in the context of licence conditions, rather than spectrum assignment/award process.

*3. Promoting efficient investment and innovation in new and enhanced infrastructures*

In the present context, while ComReg has not finalised its views in respect of the licensing of rights of use in respect of the 800 MHz, 900 MHz, and 1800 MHz bands, ComReg currently considers that flexible options which would have the capacity to facilitate a fully competitive, joint release of the 800 MHz, 900 MHz and 1800 MHz bands – thereby ensuring that winners of liberalised spectrum rights in these bands are appropriately incentivised to efficiently deploy new technologies and provide advanced communications services to end users – would better achieve the aims of this regulatory principle than not.

On this basis, ComReg considers that Option 1 is more likely to be the better option because it preserves the viability of a multi-band award, whereas administrative assignment of short term liberalised 900 MHz rights of use (envisaged under the other options identified, Options 3 and 4) could impair the benefit subsequently achievable from the broader spectrum release, and would be unlikely to result in efficient investment in UMTS/LTE equipment in the timeframe involved. This is because those licensees who were assigned short term liberalised rights of use would be unlikely to undertake the capital investment required to provide widely deployed 3G services using 900 MHz spectrum, as they would not yet know whether they would be successful in acquiring sub-1GHz spectrum rights from 2013 to 2030.

Once the results of the longer term spectrum assignment process are known, and likely in reliance on preparatory and test licences, all operators winning such spectrum rights of use will be in a position to plan their investment and networks and deploy equipment in a structured and efficient manner.

*4. Promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods*

In the present context, ComReg considers the following objectives to be of particular importance to achieving the aims of this regulatory principle:

- promoting regulatory predictability in relation to availability of spectrum rights to other users of spectrum by applying, an open, transparent, and non-discriminatory approach to spectrum release; and
- promoting regulatory predictability by avoiding administrative mechanisms in relation to (a) the quantum of spectrum assignments (b) the beneficiaries of assignment decisions and (c) spectrum usage fees for liberalised rights of use.

In relation to the first objective, and as previously stated in this paper, ComReg considers that Options 3 and 4 would likely distort or restrict competition by discriminating against an existing mobile operator and potential new entrants (in the case of Option 3) and against potential new entrants (in the case of Option 4). ComReg considers that Option 1 would be the better option in this regard as it would facilitate the continuation of the *status quo* without potentially granting existing operators a first mover advantage at rolling out and commercially providing 3G services using the 900 MHz band.

In relation to the second objective and to the extent that Options 3 and 4 would involve an administrative determination of spectrum fees for proposed recipients of liberalised 900 MHz spectrum, ComReg considers that Options 3 and 4 would not promote regulatory certainty, because:

- the lack of specificity of Options 3 and 4 regarding how spectrum fees would be precisely determined raises concerns about the ability of these options to meet ComReg's obligations in relation to regulatory predictability, transparency, reasonableness, proportionality and in terms of encouraging efficient spectrum use;
- the use of administrative mechanisms to determine, amongst other things, spectrum fees for liberalised rights could involve the risk of unnecessary delays, poor outcomes and uncertainty that would be involved with such processes;
- ComReg notes that the package bidding mechanism currently proposed for the assignment of long term rights of use in respect of the 800 MHz, 900 MHz and potentially 1800 MHz bands may not provide a clear mechanism to estimate the price paid in respect of one block in any one band. This would appear to render any proposal to levy spectrum fees for interim licences based on the auction outcome impracticable.
- additional concerns regarding discriminatory treatment could be raised to the extent that these options would involve those receiving administrative assignments paying a different amount to the prices determined by whatever mechanism is eventually selected for the assignment of rights of use in respect of the 800 MHz, 900 MHz and potentially 1800 MHz bands, for equivalent spectrum rights of use.

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

This policy direction requires ComReg to ensure that, in its management of the radio frequency spectrum, it takes account of the interests of all users of the radio frequency spectrum.

ComReg has considered the options in light of the interests of:

- MNOs both existing operators and new entrants;
- MVNOs;
- Consumers; and
- Large scale end users such as the ESB in respect of its billing systems.

In ComReg's view, Option 1 is the best option as it would flexibly facilitate the continuation of the *status quo* for the time being and in the most proportionate manner, without administratively granting any rights of use beyond what is required to avoid severe disruption for operators and end-users. At the same time, ComReg may develop its current proposals, including the addition of 800 MHz and possibly 1800 MHz spectrum into the overall award process.

Equally, while MVNOs may wish to offer 3G/4G services in the medium term, any short term degradation in the capacity of the MNOs to carry MVNO services is likely to damage their competitive position in the short term especially as the two operators facing imminent licence expiry are the only two national networks, and the only two networks currently supporting MVNOs. Accordingly, ComReg considers that the MVNOs would likely prefer Option 1, or possibly Option 2, although Option 2 implies a delay in the availability of significant additional liberalised spectrum capable of supporting advanced mobile services.

The position in respect of consumers has been considered above in the draft RIA.

From the response of the ESB to ComReg 09/14 it is apparent that large scale end users, especially those using embedded telemetry plant, want long term predictability as to the availability of services compatible with their embedded plant. Accordingly, absent information on the likely future deployment of GSM by holders of liberalised rights of use and acknowledging that ComReg does not have any mandate to encourage operators to provide services that they may wish to discontinue, it appears probable that such users may prefer Option 2.

## 4 Licence Conditions and Spectrum Fees

### 4.1 Introduction

This chapter considers responses received to Consultation 10/71 regarding ComReg's proposal for licence conditions and applicable fees for its proposed interim licences.

### 4.2 Licence conditions (part of Q5 of Consultation 10/71)

In Consultation 10/71 ComReg proposed that the existing GSM 900 MHz licence conditions applicable to each of Vodafone and O2 would be attached to their respective proposed interim licences.

Additionally, ComReg noted that variations to these licence conditions may be required during the term of the proposed interim licences.

ComReg consulted upon its proposals relating to licence conditions as follows:

Q. 5 of Consultation 10/71 asked: "Do you agree with ComReg's Interim Licence Proposal and proposed licence conditions for same? Please provide reasons for your view."

#### 4.2.1 Summary of Responses

Three responses were received on this issue. In the main, all three respondents were supportive of ComReg's proposals. It is noted that one respondent submitted<sup>44</sup> that the Interim Licences should not be limited to GSM-only technology. This respondent's proposal is addressed in Chapter 2 and 3 of this paper.

Reasons cited by the respondents in support of ComReg's proposed licence conditions include:

- that it is essentially a continuation/extension of the current licences for a limited time only. It would be disproportionate and inappropriate to expect an operator to implement any significant network or service modifications for such a short period; and
- the proposal is not disproportionate as these conditions are already being fully complied with or exceeded and will only apply for the limited additional period of the Interim Licence.

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<sup>44</sup>This issue was already discussed in Chapters 2 and 3 of this document as well as Section 3.2 of ComReg 10/71.

#### 4.2.2 ComReg's Position:

Having due regard to responses received, ComReg considers that its proposal to set licence conditions for interim licences on the basis of existing GSM 900 MHz conditions for each of Vodafone and O2 GSM licence is:

- appropriate and objectively justified in present circumstances, as the interim licence proposal is designed to maintain the *status quo* by enabling the continued provision of GSM services by Vodafone and O2 in the interim period while allowing ComReg to develop its broader spectrum release proposals, including the addition of 800 and 1800 MHz spectrum into the overall award process;
- proportionate, as it would not introduce additional conditions, save as noted below, or reduce the nature and level of conditions currently in place for each of Vodafone and O2; and
- non-discriminatory as it proposes the same treatment for both Vodafone and O2 in respect of their existing licence conditions, and would not distort the existing position between these licensees and the remaining GSM 900 MHz operator or operators in other bands.

To this end, ComReg has prepared draft licence schedules for consideration by interested parties. The draft licence schedules are set out in Annex 3 as part of the draft Statutory Instrument.

ComReg notes that, over the lifetimes of the proposed interim licences, variations to conditions of same may be required, for the following reasons:

- to ensure the fulfilment of ComReg's statutory functions, objectives and duties (in accordance with the requirements set out in Regulation 15 of the Authorisation Regulations). In this regard, it should be noted that ComReg issued a provisional consultation on electronic, and other, itemised bill formats (ComReg Document 10/96) and the outcome of this consultation process may necessitate an amendment to the proposed Interim GSM licences and other existing GSM and 3G licences; and/or
- as appropriate, to facilitate any transitional arrangements that may be required in advance of the new liberalised licences that ComReg proposes to issue covering the 900 MHz band (and in accordance with the requirements set out in Regulation 15 of the Authorisation Regulations).

### 4.3 Spectrum fees (Q6 and Q7 of Consultation 10/71)

In Consultation 10/71, ComReg outlined its proposal for the spectrum fees for proposed interim licences which can be summarised as follows:

- interim spectrum fees to be based on the licence fees currently paid by each of Vodafone and O2 for their respective GSM 900 MHz licences. This appeared a reasonable approach having regard to ComReg's intention to maintain the *status quo* in the interim period to allow it to develop its

current proposals, including the addition of 800 and potentially 1800 MHz spectrum into the overall award process; and

- apply indexation to the current fees to account for inflation in the period since the commencement of these licences in May 1996. The indexation variable proposed was the Consumer Price Index ('CPI'), which is compiled by the Central Statistics Office ('CSO'). Based on CSO data, over the period between May 1996 (when the relevant GSM 900 MHz licences were issued) and July 2010, there was a 42.54% rise in general price level.<sup>45</sup>

Based upon the above, ComReg proposed in Q6 of Consultation 10/71 that the total spectrum fees per annum for  $2 \times 7.2$  MHz of spectrum would be €2,509,719 for Vodafone and €3,113,014 for O2.

ComReg consulted upon its proposals relating to spectrum fees as follows:

Q. 6 Do you agree with ComReg's proposal to apply the spectrum usage fees (being spectrum access fee and yearly licence fee) as provided for in their respective current GSM 900 MHz licences of Vodafone and O2, but with both elements indexed to inflation? Please provide reasons for your view.

Consultation 10/71 recognised that that there could be other appropriate methods for setting spectrum fees for the proposed interim licences and sought views from interested parties as follows:

Q. 7 Are there any other approaches to determining appropriate spectrum usage fees for interim licences? Please provide reasons for your view, including any other options which you consider may be appropriate having regard to ComReg's statutory functions, objectives and duties.

#### 4.3.1 Responses to Questions 6 and 7 of Consultation 10/71

Seven respondents responded to one or both of these questions.<sup>46</sup>

One respondent considered that ComReg's proposal did not take enough account of the profitability of the 900 MHz band and instead proposed the introduction of an 'Interim Tax' and suggested that this tax could be based upon differences in profitability between the profitability of the 900 MHz band to date and the forecasted profitability for the interim period which would not include similar set-up costs. The imposition of such an 'Interim Tax' on profits would not appear to be supported by

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<sup>45</sup> See CSO data available from <http://www.cso.ie/px/pxeirestat/database/eirestat/Consumer%20Prices/Consumer%20Prices.asp>.

<sup>46</sup> One respondent, in its response to Question 7, requested that ComReg consider an alternative approach for the allocation of spectrum, stating that if spectrum is allocated via a public auction, there is a strong possibility that utilities will be denied access to spectrum. As this response is not related to the issue of spectrum fees for interim GSM Licences ComReg is not considering this suggestion any further in this document.



ComReg's statutory powers or objectives. As such it is not appropriate for ComReg to consider this suggestion any further.

The responses from the remaining five respondents are summarised below in relation to:

- the spectrum fee proposal as set out in Consultation 10/71; and
- alternative approaches to determining the spectrum usage fees for interim licences.

#### 4.3.1.1 The Spectrum Fee Proposal as Set Out in Consultation 10/71

ComReg received four responses relating to its spectrum fee proposal, being from the existing mobile operators. Two of these four respondents submitted that ComReg's proposed spectrum usage fees were too low and that it undervalued the spectrum, whereas the other two respondents submitted that ComReg's proposed spectrum fees were too high.

##### *ComReg's proposed spectrum fee is too low*

One respondent fundamentally disagreed with ComReg's interim licence proposal and stated that:

- *“the granting of interim licences to Vodafone and O2 would clearly be conferring an advantage on these entities in that Vodafone and O2 will clearly be paying far less for the relevant 900MHz spectrum than the State might otherwise be expected to secure pursuant to a tender competition for such spectrum.”*

The other respondent which believed that ComReg's proposed spectrum fees were too low, suggested the following approach:

- The introduction of an additional calculation, namely the conversion of the once-off spectrum access fee paid by Vodafone and O2 in 1996, into a 15-year annuity payment based upon a discount rate of 10.2%. It noted that this step is used elsewhere in ComReg's consultation paper, where the annual spectrum usage fee proposed for a new liberalised licence is calculated using this method. Once this step was completed, similar to ComReg's proposal, the total spectrum fees per annum should be calculated (by adding the spectrum access and usage fee elements) and then adjusted for changes over time using the CPI inflation index. It acknowledged the CPI as a generally accepted index.

On the basis of these suggestions, this respondent calculated that the total spectrum fees per annum for  $2 \times 7.2$  MHz of spectrum would be €3,709,881 for Vodafone and €4,913,258 for O2.<sup>47</sup>

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<sup>47</sup> Meteor's answer to Question 6 from Consultation 10/71, as published in ComReg Document 10/103R.

### ComReg's proposed spectrum fee is too high

The remaining two respondents suggested that ComReg's proposed fees were too high and provided the following reasons in support of their views.

One respondent believed that ComReg's proposal was in breach of ComReg's obligations, and was discriminatory and in breach of State Aid rules. In particular, it noted that:

- ComReg is proposing a higher fee for O2 than for Vodafone, and given that the rights of use proposed to be granted are essentially the same, it believed that an identical licence fee should be charged;
- ComReg's proposal was excessive and that it did not believe that the principle of setting the spectrum usage fees to a level to ensure the optimal use of resources was relevant for temporary arrangements such as the proposed interim GSM licence. In this regard, it stated that existing networks would be optimally used during the relevant period and that "*O2 and Vodafone will not, for example, be incentivised by the imposition of higher usage fees to make additional use of such resources.*" In addition, it added that there is no reason why the imposition of usage fees can, in the current economic climate, affect competition in a positive way; and
- it did not believe that the CPI index to be a relevant index to apply to spectrum licences and claimed that ComReg's proposal to charge O2 an annual fee of €3.1m for the proposed interim licence for un-liberalised spectrum would be in excess of the upper end valuation of DotEcon's for liberalised spectrum.<sup>48</sup>

The other respondent, while not being opposed in principle to the application of spectrum usage fees (SUFs), did not agree with ComReg's indexation proposal as it did not believe this was necessary to fulfil ComReg's statutory regulatory objectives. In this regard, it added that the current level of fees already achieves the central objective of ensuring efficient spectrum use, and therefore the same fee structure and level should continue to fulfil this objective over the short duration of the proposed Interim Licences.

Both of these respondents believed that if an indexation mechanism was to be used, then it is not appropriate to use the overall CPI as this relates to consumer expenditure and has little or no bearing on the value of a spectrum licence. Instead these respondents believed that the most appropriate measure is the communications sub-component of the overall CPI, and one respondent added that "*this measure more closely reflects the overall trend in the costs and revenues of the communications industry over the relevant period than the change in the overall CPI and has a stronger empirical justification than indexation relative to the overall CPI.*"

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<sup>48</sup> Based upon DotEcon's valuation range of €18 to €26m the respondent calculated the equivalent annual spectrum fee of between €1.5m and €2.2m for 2 × 7.2 MHz of spectrum.

#### 4.3.1.2 Alternative approaches to determining the spectrum usage fees for interim GSM Licences

Three respondents suggested alternative approaches that could be used to determine the spectrum usage fees for interim licences.

One respondent believed that spectrum fees should be based on the relative proportion of subscribers or revenues that an operator has because such an approach would be more equitable, as charging new entrants fees prior to them getting any customers or revenues would seem unfair. As this suggestion appears to focus on the fees charged to new entrants, and because the interim GSM licence proposal relates only to existing operators, this suggestion is not given any further consideration in relation to the Interim Licence Proposal.

Another respondent considered that there were a wide range of methods that might be used to determine spectrum usage fees. In the context of the usage fees for an interim license of limited duration it considered, however, that a separate exercise to identify specific alternative methodologies for setting the usage fees was not required, provided its suggestions in relation to ComReg's proposal are addressed.

The final respondent to this question recommended that the price for interim licences must be equal for both Vodafone and O2, and should be based on the opportunity cost of the assignment. In this case it believed that the opportunity cost is theoretical as there are no other operators who are in a position to use the spectrum in the same way to continue to provide GSM service. In addition, this respondent suggested that ComReg should charge the market value price for the spectrum and also that ComReg should set the interim licence fee at the median of the range recommended by DotEcon, after DotEcon have revised their valuations to address the respondent's views to that issue.

#### 4.3.2 ComReg's Position

ComReg's consideration of the various issues raised is set out below.

##### 1. Differential interim licence spectrum fees for Vodafone and O2

One respondent asserted that ComReg's proposal was in breach of ComReg's obligations, and that it was discriminatory and in breach of the EU rules on State Aid, as ComReg proposed a higher fee for O2 than for Vodafone. Given that the licences being granted are essentially the same purpose, it believed that an identical licence fee should be charged.

In Consultation 10/71, ComReg calculated the proposed fees for Vodafone and O2 by reference to the respective fees paid by these operators for their current 15-year

licences<sup>49</sup>. In making these calculations, ComReg noted that Esat Digifone (now O2) made an up-front payment of IR£15m (€19,046,071), while Eircell (now Vodafone) made an up-front payment of IR£10m (€12,697,381). It was these differences in up-front payments which resulted in different interim fees being proposed for Vodafone and O2.

Upon further consideration of these matters, ComReg understands that IR£5m of the IR£15m fee paid by Esat Digifone was considered by the Departmental officials at that time to be a fee associated with the administrative costs related to the competition design and selection process.<sup>50</sup>

ComReg considers that this fee is historical and relates to the once-off costs associated with the original competition for the licence, rather than the current usage value of GSM 900 MHz spectrum. It is therefore ComReg's opinion that this IR£5m administrative cost should not form part of the basis for calculating the spectrum fees for the interim licence.

On this basis, it is ComReg's view that the relevant spectrum access fees, to be associated with the existing GSM licences of Vodafone and O2, is IR£10m (€12,697,381). This adjustment would remove any difference in the interim licence spectrum fees being proposed for Vodafone and O2 under ComReg's proposal as per Consultation 10/71, thereby removing the possibility of discriminatory charging of differential prices for a like resource in like circumstances, as between these two operators.

## 2. Assessing the proposed interim licence spectrum fee in light of ComReg's obligations

A number of respondents submitted views on ComReg's criteria for assessing fees and the level of the proposed interim licence fees. One respondent suggested that the interim licence fees proposed would be lower than the fees that the State might be expected to secure pursuant to a tender competition for such spectrum. On the other hand, two respondents believed that the interim licence fees were too high and submitted the following:

- given the temporary arrangements associated with these interim GSM licences it would not be relevant to set the fees to a level to ensure the optimal use of resources;
- higher spectrum fees will not affect competition in a positive way; and

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<sup>49</sup> Both of these licences were established under the Department of Transport Energy and Communications and its successor the Department of Public Enterprise. Both were issued prior to the establishment of ComReg's predecessor the ODTR in 1997. The ODTR published the licences ODTR 00/01 and 00/03 in this respect in 2000 following a public consultation on the Licensing of Telecommunications.

<sup>50</sup> On the 20th June, 1995, Mr. Martin Brennan wrote to Mr. C. Hocepiod of the European Commission. In this letter, Mr. Brennan stated that:

"Eircell will be required to pay a fee related to but less than the new operator. A difference of £5 million can be justified by administrative costs related to the GSM competition design and selection process."

Source: <http://www.moriarty-tribunal.ie/asp/index.asp?ObjectID=310&Mode=0&RecordID=378>

- the current level of fees already achieves the central objective of ensuring efficient spectrum use and therefore it is not necessary to increase these fees in order to fulfil ComReg’s statutory objectives.

ComReg notes that the relevant criteria for assessing spectrum fees in interim licences were discussed in detail in section 3.3.2 of Consultation 10/71.<sup>51</sup> It is not proposed to reiterate in this document the above analysis, which ComReg considers to remain valid save as otherwise set out in this Chapter 4. However, in relation to the above comments, ComReg sets out some further analysis below.

ComReg considers the revised proposed interim licence spectrum fees to be appropriate. Even if there were any merit in H3GI’s argument that the proposed fees are too low, ComReg, in light of the decision of the General Court (formerly the European Court of First Instance) in the *Bouygues* case<sup>52</sup> (upheld by the European Court of Justice), considers that it is not legally required to obtain the maximum financial return for the State in respect of licences.<sup>53</sup> ComReg further notes that the argument advanced by H3GI in this regard appears to run counter to the arguments submitted in respect of minimum price at section 14 of its response to 10/71.

ComReg further notes that European case law confirms that, under the Common Regulatory Framework, ComReg is afforded a measure of flexibility in setting the level of fees.<sup>54</sup> Given the nature and duration of the Interim Licence Proposal, ComReg is of the view that it may be inappropriate or impractical to implement some of the options put forward for calculating the interim licence spectrum fees. For example, the suggestion that the fees be based upon a tender competition for such spectrum does not appear to be workable, given that ComReg is not proposing to hold a competition for interim licences and therefore such pricing information would not be available to ComReg. As mentioned above, ComReg is not required to secure the

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<sup>51</sup> ComReg notes that Authorisation Directive (as amended) provides:

- Usage fees may be levied for the use of radio frequencies as an instrument to ensure the optimal use of such resources (Recital 32 of Authorisation Directive);
- Member States may allow the relevant authority to impose fees for the rights of use for radio frequencies which reflect the need to ensure the optimal use of these resources (Article 13 of Authorisation Directive); and
- Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of Directive 2002/21/EC (Framework Directive) and Article 13 of the Authorisation Directive. In addition, it is noted the Court of Justice of the European Union (formerly the European Court of Justice) stated, in setting out guidelines for the relevant national court in reviewing licence fees set by the national regulator in the *Connect Austria* matter (Case C-462/99), that fees should be set on an economically equivalent basis for all and should take into account:
  - the size of frequency clusters allocated;
  - the time when the relevant operator entered the market; and
  - the importance of being able to present a full range of telecommunications services.

<sup>52</sup> *Bouygues Télécom SA v Commission of the European Communities* (Case C-31/07 P),

<sup>53</sup> Case T-475/04 Decision of the General Court at paragraph 111

<sup>54</sup> See Case T-475/04 Decision of the General Court Instance at paragraph 109

highest possible price for these proposed interim licences. Further, it is questionable whether an exercise to estimate this market price would actually lead to a more accurate valuation than that proposed in Consultation 10/71, as numerous questionable assumptions would have to be used in that exercise to model the distinctive characteristics of the interim licences.

In light of the circumstances of the Interim Licence Proposal, it is ComReg's view that a pragmatic and practical approach should be taken to the setting of interim licence fees and this approach should be considered against all relevant criteria provided for in the Common Regulatory Framework including ComReg's statutory objectives.

### 3. Indexing licence fees to current value

Two respondents submitted it was not necessary to apply an indexation to existing GSM fees in order to calculate the interim licence spectrum fees.

The GSM licence fees which apply to Vodafone and O2, in terms of both the access fee and ongoing annual spectrum usage fees, were set circa 1995. The licence fees related to a 15 year licence covering the period May 1996 to May 2011. As noted above, both Vodafone and O2 paid a once-off spectrum access fee of IR£10m, which equates to €12,697,381 for their respective 15 year licences. The annual spectrum usage fees paid by the two operators was set at IR£20,000 for a 200 kHz duplex channel<sup>55</sup>, which equates to €25,395. With a total of 36 such channels in a 7.2 MHz spectrum assignment, this leads to a total annual spectrum usage fee of €14,220. During the lifetime of the existing GSM licences there has been no adjustment to these fees.

As set out in Consultation 10/71, ComReg is of the view that as the proposed interim licences will commence after the 15-year licence period, for which the GSM licences were originally granted, has elapsed, it is appropriate that these historical fees, which were set circa 1995, are indexed to their current value in 2011.

As regards Meteor's current GSM licence, ComReg is of the view that it would not be appropriate to index the fees paid by Meteor under its existing GSM licence because:

- Meteor's licence is still within its 15 year licence term; and
- no adjustment was made to the original fees during the 15 year lifetime of both Vodafone and O2's existing GSM licences.

It is also for this reason that ComReg does not consider a difference between the spectrum fees proposed to be paid by Vodafone and O2 (as a result of any proposed indexation) for their respective interim rights, on the one hand, and that which would be paid by Meteor under its existing GSM 900 MHz licence during the interim period, on the other, as discriminatory between these operators.

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<sup>55</sup> This spectrum usage fee was set under Statutory Instrument 468 of 1997.

#### 4. Communications sub-component of CPI

Another issue relating to indexation is the selection of the measure itself. While one respondent agreed with ComReg's proposal to use the overall CPI inflation index as this is a generally accepted index, two respondents stated that if an indexation was to be used, then the communications sub-component of the CPI is a more appropriate measure than the overall CPI.

The overall CPI is a widely used measure for inflation as it measures changes through time in the price level of consumer goods and services. Sub-indexes are computed for different categories of goods and services, and are combined to produce the overall index using appropriate weights to reflect their share of total consumer expenditure. The communications sub-component of the CPI measures the change in consumer prices that are specifically related to the communications and postal services. According to the CSO, the communications sub-component comprises price trends for postage, telephone equipment, private telephones, mobile telephones and internet services.<sup>56</sup> Therefore the communications sub-index refers only to price trends in a very limited part of the economy and does not reflect overall price changes in the wider economy.

The selection of an appropriate measure for indexing prices should take into account the item which is being updated. In this case, where the item of concern is spectrum fees, it would not be appropriate to index these fees to the change in prices for a basket of goods which does not contain the item itself. The only circumstance whereby one would use a sub-index to update the price of a good/service would be where the particular item in question is included in the particular sub-index. It is clearly not the case that spectrum fees are included in the communications sub-index, as calculated by the CSO. ComReg believes that the overall price changes in the wider economy are of much higher relevance when updating historical spectrum fees to their current level. Therefore, in terms of setting interim spectrum fees, ComReg believes that the more appropriate measure by which to update prices in this context is the overall CPI rather than a sub-index such as the communications sub-index.

In addition, the overall CPI has previously been used by ComReg in the updating of spectrum fees.<sup>57</sup> Indeed in the case of 26 GHz national licences, where ComReg has used the overall CPI to update annual spectrum usage fees, this has applied to the same two operators which have disputed the proposed use of CPI for interim licences.

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<sup>56</sup> The variety of goods and services included in this communications sub-category is defined as postage, telephone equipment, telephones—private, telephones—mobile and internet services. There has been a large change in the composition of this sub-index over the years with the inclusion of new and advanced services.  
[http://www.cso.ie/surveysandmethodologies/documents/pdf\\_docs/appendix\\_3\\_COICOP\\_groups\\_weights\\_dec\\_06.pdf](http://www.cso.ie/surveysandmethodologies/documents/pdf_docs/appendix_3_COICOP_groups_weights_dec_06.pdf)

<sup>57</sup> 26 GHz National Block Licences - <http://www.comreg.ie/fileupload/publications/ComReg0793R.pdf> ,  
TETRA licence <http://www.comreg.ie/fileupload/publications/ComReg0867.pdf> ;  
eircom line rental - [http://www.askcomreg.ie/home\\_phone/Universal\\_Service.90.LE.asp](http://www.askcomreg.ie/home_phone/Universal_Service.90.LE.asp)

Furthermore, a general CPI has been used by DotEcon in its benchmarking study of auction fees.<sup>58</sup>

For these reasons, ComReg believes that the overall CPI measure is the most appropriate proxy indexation measure to use and is consistent with previous practice in relation to setting spectrum fees. By using the CPI to update the fees paid by Vodafone and O2 for their 15 year GSM licences to present day values, this means that the proposed interim licence fee is the same in real terms as it was when their original GSM licences commenced. For the relevant period, May 1996 to January 2011, the overall CPI has increased by 43.33%.

5. Proposal by respondent: Convert the once-off spectrum access fee paid by Vodafone and O2 in 1996 into a 15 year annuity payment using a discount rate of 10.2%

ComReg notes that one respondent suggested the insertion of an additional step into its proposal as set out in Consultation 10/71, namely the conversion of the once-off spectrum access fee paid by Vodafone and O2 in 1996 into a 15 year annuity payment using a discount rate of 10.2%

The 10.2% rate as suggested by this respondent relates to eircom's Weighted Average Cost of Capital (WACC)<sup>59</sup>. The WACC is a measure of a firm's cost of capital and is the rate that a particular company is expected to pay on average to all its security holders in order to finance its assets and future projects. As the WACC is a forward-looking measure, the risk associated with the uncertainty of future returns is one of the factors used to calculate its overall value. As the indexation period in relation to the existing spectrum fees is historic in nature, the use of such a measure to update fees would not be appropriate.

For the above reasons, ComReg does not believe that it is appropriate to include this proposal in the calculation of the spectrum fees for the interim licences.

6. Proposal by respondent: Alternative proposals for calculating interim licence spectrum fees

One respondent suggested two alternative proposals for calculating the interim licence spectrum fees.

First, this respondent suggested that ComReg should set the interim fee at the opportunity cost of spectrum. ComReg believes that it is not appropriate to consider this suggestion, as the interim licence proposal does not allow for the possibility of an alternative assignment of this spectrum to other operators. ComReg believes that it

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<sup>58</sup> Note as DotEcon's database of awards data is based upon worldwide date, DotEcon has used the monthly US CPI to take account of inflation. See section 3.2 of ComReg 10/71b.

<sup>59</sup> This is covered in the Response to Consultation ComReg 10/35 on Eircom's Cost of Capital



would therefore be illogical to try to calculate the opportunity cost of spectrum for an interim licence and ComReg notes that the respondent also recognised this fact and stated that this suggestion is theoretical.

The same respondent also suggested that ComReg should charge the market value of spectrum and, in this regard, suggested the median of the 900 MHz valuation range as suggested by DotEcon, once this range was finalised taking on board the comments of the respondents and other relevant factors.

As mentioned above, ComReg's statutory objectives and EU electronic communications law do not require ComReg to calculate licence fees based on apparent market values. ComReg believes that it would not be appropriate or justified to use the median valuation of DotEcon's benchmark as DotEcon have estimated a minimum price for liberalised 900 MHz licences (the real value would be determined in a competitive auction process) whereas the interim licence proposal would involve the grant of GSM-only rights of use. ComReg's Interim Licence Proposal does not allow the possibility of other uses nor other users of 900 MHz spectrum allocated currently to either of Vodafone or O2. Hence, the notion of charging a market based price or one that reflects the opportunity cost does not arise. This issue is considered further below.

#### 7. Comparison of ComReg's proposal against DotEcon's benchmark valuation

One respondent suggested that ComReg's proposed interim licence spectrum fees would be in excess of the upper-end valuation produced by DotEcon and therefore considered ComReg's proposed fees to be excessive. Using the €18m to €26m benchmarking range estimated by DotEcon, this respondent believed that this represented an equivalent annual interim licence spectrum fee of between €1.5m and €2.2m for 2×7.2 MHz of spectrum.

It is not clear to ComReg how this respondent calculated the above equivalent annual interim licence spectrum fee range of €1.5m and €2.2m for 2×7.2 MHz of spectrum based on DotEcon's estimated valuation. ComReg's calculations, using DotEcon's methodology to calculate an interim licence spectrum fee, would result in an equivalent annual interim licence spectrum fee range of between €2.4m and €3.5m for 2×7.2 MHz of spectrum. However, in any event, ComReg is of the view that it would not be appropriate to use the same methodology used by Dotecon in the context of setting interim licence spectrum fees because:

- DotEcon has calculated a *minimum price* for liberalised sub-1GHz spectrum. The amount of fees paid by a successful bidder could be over and above this minimum price. This minimum price is split 50:50 between an up-front access fee and an annual spectrum usage fee based on Net Present Values which would be spread over the duration of the licence. In this context, ComReg is proposing to set a single annual interim licence spectrum fee which is a combined access and usage fee; and

- The interim licences would be granted on a GSM-only basis whereas DotEcon estimated a minimum price for liberalised sub-1GHz spectrum.

## 8. ComReg's Proposal

Given the circumstances associated with the interim licence proposal, ComReg is of the view that a pragmatic and practical approach should be taken to the setting of interim licence fees. In this regard, ComReg is cognisant of the fact that the Interim Licence Proposal is a short term licence to facilitate the continued provision of GSM services provided via Vodafone and O2's GSM 900 MHz licences, in advance of ComReg's proposed competition for the 800 MHz, 900 MHz and potentially 1800 MHz bands, which is being designed to ensure the longer term efficient use of spectrum in these bands.

Having due regard to responses received and in light of the above analysis, ComReg's considered and revised proposal for interim licence spectrum fees can be summarised as follows:

- interim licence fees would be determined by reference to the spectrum fees paid by Vodafone and O2 for their respective 15 year licences (and not including fees that were administrative in nature). Therefore, the relevant historic spectrum fees for both operators would be:
  - the up-front payment of IR£10m (€12,697,381); and
  - the annual spectrum fee of €25,395 for a 200 kHz duplex channel, or €14,220 for 36 channels (for 2x7.2MHz of spectrum); and
- these fees would be updated on a once-off basis to present day terms to take account of the change in the average level of prices paid for consumer goods and services since 1996 using the overall CPI. The overall CPI change between May 1996 and January 2011 is 43.33%. This figure will be updated in due course to reflect the most recent CPI data available at the time the interim licences are finalised.

Based upon the above, the calculations associated with ComReg's revised position are set out in Table 3 below.

	<b>Historical Fees set for 15 year GSM 900 MHz Licence (1996-2011)</b>	<b>Fees updated to current price levels (CPI 43.33%)</b>
<b>Access Fee</b>		
Access Fee for 15 year licence	12,697,381	
Access Fee for 1 year (pro rata)	846,492	1,213,277
<b>Usage Fees</b>		
Usage Fee for 1 year (based on €25,395 per 200 kHz duplex channel and a total of 36 such channels in 7.2 MHz)	914,220	1,310,352
<b><u>Total Spectrum Fees for Interim GSM Licence</u></b> (based on 1 year usage fee + 1 year access fee)		
<b>Total fee for 2 ×7.2 MHz for 1 year</b>		<b>2,523,629</b>
<b>Total Fee for 1 duplex channel (200 kHz) for 1 year</b>		<b>70,101</b>

**Table 3: Proposed Spectrum Fees for the Interim Licence (€)**

ComReg is proposing a total annual interim licence spectrum fee of €2,523,629 (see table 3 above). This figure will be updated in due course to reflect the most recent CPI data available at the time the interim licences are finalised.

## 5 Conclusions

ComReg is proposing to put in place interim measures that deal with the issue of the expiry of rights of use of 900 MHz spectrum by Vodafone and O2 for 2G purposes in May 2011. This is because, amongst other things, their 2G licences would otherwise come to an end at that point in time, and:

- no matter how ComReg arranges and decides on its broader spectrum release proposals and the implementation of same, and
- no matter what permutations of spectrum-allocation, spectrum-loss, spectrum-substitution, relocation within frequency bands, retuning, infrastructure roll-out, test-and-trial, migration or ‘churn’, for example, occur following the implementation of the process,

there will be a period between May, 2011 and 31 January 2013, in which there is a clear requirement to preserve the *status quo* in relation to Vodafone and O2 and their respective customers while these matters take their course.

Such measures would provide for the use of this spectrum in the period from May 2011 onwards, and up until 31 January 2013, thereby maintaining competition and eliminating probable serious consumer disruption during that period. The implementation of such interim measures would also allow ComReg to continue to develop its proposals and give appropriate consideration to all of the materials submitted to it in the context of its wider consultation process on spectrum release in respect of the 800 MHz, 900 MHz and 1800 MHz bands, and to proceed to a final decision on which spectrum bands to release and how these will be assigned for the period currently proposed as 2013 to 2030.

ComReg is grateful for all of the submissions provided by respondents in response to this consultation process and has given careful consideration to all of the material submitted by interested parties in relation to the interim licence proposal (both in response primarily to Consultation 10/71 and also more recently in relation to Consultation 10/105), including alternative proposals, and other available information before it.

ComReg has set out its analysis of the materials in this document and has assessed the options that appeared to be reasonably open to it to deal with the issue at stake within the structured assessment of options both in the draft RIA and against other important criteria that reside beyond the RIA framework. To the extent that ComReg has not set out its analysis of any particular points raised by any respondent in this document no inference should be drawn that ComReg has not had regard to such material.

In considering ComReg’s Interim Licence Proposal, ComReg has had regard to relative alternative proposals put forward by interested parties. The draft RIA and other analysis set out in this document has supported ComReg’s view that, on balance, the approach that it proposed in Consultation 10/71 on interim measures, modified with the addition

of a specific end date of 31 January 2013, is the most proportionate and desirable option that is reasonably open to it in the current circumstances. This option would see both Vodafone and O2 issued with interim licences for their current spectrum holdings on a 2G-use-only basis for the period from 16 May 2011 until 31 January 2013. ComReg notes that this option would not limit the possible options that it might adopt in its ultimate decision in relation to the wider consultation process.

ComReg's assessment of alternative proposals indicates that they each in different ways suffer from deficiencies, and ComReg's Interim Licence Proposal better meets ComReg's statutory functions and objectives. In particular, relative to the option proposed, the other options considered would variously have the potential to:

- reduce substantially the interest of potential new entrants in entering into any process to award spectrum usage rights by allowing existing operators early access to 900 MHz spectrum for advanced services;
- distort competition vis à vis both existing players in the Irish market and potential new entrants;
- unnecessarily constrain the options available to ComReg in relation to the wider consultation process;
- unnecessarily delay the roll-out of advanced services at 900 MHz; and
- delay and complicate any retuning and relocation processes required in light of the allocation of spectrum in the period 2013-2030, arising from the currently proposed wider 800/900/1800 MHz allocation process.

ComReg notes that the adoption of any option that disproportionately assisted all or some of the operators who are currently in the market would reduce competition for spectrum in whatever process is decided upon, which would in turn call into question whether the operators that ultimately acquired usage rights would be the ones that would use it most efficiently in the interests of consumers and society generally. Any 'mis-assignment' of this type would have long-term negative impacts both in terms of competition in the related downstream retail markets and on innovation (which is itself driven by the intensity of competition), thereby damaging the interests of consumers.

ComReg's preferred option does not discriminate between existing and potential operators. Furthermore it ensures that the two largest providers of 2G services can continue to offer their services, as they do now, in the interim period between the expiry of their 2G licences in May 2011 and 31 January 2013, which is when the outcome of the process that ComReg will shortly fasten upon with regard to assigning spectrum-use rights for the longer-term is expected to come into effect.

ComReg remains of the view that the Interim Licence Proposal would not be unduly or unlawfully discriminatory as against H3GI (or any other party). The approach ComReg is proposing to take is consistent with the GSM Amending Directive and its Irish transposing regulations and such an approach is entirely reasonable, justified and

proportionate.<sup>60</sup> The Interim Licence Proposal is open to Vodafone and O2, and would have been extended to Meteor also, had its 900 MHz licence also been about to expire with similar imminence. There is, accordingly, no discrimination, as neither H3GI, nor any prospective new entrant, is being denied anything it could lawfully and rationally have used until 2013 in any case. It appears that H3GI would only have a business interest in acquiring 900 MHz spectrum on a *liberalised* basis as it does not provide 2G services over its own network. Acquiring this in advance of when other operators who currently provide advanced services could practically use it would itself be discriminatory<sup>61</sup>, particularly as these users would apparently not be afforded the opportunity to acquire sufficient spectrum to run both 2G and advanced services in advance of the implementation of the ultimate decision on long-term usage rights.

Further, ComReg is firmly of the view that there is no State aid present in the Interim Licence Proposal in that, amongst other things, the decision to award interim licences on a 2G only basis would not involve the granting of a ‘special right’, nor any discrimination against Meteor, H3GI or potential new entrants, and can be justified by the general scheme of the system.

The preferred option, as set out earlier, could notionally delay the roll out of advanced services at 900 MHz but there is sufficient evidence from all operators currently in the 900 MHz band that they could not run both 2G and advanced services with the amount of spectrum that they currently have. Hence, the practical impact of the proposed ‘delay’ to 2013 is negligible. Moreover, proposed use of preparatory (and potentially test) licences in the interim period by operators that are awarded spectrum usage rights for the 2013 to 2030 period will largely mitigate any effective delay in operators deploying high coverage 3G/4G services.

Additionally, as set out in this document ComReg may consider early liberalisation of the band, as a potential modification to its broader spectrum release proposal, subject to the views and co-operation of operators, ComReg’s statutory objectives and especially competition concerns.

In summary, ComReg’s proposal represents the most proportionate response to the issue at hand, which should deliver the greatest benefits to all stakeholders and competition in the market, while minimising the risks of distortions to competition.

At the same time, one of the objectives that ComReg has to pursue in carrying out its functions under the regulatory framework is to promote the development of the internal market. ComReg’s preferred option, by insofar as possible, placing incumbents and new entrant operators on an even footing, does not discriminate unnecessarily between these two types of operators. It recognises that the unique position that has arisen with respect to two of the incumbent operators who need to deal with imminent licence

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<sup>60</sup> ComReg also notes that this view is consistent with the ruling by the UK Competition Appeal Tribunal’s (CAT) ruling in Case 1154/3/3/10 Telefónica O2 UK Limited v Office of Communications (900 MHz Band), judgment of 7 October 2010.

<sup>61</sup> See chapter 2.3.4 on non-discrimination.

expiry, and the development and pursuit of the opportunity to make a joint multi-band award of rights of use of spectrum facilitating the deployment of advanced services, require that interim measures must be provided for.

ComReg considers that its proposal to set licence conditions for interim licences on the basis of the respective existing GSM 900 MHz conditions for each of Vodafone and O2's proposed interim GSM licences is appropriate, transparent and objectively justified in present circumstances.

The interim licence proposal is designed to maintain the *status quo* for a minimal period by enabling the continued provision of GSM services by Vodafone and O2 for the time being, and up until 31 January 2013.

It is proportionate, as it achieves its objectives of protecting users and competition while not introducing unnecessary additional conditions or obligations, or reducing the nature and level of existing obligations, currently in place for each of Vodafone and O2. Equally, it does not create any new obligations for other existing operators.

It is also non-discriminatory as it proposes the same treatment for both Vodafone and O2 in respect of their existing licence conditions, and would not distort the existing position between these licensees, or between these licensees and the remaining GSM 900 MHz operator.

Finally, in relation to fees, the fees would be determined by reference to the spectrum access fees paid by Vodafone and O2 for their respective 15 year licences (but not including fees that were administrative in nature) updated to present day terms using the Consumer Price Index. Vodafone and O2 would pay the same annual spectrum fees for the Interim Licences.

To conclude, ComReg considers that granting interim licences to O2 and Vodafone until 31 January 2013, as per its draft decision, carries the following key benefits:

- it should maintain the *status quo* for a short period prior to the implementation of ComReg's broader spectrum release proposal, and in particular it should maintain current levels of market competition and eliminate or minimise any disruption to existing consumer services;
- maintaining the *status quo* (as detailed in section 2.4.3 of Consultation 10/71) will allow ComReg to properly develop and consider its proposals regarding the longer-term release of spectrum in the 800 MHz, 900 MHz, and 1800 MHz bands, taking into account its statutory functions and objectives, the relevant facts, and submissions from interested parties;
- it will ultimately facilitate the full liberalisation of spectrum usage in the 900 MHz band by early 2013, in accordance with the EC Decision requiring same;
- using a competitive process for awarding 900 MHz spectrum usage rights (and which may combine the 800 and 1800 MHz bands), if that is the approach ultimately selected by ComReg in the context of its broader spectrum liberalisation process, should maximise the likelihood that

competition in the provision of mobile electronic communications services will be enhanced in the medium to long term, particularly as the granting of interim licences will mean that no operator will be given a first mover advantage in rolling out advanced services at 900 MHz; and

- the granting of interim licences will allow for a subsequent competition for the long-term assignment of the spectrum that shall be open, transparent and fair, as all parties thereto shall be assessed on the merits of their respective offerings and not on incumbency.



## 6 Next Steps

### 6.1 Submitting Comments

All input and comments are welcome; however, it would make the task of analysing responses easier if comments were referenced to the relevant sections from this document.

Please also set out your reasoning and all supporting information for any views expressed.

The consultation period will run until 5 pm on 18 March 2011, during which time ComReg welcomes written comments on any of the issues raised in this paper.

ComReg notes that, unlike the situation in respect of earlier consultations within the broader spectrum liberalisation process, in light of the limited time in which its final decision on interim licences must be issued if serious consumer and market disruption is to be avoided and given the opportunity already afforded by Consultation 10/71 to provide comments and give relevant views, it is unlikely that ComReg will extend the consultation period in respect of this consultation.

Further, in order to promote further openness and transparency ComReg will publish all respondents' submissions to this response to consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information<sup>62</sup>.

We would request that electronic submissions be submitted in an unprotected format so that they can be appended into the ComReg submissions document for publishing electronically.

ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful. As it is ComReg's policy to make all responses available on its website and for inspection generally, respondents to consultations are again requested clearly to identify confidential material, and to place confidential material in a separate annex to their response, also providing supporting reasoning as to why such material is confidential in this annex.

In anticipation of any 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<sup>63</sup>.

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<sup>62</sup> ComReg 05/24 Response to Consultation - Guidelines on the treatment of confidential information - March 2005.

<sup>63</sup> Ibid.

## **6.2 Next Steps**

Interested parties have four weeks from the date of publication of this consultation paper to submit their observations on the draft decision to ComReg.

All submissions which are received will be published (redacted as necessary in order to take account of any confidential or commercially sensitive information).

When it has concluded its review of all of the submissions received, and other relevant material, ComReg shall then proceed to publish its final RIA and decision in a “Response to Consultation and Final Decision” paper.

If the final decision is the same, or broadly similar, as the draft decision set out herein then the Response to Consultation will also include a copy of the Regulations pursuant to which the interim licences will be granted.

It is ComReg’s intention that the final RIA and decision will be published in advance of the expiry of Vodafone and O2’s existing GSM 900 MHz Licences.

## Annex 1 - ComReg's Functions and Objectives in relation to Spectrum

The Communications Regulation Acts 2002-2010<sup>64</sup>, the Common Regulatory Framework<sup>65</sup> (including for the purposes of this paper the Framework and Authorisation Directives as transposed into Irish law by the corresponding Framework and Authorisation Regulations), and the Wireless Telegraphy Acts<sup>66</sup> set out, amongst other things, powers, functions, duties and objectives of ComReg that are relevant to this response to consultation and draft decision.

Apart from licensing and making regulations in relation to licences, these duties include the management of Ireland's radio frequency spectrum in accordance with ministerial Policy Directions under Section 13 of the Communications Regulation Act 2002 (the "2002 Act"), which ComReg is to carry out effectively, and in a manner serving to ensure that the allocation and assignment of radio frequencies is based on objective, transparent, non-discriminatory and proportionate criteria.

This annex is intended as a general guide as to ComReg's role in this area, and not as a definitive or exhaustive legal exposition of that role. Further, this annex restricts itself to consideration of those powers, functions, duties and objectives of ComReg that appear most relevant to the matters at hand and by way of example excludes those in relation to premium rate services.

Note: All references in this annex to enactments are to the enactment as amended at the date hereof.

### *Primary objectives and regulatory principles under the 2002 Act and Common Regulatory Framework*

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<sup>64</sup> The Communications Regulation Act 2002 (No. 20 of 2002), The Communications Regulation (Amendment) Act 2007 and the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010.

<sup>65</sup> It is noted that there have been substantive amendments to those European Directives comprising the Common Regulatory Framework and these have yet to be incorporated into the statutory instruments which transpose these Directives. Nevertheless, ComReg is, in accordance with best practice of a forward looking ex ante regulator, interpreting its regulatory objectives and obligations in accordance with impending substantive amendments to those statutory instruments which transpose the Common Regulatory Framework. In ComReg's opinion, this approach will provide certainty for market participants. ComReg also notes that Directive 2009/140 provides for its transposition into national law by 25 May 2011. Accordingly, while this may or may not be transposed before any grant of interim licences, the State is obliged to transpose it, at the latest, in the same month in which the first of the current 900 MHz GSM licences expire. In addition, ComReg is, prior to the transposition deadline, obliged under EU law to refrain from taking any measures likely to seriously compromise the attainment of the result prescribed by that directive.

<sup>66</sup> The Wireless Telegraphy Acts, 1926 and 1956, the Broadcasting Authority Acts, 1960 to 1971, in so far as they amend those Acts, the Wireless Telegraphy Act 1972, sections 2, 9, 10, 11, 12, 14, 15, 16, 17 and 19 of the Broadcasting and Wireless Telegraphy Act 1988 and sections 181 (1) to (7) and (9) and section 182 of the Broadcasting Act 2009.

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

- promote competition<sup>67</sup>;
- contribute to the development of the internal market<sup>68</sup>;
- promote the interests of users within the Community<sup>69</sup>; and
- ensure the efficient management and use of the radio frequency spectrum in Ireland in accordance with a direction under section 13 of the 2002 Act<sup>70</sup>.

### *Promotion of Competition*

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

- (i) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;
- (ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
- (iii) encouraging efficient investment in infrastructure and promoting innovation<sup>71</sup>, and
- (iv) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

### *Contributing to the development of the internal market*

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

- (i) removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level;

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<sup>67</sup> Section 12 (1)(a)(i) of the 2002 Act (No. 20 of 2002).

<sup>68</sup> Section 12 (1)(a)(ii) of the 2002 Act (No. 20 of 2002).

<sup>69</sup> Section 12(1)(a)(iii) of the 2002 Act (No. 20 of 2002).

<sup>70</sup> Section 12(1)(b) of the 2002 Act (No. 20 of 2002). Whilst this objective would appear to be a separate and distinct objective in the 2002 Act, it is noted that, for the purposes of ComReg's activities in relation to ECS and ECN, Article 8 of the Framework Directive identifies "encouraging efficient use and ensuring the effective management of radio frequencies (and numbering resources)" as a sub-objective of the broader objective of the promotion of competition. In light of this, the assessment of different regulatory options against this objective is set out in the context of the RIA (chapter 3).

<sup>71</sup> As a result of recent amendments to the Framework Directive, this sub-objective has been removed and now appears, albeit modified, as a "regulatory principle" to be applied in the pursuit of the main policy objectives (in Article 8(5)).

- (ii) encouraging the establishment and development of trans-European networks and the interoperability of transnational services and end-to-end connectivity;
- (iii) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services and associated facilities<sup>72</sup>; and
- (iv) co-operating with electronic communications national regulatory authorities in other Member States of the Community and with the Commission of the Community in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of Community law in this field.

### *Promotion of Interests of Users*

Section 12(2)(c) of the 2002 Act requires ComReg, when exercising its functions in relation to the provision of electronic communications networks and services, to take all reasonable measures which are aimed at the promotion of the interests of users within the Community, including:<sup>73</sup>

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

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<sup>72</sup> As a result of recent amendments to the Framework Directive, this sub-objective has been removed and now appears, albeit modified, as a “regulatory principle” to be applied in the pursuit of the main policy objectives (in Article 8(5)).

<sup>73</sup> As a result of recent amendments to the Framework Directive, the following sub-objective was added: promoting the ability of end-users to access and distribute information or run applications and services of their choice. In addition, the following wording has been added to the end of sub-objective (vi) above by amendment to its equivalent provision in Article 8(4) of the Framework Directive: “elderly users and users with special social needs”.

- (vii) ensuring that the integrity and security of public communications networks are maintained.

### *Regulatory Principles*

In addition, amendments to the Framework Directive<sup>74</sup> will, with effect from the date of transposition of the amending directive into Irish law, require ComReg, in pursuit of the above 3 policy objectives, to apply objective, transparent, non-discriminatory and proportionate regulatory principles by, inter alia:

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

### Other obligations under the 2002 Act

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

- (i) seek to ensure that any measures taken by it are proportionate having regard to the objectives set out in Section 12 of the 2002 Act;<sup>75</sup>
- (ii) have regard to international developments with regard to electronic communications networks and electronic communications services, associated facilities, postal services, the radio frequency spectrum and

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<sup>74</sup> Directive 2009/140 EC, the transposition deadline for this directive is 25 May 2011, DCNER has indicated that this directive will be transposed by Statutory Instrument, which will come into force in May 2011:  
<http://www.dcenr.gov.ie/Communications/Communications+Policy/Telecommunications+Regulatory+Reform+Package.htm>

<sup>75</sup> Section 12(3) of the 2002 Act (No. 20 of 2002).

numbering (this is taken into account in the context of Policy Direction 7 below)<sup>76</sup>; and

- (iii) take the utmost account of the desirability that the exercise of its functions aimed at achieving its radio frequency management objectives does not result in discrimination in favour of or against particular types of technology for the provision of ECS.<sup>77</sup>

Separately, pursuant to the Framework Regulations, ComReg is obliged to promote the harmonisation of use of radio frequencies across the European Community and this will be considered within the discussion of the objective to contribute to the development of the internal market.<sup>78</sup>

### **Policy Directions<sup>79</sup>**

Section 12(4) of the 2002 Act requires ComReg to comply with any policy direction given to ComReg by the Minister for Communications, Energy and Natural Resources (“the Minister”) as he or she considers appropriate to be followed by ComReg in the exercise of its functions. Section 10(1)(b) of the 2002 Act also requires ComReg, in managing the radio frequency spectrum, to do so in accordance with a direction of the Minister under Section 13 of the 2002 Act whereas Section 12(1)(b) requires ComReg to ensure the efficient management and use of the radio frequency spectrum in accordance with a direction under section 13.

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

- **Policy Direction No.3 on Broadband Electronic Communication Networks**

The Commission shall in the exercise of its functions, take into account the national objective regarding broadband rollout, viz, the Government wishes to ensure the widespread availability of open-access, affordable, always-on broadband infrastructure and services for businesses and citizens on a balanced regional basis within three years, on the basis of utilisation of a range of existing and emerging technologies and broadband speeds appropriate to specific categories of service and customers. ComReg is conscious that the three year objective described in this policy direction has now expired making this direction less relevant currently.

- **Policy Direction No.4 on Industry Sustainability**

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<sup>76</sup> Section 12(5) of the 2002 Act (No. 20 of 2002).

<sup>77</sup> Section 12(6) of the 2002 Act (No. 20 of 2002).

<sup>78</sup> Regulation 23(2) of the Electronic Communities (Electronic Communications Networks (Framework) Regulations 2003.

<sup>79</sup> ComReg also notes the Spectrum Policy Statement issued by the DCENR in September 2010

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

- **Policy Direction No.7 on Consistency with other Member States**

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

- **Policy Direction No.8 on Cost of Regulation**

The Commission shall ensure that the costs incurred by it in effectively carrying out its functions in relation to the electronic communications market and the management of the radio frequency spectrum are minimised, consistent with best practice in other Member States of the European Community, and, subject to any different conditions that may exist, should not be out of line with the cost of regulation in such Member States.

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

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.

## **Other relevant obligations under the Framework and Authorisation Regulations**

### ***Framework Regulations***

Regulation 23(1) of the Framework Regulations requires that ComReg, subject to any directions issued by the Minister pursuant to section 13 of the Act of 2002, ensure the effective management of radio frequencies for electronic communications services in accordance with section 12 of the Act of 2002 and ensure that the allocation and assignment of such radio frequencies is based on objective, transparent, non-discriminatory and proportionate criteria.

Regulation 23(2) of the Framework Regulations requires that ComReg, having regard to its objectives under section 12 of the Act of 2002 and its functions under these Regulations and the Specific Regulations, promote the harmonisation of use of radio frequencies across the European Community, consistent with the need to ensure effective and efficient use thereof in accordance with Decision No. 676/2002/EC7 of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community.



## ***Authorisation Regulations***

### Publication of procedures

Regulation 9(4) of the Authorisation Regulations requires that ComReg establish open, transparent and non-discriminatory procedures for the grant of licences and cause any such procedures to be made publicly available.

For the avoidance of doubt, the obligations under this Regulation would be fulfilled by the publication of the final response to consultation, final decision and Statutory Instrument relating to the Interim Licence Proposal.

### Licence conditions

Regulation 10 of the Authorisation Regulations requires that licence conditions be objectively justified in relation to the electronic communications network or service concerned and shall be non-discriminatory, proportionate and transparent.

### Grant of limited number of licences

Regulation 11 of the Authorisation Regulations requires that, when granting new licences, ComReg:

- grants licences on the basis of selection criteria which are objective, transparent, non-discriminatory and proportionate and which give due weight to the achievement of the objectives set out in section 12 of the 2002 Act; and
- where it decides to use a competitive or comparative selection procedures, ensure that such procedures are fair, reasonable, open and transparent to all interested parties.

### Fees for spectrum rights of use/licences

Regulation 20 of the Authorisation Regulations permits ComReg to impose fees for a licence which reflect the need to ensure the optimal use of the radio frequency spectrum.

## **Other Relevant Provisions**

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

In particular regulation 3(2) of S.I. 195 of 2010 provides that:

“The Commission for Communications Regulation shall examine whether the existing assignment of spectrum in the 900 MHz band to competing mobile operators is likely

to distort competition in the mobile markets in the State and, where justified and proportionate, it shall address such distortions in accordance with Regulation 15 of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003 (S.I. No. 306 of 2003).”

## Annex 2 – Draft Decision

This annex sets out a draft of ComReg’s proposed decision on its interim licence proposal.

### 1. DEFINITIONS AND INTERPRETATION

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

“**Access Regulations**” means the European Communities (Electronic Communications and Network Services) (Access) Regulations, 2003 (S.I. No. 305 of 2003) as amended by the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007);

“**Authorisation Regulations**” means the European Communities (Electronic Communications and Network Services) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003) as amended by the European Communities (Electronic Communications Networks and Services) (Authorisation) (Amendment) Regulations 2007 (S.I. No. 372 of 2007);

“**Communications Regulation Act 2002**” means the Communications Regulation Act, 2002, (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act, 2007 (No. 22 of 2007) and the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010;

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

“**Fees**” means annual spectrum fees of €70,101<sup>80</sup> per duplex 200 KHz channel which shall be pro-rated for any period of less than a year within the Interim Licence Term;

“**Framework Regulations**” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, (S.I. No. 307 of 2003) as amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007);

“**GSM**” means an electronic communications network that complies with the GSM standards as published by ETSI, in particular but not limited to EN 301 502 and EN 301 511;

“**GSM Amendment Regulations**” means the European Communities (Public Pan-European Cellular Digital Land-Based Mobile Communications) Regulations 2010 (S.I. 295/2010), made under section 3 of the European Communities Act 1972 (No. 27 of

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<sup>80</sup> At finalisation of this SI, the spectrum fee will be updated to incorporate the most up to date CPI value available at that time.

1972) for the purpose of giving effect to Directive 87/372/EEC, as amended by Directive 2009/114/EC;

**“GSM Mobile Telephony Service”** means a mobile telephony service corresponding to GSM standards;

**“Interim Licences”** means the licences described in Regulation 3 of the Interim Licence Regulations;

**“Interim Licence Regulations”** means the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations, 2011 (S.I. No. XXX of 2011);

**“Interim Licence Term”** means the period from 16 May, 2011 to 31 January, 2013, or such shorter period as may be specified by ComReg;

**“Joint Spectrum Release”** means the process currently contemplated by ComReg whereby rights of use in respect of some or all of the 800, 900 and 1800 MHz bands may be released jointly and in respect of which it is currently contemplated licences will run from 2013 to 2030;

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

**“New Framework Directive”** means Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services;

**“O2”** means Telefónica O2 Ireland Limited;

**“RIA”** means Regulatory Impact Assessment;

**“Vodafone”** means Vodafone Ireland Limited; and

**“Wireless Telegraphy Act 1926”** means the Wireless Telegraphy Act 1926, as amended.

## **2. DECISION-MAKING CONSIDERATIONS**

**2.1** ComReg has made this Decision having regard to:

- (i) the contents of, and the materials referred to in, as well as the materials provided by respondents in response to, and in connection with, ComReg documents:
  - a. 08/57;
  - b. 09/14;

- c. 09/99;
- d. 10/59;
- e. 10/71;
- f. 10/105;
- g. [11/11],
- h. [11/●];

including, but without limitation, those relating, inter alia, to:

- the imminent expiry (on 15 May, 2011) of licences held by Vodafone and O2 under section 5 of the Wireless Telegraphy Act 1926, 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 Vodafone and O2 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 900 MHz band (“Current Licences”);
- the fact that ComReg will not be in a position to finalise its decision-making in relation to its broader spectrum release proposals and related on-going consultation process in respect of the Joint Spectrum Release and implement the outcome of this decision-making before the Current Licences expire on 15 May, 2011;
- the consequent need to facilitate the finalisation by ComReg of its decision-making in respect of the Joint Spectrum Release, with the stated benefits envisaged by ComReg that would flow from the spectrum-release contemplated, once finalised (and, in particular, the maximisation of benefits for users and the facilitation of the development of competition);
- the avoidance of undue effects on the sustainability of the businesses of industry operators during the time between May, 2011 and the commercial commencement date of new, liberalised-use licences in the relevant frequency bands;
- the desirability of providing for interim measures that can be put in place in that period, preserving the *status quo*, pending the outcome of the proposed spectrum-allocation process and the crystallisation thereof, thereafter;
- the likely disruption to consumers and competition if interim measures are not put in place to provide for the continuation of the provision of existing 900 MHz GSM services by Vodafone and O2 between the expiry of their Current Licences and the completion of the foregoing consultation process relating to the Joint Spectrum Release;

- the desirability of providing as much regulatory certainty and predictability as possible in the circumstances;
- (ii) the consultants' reports commissioned, and the advice obtained, by ComReg in relation to the subject-matter of the documents and materials listed above;
- (iii) the powers, functions, objectives and duties of ComReg, including, without limitation:
- a. the Communications Regulations Act 2002, and, in particular, sections 10, 12 and 13 thereof;
  - b. the Framework Regulations, and, in particular, Regulations 20 and 23 thereof;
  - c. the Authorisation Regulations, and, in particular, Regulations 9, 10, 11 and 12 thereof;
  - d. the GSM Amendment Regulations;
  - e. its functions under Regulation 6(1) of the Access Regulations;
  - f. Sections 5 and 6 of the Wireless Telegraphy Act, 1926;
  - g. the applicable Policy Directions made by the Minister under Section 13 of the Communications Regulation Act 2002;
- (iv) the new Framework Directive;

and noting that it has given all interested parties the opportunity to express their views and make their submissions, and evaluated the matters to be decided, in accordance with its obligations pursuant to inter alia:

- (i) Regulation 19 of the Framework Regulations; and
- (ii) ComReg's RIA guidelines and the RIA Guidelines issued by the Department of An Taoiseach in June 2009.

### **3. DECISION**

- 3.1 In light of the processes and matters mentioned above, at a meeting of the Commissioners held today, the -----day of -----, 2011, and having beforehand procured the consent of the Minister to their being made (as required by section 37 of the Communications Regulation Act 2002), ComReg made the Interim Licence

Regulations under section 6(1) of the Wireless Telegraphy Act 1926, prescribing relevant matters in regard to Interim Licences.

At that meeting, ComReg further decided that it will, upon application properly being made to it by Vodafone and/or O2 within the terms of the Interim Licence Regulations, and on payment of the Fees prescribed thereby, grant to them, or either of them, as the case may be, under section 5 of the Wireless Telegraphy Act 1926, a licence to keep, have possession of, install, maintain, work and use in a specified place in the State, apparatus for wireless telegraphy for the purpose of providing a GSM Mobile Telephony Service in the form, for the period, and subject to the conditions and restrictions (including conditions as to revocation, and so on), prescribed in those Regulations, a copy of which is appended hereto.

- 3.2 The licences granted pursuant to this Decision may be amended in any way, inter alia, to (i) facilitate the realignment of frequencies as part of the Joint Spectrum Release or (ii) facilitate the Joint Spectrum Release, in line with Regulation 15 of the Authorisation Regulations.
- 3.3 Without limitation to section 3.2 above, licences granted pursuant to this Decision may be foreshortened pursuant to Regulation 15 of the Authorisation Regulations to facilitate liberalisation of rights of use of 900 MHz spectrum at a date earlier than January, 2013, following a transparent and lawful process.
- 3.4 For the avoidance of doubt, ComReg makes no commitment to extend or renew the licences to be granted hereunder beyond the Interim Licence Term, whether at all, or for any particular period or on any particular terms.

#### **4. STATUTORY POWERS NOT AFFECTED**

- 4.1. Nothing in this Decision shall operate to limit ComReg in the exercise and performance of statutory powers, functions or duties conferred on it under any primary or secondary legislation from time to time.

**ALEX CHISHOLM  
CHAIRPERSON  
THE COMMISSION FOR COMMUNICATIONS REGULATION  
THE • DAY OF • 2011**

Annex 3 – Draft Statutory Instrument (SI)

**STATUTORY INSTRUMENTS**

**S. I. No.            of 2011**

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**Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations 2011**

(Prn.            )



The Commission for Communications Regulation, in exercise of the powers conferred on it by section 6 (as substituted by section 182 of the Broadcasting Act 2009, (No. 18 of 2009)) of the Wireless Telegraphy Act, 1926, (No. 45 of 1926), and with the consent of the Minister for Communications, Energy and Natural Resources, pursuant to section 37 of the Communications Regulation Act, 2002, (No. 20 of 2002), hereby makes the following Regulations:

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## **Citation**

1. (1) These Regulations may be cited as the Wireless Telegraphy (**Interim GSM Mobile Telephony Licence**) Regulations, 2011;  
(2) These Regulations come into force on XX/XX/2011.

DRAFT

## **Interpretation**

2. (1) In these Regulations, unless the context otherwise requires:

“Act of 1926” means the Wireless Telegraphy Act, 1926 (No. 45 of 1926);

“Act of 1972” means the Wireless Telegraphy Act, 1972 (No. 5 of 1972);

“Act of 2002” means the Communications Regulation Act, 2002 (No. 20 of 2002);

“Act of 2007” means the Communications Regulation (Amendment) Act, 2007 (No. 22 of 2007);

“Act of 2009” means the Broadcasting Act, 2009 (No. 18 of 2009);

“Apparatus” means apparatus for wireless telegraphy as defined in section 2 of the Act of 1926, as amended, for the purpose of providing a Mobile Telephony Service and in relation to a Licence, means the particular apparatus for wireless telegraphy to which the licence relates;

“Authorisation Regulations” means the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations, 2003 (S.I. 306 of 2003);

“Commission” means the Commission for Communications Regulation;

“Electronic Communications Network” and “Electronic Communications Service” have the same meanings as are set out in the European Communities (Electronic Communications Networks and Services)(Framework) Regulations, 2003 (S.I. 307 of 2003);

“ETSI” means the European Telecommunications Standards Institute;

“Euribor” means the Euro Interbank Offered Rate;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services)(Framework) Regulations, 2003 (S.I. 307 of 2003);`

“GSM” means an electronic communications network that complies with the GSM standards as published by ETSI, in particular but not limited to EN 301 502 and EN 301 511;

“GSM and TACS Regulations” means Wireless Telegraphy (GSM and TACS Mobile Telephony Licence) Regulations, 1997, (S.I. No. 468 of 1997);

“Harmful Interference” means interference which endangers the functioning of a radionavigation service or other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a Radiocommunications Service operating in accordance with the applicable international, European Community or national regulations;

“ICNIRP” means the International Commission on Non-Ionizing Radiation Protection;

“Licence” means a licence under-, or as the case may be, of the type described in section 5 of the Act of 1926, to keep, have possession of, install, maintain, work and use Apparatus in a specified place in the State;

“Licensee” means the holder of a Licence;

“Mobile Telephony Service” or “GSM Mobile Telephony Service” means a mobile telephony service corresponding to the GSM specifications;

“Original Licence” means a licence under the Wireless Telegraphy (GSM Mobile Telephony Licence) Regulations, 1999 and 2003;

“Radiocommunications Service” means a service as defined in the Radio Regulations of the International Telecommunication Union involving the transmission, emission and or reception of radiowaves for specific telecommunication purposes;

“Radionavigation Service” means a service involving the determination of the position, velocity and/or other characteristics of an object, or the obtaining of information related to their parameters, by means of the propagation properties of radio waves and used for the purposes of navigation, including obstruction warning;

(2) In these Regulations;

- (a) a reference to an enactment or regulation shall be construed as a reference to the enactment or regulation as amended or extended by or under any subsequent enactment or regulation;
- (b) a reference to a Regulation or a Schedule is to a Regulation of or Schedule to these Regulations, unless it is indicated that a reference to some other enactment is intended;
- (c) a reference to a paragraph or subparagraph is to the paragraph or subparagraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended; and
- (d) a reference to a Directive of the European Parliament and Council shall be construed as a reference to the Directive as amended or extended by any subsequent Directive.

(3) The Interpretation Act 2005 (No. 23 of 2005) applies to these Regulations.

### **Licences to which these Regulations apply**

3. (1) These Regulations prescribe matters in relation to Licences of the type detailed in the schedules to the form of Licence contained in the Schedule hereto, application for the grant (or, as the case may be, renewal) of which may be (or, as the case may be, has been) made hereunder by any person who, at the time of making their first application for a Licence pursuant to these Regulations, holds, or, as the case may be, held an Original Licence which is, or as the case may be, was due to expire on the 15<sup>th</sup> day of May, 2011, and who was previously the holder of a licence under the GSM and TACS Regulations.
- (2) The provisions of the Wireless Telegraphy (GSM Mobile Telephony Licence) (Amendment) Regulations, 2003 (S.I. No. 339 of 2003), and, in particular, Regulation 4(5) thereof, do not apply to Licences to which these Regulations apply, and, for the avoidance of doubt, any person whose Original Licence is, or, as the case may be, was, pursuant to that Regulation incapable of grant or renewal so as to expire later than the 15<sup>th</sup> day of May 2011, may apply hereunder for the grant, or as the case may be, renewal, of a licence to which these Regulations apply, notwithstanding those provisions.

### **Application for Licences and Form of Licences**

4. (1) Application for a Licence to which these Regulations apply shall be made to the Commission and shall be in writing and in such form as may be determined by the Commission from time to time.
- (2) A person who makes an application under paragraph (1) of this Regulation shall furnish to the Commission such information as the Commission may reasonably require for the purposes of these Regulations, and if the person, without reasonable cause, fails to comply with this paragraph, the Commission may refuse to grant a Licence to the person.
- (3) The Commission may grant a Licence to which these Regulations apply in accordance with the provisions of Regulation 9 of the Authorisation Regulations and on payment by the applicant of the fees prescribed in Regulation 9 hereof.
- (4) A Licence to which these Regulations apply shall be in the form specified in the Schedule to these Regulations with such variation (if any) (whether by addition, deletion or alteration) as the Commission may determine from time to time or in any particular case.

### **Duration and Renewal of Licences**

5. (1) A Licence to which these Regulations apply that has not been renewed shall (unless it has been revoked or withdrawn) be in force for a period of up to one year and, unless renewed, shall then expire.
- (2) Subject to paragraph (4) of this Regulation, a Licence to which these Regulations apply may be renewed from time to time by the Commission under paragraph (3) of this Regulation, on payment by the applicant of the fees prescribed in Regulation 9 hereof.
- (3) On application by or on behalf of a Licensee to the Commission before the expiration of their Licence, the Commission may, by notice in writing given to the Licensee or sent to the Licensee at the address of the Licensee specified in the Licence or notified to the Commission by the Licensee in accordance with the Licence, renew the Licence for a specified period of up to one year from the day following the expiration of the last previous period during which it was in force. The granting or renewal of a Licence shall not be construed as warranting, representing or otherwise holding out that the Licence shall be renewed at any time in the future, or renewed for any particular period or on any particular terms.
- (4) Notwithstanding paragraphs (1), (2) and (3) of this Regulation, a Licence granted or renewed under these Regulations shall, in any event, terminate on 31 January, 2013, or such earlier date as may be notified to the Licensee by the Commission.



## Conditions of Licences

6. It shall be a condition of a Licence to which these Regulations apply that the Licensee shall:
- (1) ensure that it complies with the conditions contained within the Licence and these Regulations;
  - (2) ensure that the apparatus, as appropriate, is used only on such radio frequency spectrum as may be specified in the Licence and that such radio frequencies shall be used in an effective and efficient manner;
  - (3) ensure that it makes payments of the fees as set out in Regulation 9 of these Regulations;
  - (4) not, without the prior consent of the Commission (which shall not be unreasonably withheld), assign the Licence or any of the powers, duties or functions conferred by it or otherwise transfer any of the rights or obligations conferred by it;
  - (5) ensure that non-ionising radiation emissions from the wireless telegraphy apparatus operated under the Licence for the purposes of the Service are within the limits specified by the guidelines published by the International Commission for Non-Ionising Radiation Protection (“ICNIRP”) and that it complies with any radiation emission standards adopted and published from time to time by ICNIRP, any standards of the European Committee for Electrotechnical Standards and any standards which may from time to time be specified by national and European Community law;
  - (6) ensure that the wireless telegraphy apparatus operated under the Licence is not installed or operated at a location in a manner such as to be the cause of the

aggregate non-ionising radiation emissions exceeding the limits specified by the guidelines published by the ICNIRP and that it complies with any radiation emission standards adopted and published by ICNIRP or its successors from time to time, any radiation emission standards of the European Committee for Electrotechnical Standards and any radiation emission standards specified by national and European Community law;

- (7) ensure that if the address of the Licensee or the person to whom the Licence has been assigned changes, the Licensee or assignee shall, as soon as possible, but within 28 days, notify the Commission in writing of the change;
- (8) furnish, such information and reports relating to the operation of the Apparatus as may be requested by the Commission from time to time;
- (9) where consent is granted, under paragraph 4 of this Regulation, ensure that the assignee is contractually obliged to provide to the assignor such details as the Commission may request from time to time;
- (10) ensure that the apparatus or any part thereof, shall be installed, maintained, operated and used so as not to cause harmful interference; ensure that the installation of the apparatus or any part thereof, is effected, and its maintenance and operation is carried on, in such a manner as to ensure that the safety of persons or property is not endangered;
- (11) comply with any special conditions imposed under section 8 of the Act of 1972 and subject to which this Licence is deemed by subsection (3) of that section to be issued;
- (12) ensure that, save as may be required by law, physical access to, and use of, the

apparatus to which the Licence relates is restricted to the Licensee, employees or agents of the Licensee and persons authorised by or on behalf of the Licensee;

(13) upon becoming aware of any event likely to materially affect their ability to comply with these Regulations, or any conditions set out or referred to in the Licence, notify the Commission of that fact in writing within 5 business days;

(14) comply with all obligations under relevant international agreements relating to the use of apparatus or the frequencies to which they are assigned;

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### **Enforcement, Amendment, Revocation and Suspension**

7. (1) Enforcement by the Commission of compliance by a Licensee with conditions attached to their Licence shall be in accordance with the Authorisation Regulations, and any other requirements under applicable national or European Community law.
- (2) The Commission may amend the Licence from time to time where objectively justifiable and in a proportionate manner. Any amendment shall be made subject to and in accordance with the Authorisation Regulations, and any other requirements under applicable national or European Community law.
- (3) Where the Commission is of the opinion that, in the interest of the efficient and orderly use of apparatus for wireless telegraphy or radio frequency spectrum, it is desirable to do so, it may amend the Licence in accordance with the Authorisation Regulations.
- (4) Without prejudice to paragraph (1) of this Regulation, at the request of the Licensee, the Commission may, if it considers it appropriate to do so, amend the Licence by adding to, deleting from or altering the radio frequency spectrum specified in the Licence on which the Apparatus may be used. Any such amendment shall be effected by notice in writing from the Commission specifying the amendment and given to the Licensee or sent to the Licensee at the address specified in the Licence or notified to the Commission pursuant to the Licence.
- (5) A Licence may be suspended or withdrawn by the Commission in accordance with the Authorisation Regulations, and any other requirements under applicable national or European Community law.

### **Powers of Authorised Officers**

8. (1) The Commission may appoint such members of its staff as it considers appropriate to be authorised officers to act for the purposes of these Regulations.
- (2) A person appointed under paragraph (1) shall, on their appointment, be furnished by the Commission with a certificate of their appointment and when exercising a power conferred by paragraph (3) shall if so requested by any person thereby affected produce such certificate to that person for inspection.
- (3) For the purposes of the exercise by the Commission of its functions under these Regulations, an authorised officer appointed hereunder may exercise the powers conferred by section 39(3) of the Act of 2002 on authorised officers appointed under that Act.

## Licence Fees

9. (1) Subject to paragraph (2) of this Regulation, the following fees are hereby prescribed in relation to Licences to which these Regulations apply:

The Licensee shall pay:

in respect of each 200 kHz duplex radio frequency channel in the 900 MHz frequency band as specified in the Licence, a fee of €70,101 for a one-year period and

- (2) If the Licence is granted or renewed for a part of a year then the fee in respect of the Licence to be paid by the Licensee shall be calculated as follows:

$$A \times (B \div 12) = C,$$

Where A is the appropriate annual fee as set out in paragraph (1) of this Regulation; B is the aggregate number of whole months and parts thereof (if any) for which the Licence is granted; and C is the appropriate Licence fee to be paid.

- (3) The fees specified in paragraphs (1) and (2) of this Regulation shall be paid to the Commission at the time of the making of any application under Regulation 4(1) or Regulation 5(3), and prior to any grant or renewal of a Licence hereunder, as the case may be, by way of banker's draft or such other means and on such other terms-, if any, as the Commission may decide. Where the date of payment falls on a Saturday, a Sunday or a public holiday, payment shall be made on or before the last working day before the date on which payment would otherwise have fallen due.
- (4) If a Licence is surrendered, withdrawn, suspended or revoked, the Licensee shall not be entitled to be repaid any part of the fee paid by the Licensee under this Regulation, but shall still be liable to pay any sums (including interest) that are outstanding.

- (5) If a Licence is amended by the addition of a radio frequency channel to those specified in the Licence on which the Apparatus may be used, the appropriate fee specified in paragraph (1) of this Regulation in relation to such channel shall be paid (on a pro-rata basis, based on the proportion of the unexpired period of the Licence on the date of the amendment).
- (6) Where payment is not made in due time, then interest shall be payable by the Licensee at the appropriate Euribor rate standing on the fee or part thereof in respect of the period between the date when such fee or part fell due and the date of payment of such fee or part.
- (7) An amount payable by a person in respect of a fee under this Regulation may be recovered by the Commission from the person as a simple contract debt in any court of competent jurisdiction.

### **Licensee to satisfy all Legal Requirements**

10. (1) A Licence granted pursuant to these Regulations does not grant to the Licensee any right, interest or entitlement other than the right to keep, install, maintain, work and use, at a specified location or locations in the State, apparatus for wireless telegraphy for the purpose of the provision of a GSM Mobile Telephony Service.
- (2) Nothing in these Regulations shall absolve the Licensee from any requirement in law to obtain such additional consents, permissions, authorisations or licences as may be necessary for the provision the service and for the exercise of his or her rights or discharge of his or her obligations under the Licence. The Licensee is responsible for all costs, expenses and other commitments (financial and non-financial) in respect of the Licence and the provision of the GSM Mobile Telephony Service and the Commission shall bear no responsibility for such costs, expenses or commitments.



## SCHEDULE

### WIRELESS TELEGRAPHY ACT, 1926 WIRELESS TELEGRAPHY (INTERIM GSM MOBILE TELEPHONY LICENCE) REGULATIONS 2011 Mobile Telephony Licence

**Licence under section 5 of the Wireless Telegraphy Act, 1926, to keep and have possession of , install, maintain, work and use apparatus for wireless telegraphy for the purpose of providing a GSM Mobile Telephony service.**

The Commission for Communications Regulation, in exercise of the powers conferred on it by section 5 (as substituted by section 182 of the Broadcasting Act 2009 (No. 18 of 2009)) of the Wireless Telegraphy Act, 1926 (No. 45 of 1926), hereby grants to the Licensee specified (**Licensee of XXX, Registered Address**), authorisation to keep, have possession of, install, maintain, work and use apparatus for wireless telegraphy as specified in Schedule 2 to this Licence, in the places specified in Schedule 1 to this Licence and subject to the terms and conditions and restrictions as set out in the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations, 2011 (S.I. No. xxx of 2011), including, but not limited to, the following;

1. The Licensee shall ensure that it complies with the geographical and technical conditions contained within Schedules 1 to 3 to this licence.
2. The Licensee shall ensure that it complies with all the commitments contained within Schedule 4 to the Licence which were made by the Licensee in the course of a comparative evaluation selection procedure, prior to the granting of the Original Licence.

This Licence shall come into operation on **Commencement date** and unless previously revoked or withdrawn, shall expire on the **Termination date**.

GIVEN under the official seal of the Commission for Communications Regulation, this  
day  
of , 2011

**For and on behalf of the Commission for Communications Regulation**

**Schedule 1**  
**Company 2G**

**Places at which the Licensee is authorised by this Licence to keep  
and have possession of 2G Apparatus.**

<b>Site</b>	<b>Easting</b>	<b>Northing</b>

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## **Schedule 2**

**The apparatus for wireless telegraphy to which this Licence applies.**

Ref	Manufacturer	Component	Equipment No.
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## **Schedule 3**

**Radio Frequency Channels on which the Apparatus is authorised by this Licence  
to be used.**

### **Schedule 3 (a) - GSM 900 Frequencies**

<b>Base Tx ( MHz )</b>	<b>Base Rx ( MHz )</b>	<b>Channel Number</b>
------------------------	------------------------	-----------------------

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**Schedule 4**  
**COMMITMENTS MADE BY THE LICENSEE PRIOR TO THE GRANT OF**  
**THE ORIGINAL LICENCE.**

**Part 1**

**LICENCE COMMENCEMENT DATE**

The Licence Commencement Date is the xx<sup>th</sup> day of May 2011.

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## SCHEDULE 4

### Part 2

#### THE LICENSED MOBILE SERVICES

##### 1. The Licensed Mobile Services.

1.1. The Licensed Mobile Services are GSM Mobile and Personal Communications Services having the characteristic of a pan-European, cellular, digital, land based, mobile telephony service:-

- (i) With the international roaming capability referred to in Part 5 of the Schedule.

##### 2. Additional services

2.1 The Licensee shall be required to provide the following services:-

- (i) Fax and data.
- (ii) Short message service.
- (iii) Voicemail.
- (iv) Call diversion.
- (v) Call waiting.
- (vi) Itemised billing.
- (vii) High Speed Circuit Switched Data (“HSCSD”).
- (viii) General Packet Radio Service (“GPRS”).
- (ix) Enhanced Data rates for GSM Evolution “EDGE”
- (x) The licensee shall provide value added services that enhance messaging, voicemail and SMS services
- (xi) The licensee shall provide Information Services and a platform for electronic commerce (e commerce).

## **SCHEDULE 4**

### **Part 3**

#### **ACCESS TO THE EMERGENCY SERVICES**

**1. General.**

The Licensee shall provide ready access for customers through the Licensed Mobile Services to the emergency services (within the meaning this of Part 3 of the Schedule).

**2. Calls to an Emergency Service**

In this part an “emergency service” means the Garda Síochána, the fire brigade services, the ambulance services, the boat and coastal rescue services (including the rescue services provided by the Air Corps) or the mountain and cave rescue services.

**3. Directions by the Commission**

The Commission may give directions in writing to the Licensee in relation to the handling of calls to and from customers relating to an emergency service (“emergency calls”), and the Licensee shall comply with any such directions.

**4. Acceptance of Emergency Calls**

Emergency access codes 999 and 112, and any other codes subsequently designated for use as emergency access codes, shall be open to all GSM terminal equipment equipped with a valid SIM Card, where technically necessary.

**5. Routing of Emergency Calls**

The Licensee shall ensure that an emergency call is routed at the expense of the Licensee, to a collection centre for emergency calls. The Licensee shall provide not less than two routes with physical diversity between each mobile switching centre and a collection centre as described.

**6. Emergency Calls Free of Charge**

- (a) The Licensee shall not impose a charge on the customer in respect of an emergency call.
- (b) The Licensee shall not list on a customer’s itemised bill any emergency call.

**7. Identification of Emergency Calls**

When an emergency call is made from terminal equipment of a customer of the Licensee, the Licensee shall, where technically possible, transmit the customer’s number to a collection centre for emergency calls in the form of a calling line identification message.



## SCHEDULE 4

### Part 4

#### SERVICE QUALITY, PERFORMANCE STANDARDS AND OBLIGATIONS

##### 1. General Obligations.

1.1 For the purposes of carrying out service quality surveys, the Licensee shall provide, on request, to the Commission:-

- (i) Maps showing coverage for, in the case of the GSM900 service, 2 Watt terminals;
- (ii) An up to date list of the locations of the base transceiver stations;
- (iii) A mechanism for identifying the base station that is handling a call at any given time; and
- (iv) An adequate number of test numbers.

1.2 Where requested to do so, the Licensee shall provide to members of the public, maps of the other GSM operators with whom it has roaming agreements showing the coverage provided by them.

##### 2. Coverage.

2.1 "Coverage" means the extent to which the strength of the radio signal is sufficient to provide an adequate service for:-

- a 2 Watt, GSM900 terminal and/or

An adequate service is achieved outdoors if the average field strength measured outdoors is at least 46dB $\mu$ V/m for the GSM 900 service at a height of 1.5 metres above ground level.

An adequate service is achieved indoors if the average field strength measured indoors is 56 dB $\mu$ V/m for the GSM 900 service at a height of 1.5 metres above ground level.

Coverage is expressed as a percentage of geographical area, or as a percentage of population, of the State.

##### 2.2 Measurement Guidelines for coverage.

The appropriate figures contained in the latest population census published by the Central Statistics Office will be used for calculating the base figure when calculating national population coverage. Measurements to determine coverage shall be carried out using:

a 2 Watt, GSM900 terminal;

Alternatively, signal strength measuring equipment may be used

### 2.3 **Mandatory Service Standards.**

The Licensee shall ensure that the national outdoor population coverage shall not fall below :- That given in the voluntary commitments in Schedule 4 to the Original Licence

### 2.4 **Other Obligations.**

2.4.1 The Licensee shall publish up to date maps showing coverage for 2 Watt, GSM900 mobile terminals operating outdoors.

### 3. **Service Unavailability.**

3.1 "**Service unavailability**" means the average number of minutes per terminal for any six month period for which the service is not available due to a network disturbance, failure or scheduled unavailability.

### 3.2 **Measurement Guidelines for service unavailability.**

The calculation of service unavailability is subject to the following weighting factors which take account of traffic load variations:

Service Unavailability, Weighting Factors (divide duration of each network event by weighting factor)			
	Monday to Friday	Saturday	Sunday
For periods between 07.00 and 24.00			
For periods between 00.00 and 07.00			

### 3.3 **Mandatory Service Standard.**

The Licensee shall ensure that service unavailability is less than XX minutes, as given in the voluntary commitments in Schedule 4 to the Original Licence.

### 3.4 **Other Obligations.**

3.4.1 The Licensee shall keep a log (the "network log") for the purposes of recording and tracking all periods of system unavailability. The Licensee shall maintain this network log in a manner that will demonstrate, to the satisfaction of the Commission that such a network log is an adequate means of assessing whether the Licensee is complying with its system availability obligations under this Licence.

3.4.2 The network log or, as may be appropriate, part thereof shall be made available on request to the Commission.

3.4.3 The Licensee shall calculate the service unavailability for the Licensed Mobile

Services for any period specified by the Commission from the information recorded in the network log, and shall upon request and within such time as may be specified by the Commission, provide the Commission with the results of the calculation.

#### **4. Grade of Service**

##### **4.1 Blocking Rates**

###### **4.1.1 Definitions:**

**"Blocking rate"** means the percentage of total call attempts made for the traffic case concerned, during the time consistent busy hour and within coverage, which are unsuccessful.

**"Time consistent busy hour"** means the period of one hour starting at the same time each day for which the average traffic of the Licensee's Mobile and Personal Communications System concerned is greatest over the days under consideration. The time consistent busy hour shall be determined from an analysis of traffic data obtained from the Licensed Mobile Services and shall be subject to the approval of the Commission.

###### **4.1.2 Mandatory Service Standards.**

The Licensee shall ensure that the blocking rate shall not exceed the percentages in respect of each of the traffic cases specified in the following Table, as given in the voluntary commitments in Schedule 4 to the Original Licence.

:-

Maximum Permissible Blocking Rates		
Traffic Case	Blocking rate	
	Average	Worst Case
Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Licensee's Mobile and Personal Communications System)		
Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Mobile and Personal Communications System of an Other Licensed Operator)		
Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Telecommunications Network of an Other Licensed Operator)		

#### 4.2 Dropped Calls.

4.2.1 **"Dropped call rate"**: the percentage of total established calls during any measurement period which are prematurely released by the Licensee's Mobile and Personal Communications System within three minutes.

#### 4.2.2 Measurement Guidelines.

Measurements will be made

with a 2 Watt GSM 900 terminal operating within claimed coverage areas.

#### 4.2.3 Mandatory Service Standards

The Licensee shall ensure that the dropped call rate shall not exceed X% on average or X% worst case, as given in the voluntary commitments in Schedule 4 to the Original Licence.

#### 4.3 Transmission Quality

The Licensee shall ensure that the speech transmission quality complies with the GSM Technical Specifications of ETSI.

In particular, the Licensee shall ensure that appropriate echo treatment equipment is used in the provision of the Licensed Mobile Services and that it is properly configured.

#### 4.4 Other Obligations

The Licensee shall provide to the Commission, on request, such grade of service measurement information as the Commission considers necessary to determine performance against mandatory service standards as specified to the Licensee.

### 5. Billing

#### 5.1 Mandatory Service Standards

In relation to billing, the Licensee shall, unless agreed otherwise with individual customers, comply with the appropriate standard requirements specified in the following Table:-

Billing Aspects	Standard Requirements	Options and Alternatives
Billing Frequency	Monthly	Alternative frequency or flexible frequency subject to agreement with customer
Billing Itemisation	All billable calls and services	Customised bill layouts with or without summary itemisation subject to agreement with customer
Billing Medium	Paper	Delivery of bills on computer media or on-line subject to prior agreement with customer
Billing Method	Per Second Billing	

An itemised bill shall contain, at least, the following information in respect of each billable call:-

- (i) the date of the call
- (ii) the start time of the call
- (iii) the number called
- (iv) the duration of the call
- (v) the price of the call

#### 5.2 Billing Accuracy and Fraud Detection

The Licensee shall incorporate where possible in its billing system and otherwise shall adopt:

- (i) measures to ensure that each call record is an accurate record of the actual call and that the correct accumulated call records are applied to generate each customer's bill, and
- (ii) measures to detect cases of possible fraud including measures to identify rapidly abnormal calling patterns.

### 6. Performance Standards and Objectives

The Commission may, by direction in writing given to the Licensee, specify performance standards and obligations with respect to service quality or modify existing

performance standards and obligations and the Licensee shall comply with any such directions.

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## **SCHEDULE 4**

### **Part 5**

#### **ROAMING**

1. The Licensee shall not act on foot of any agreement providing for a national roaming capability made between the Licensee and any other provider of a GSM mobile telephony service in the State unless and until the Commission has approved the terms of the agreement.
2. The Licensee shall establish and maintain as part of the Licensed Mobile Services an international roaming capability for its customers that is as wide and comprehensive as is practicable.

## **Part 6**

### **OTHER CONDITIONS**

(Other relevant commitments made by the Licensee in the original licence)

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GIVEN under the official seal of the Commission for Communications Regulation, this  
XX day of Xxxxxr 2011

**For and on behalf of the Commission for Communications Regulation**

The Minister for Communications, Energy and Natural Resources consents to the  
making of the foregoing Regulations.

GIVEN under the Official Seal of the Minister for Communications, Energy and  
Natural Resources

this XX day of Xxxxxr, 2011

**XXX YYY T.D.**

**Minister for Communications, Energy and Natural Resources**

## EXPLANATORY NOTE

*(This note is not part of the Instrument and does not purport to be a legal interpretation.)*

These Regulations prescribe matters in regard to licences that may be granted under section 5 of the Wireless Telegraphy Act 1926 (as amended), to keep and have possession of, apparatus for wireless telegraphy in a specified place in the State for the purpose of the provision of a GSM Mobile Telephony Service, including matters relating to their form, the period(s) during which they continue in force, the fees payable in respect of them, and the conditions and restrictions applying to them.

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## Annex 4 – International Updates

This Annex sets out details of relevant developments relating to the position taken by other Member States in relation to expiry of GSM 900 MHz and 1800 MHz licences.

### Belgium

The Belgian Institute for Postal services and Telecommunications (BIPT) extended two of the existing three 900 MHz licences from 2010 until 2015, with these extended licences co-terminating with the third 900 MHz licence. In the original Royal Decree, the possibility of an extension for a period of 5 years was presented. Two operators (Belgacom Mobile and Mobistar) licences were extended on this basis for 5 years. The fees for this extension were based on the original Spectrum Access fee per MHz paid in respect of their existing licences. The operators had the possibility to pay a once-off fee or to pay per year (which they chose). The original licence was for a period of 15 years; therefore the two operators pay 1/15th of the original amount per MHz per year for their extended 900 MHz licences.

In April 2010, BIPT adopted a decision<sup>81</sup> on the introduction of UMTS in the 900 MHz band, since then UMTS has been deployed in the 900 MHz band.

**[Confidential material removed]**

### Denmark

The original 900 MHz licenses were awarded for a 10-year period via a beauty contest. According to the existing Frequency Act<sup>u</sup> at that time, the licences would upon expiry automatically be renewed for another 10-year period if not actively revoked by the National IT and Telecom Agency (NITA). As a general rule, a revocation could only be considered if certain criteria were met, one example being if the licensed service provided were no longer profitable.

Due to the amendment of the GSM-directive, NITA decided to reform the 900 MHz and 1800 MHz bands. Licences in the 900 MHz band and 1800 MHz band did not co-terminate. Some licences had recently been renewed, in 2007, for 10 years on the expiration of existing licences. Other licences were due to expire in 2011 and 2012. NITA decided that it was too early to revoke licences in 2011 and 2012, and did not want to issue another 10 year licence as NITA considered that this may have a significant effect on competition with certain licensees possessing licences for 5 years longer than others. During the reforming exercise, the licences were renewed for a shorter period and subsequently revoked. Therefore, 900 MHz licences will expire in 2019 and 1800 MHz licences in 2017. Existing licences will become technology and service neutral as and from May 2011.

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<sup>81</sup> Information on the BIPT decision available here

[http://www.cullen-international.com/report/5347/t4030#Table\\_22](http://www.cullen-international.com/report/5347/t4030#Table_22)

## Malta

In February 2009, the Malta Communications Authority (MCA) published a consultation outlining future licensing proposals and assignment mechanisms for the 900 and 1800 MHz bands<sup>82</sup>. The consultation phase was followed by a round of bilateral meetings to clarify respondent's views and on 16 July 2010 the MCA published its analysis of stakeholders comments together with its final decision<sup>83</sup>. The decision addresses numerous issues, including interim measures to deal with differences in the existing licence expiry dates (2010 and 2011).

The MCA published a call for applications from prospective licensees on 27 October 2010<sup>84</sup>, and there were three expressions of interest submitted<sup>85</sup> by the closing date of 14 January 2011, which are now being evaluated by the Maltese authorities.

The licences of incumbent operators were extended to ensure continuity of GSM services until the new licences come into effect<sup>86</sup>. A provision was present in 900 MHz licences which empowered the Authority to add or amend any of the licence terms and conditions, which it enacted in the form of written correspondence with licensee. Currently the existing licences in the 900 MHz and 1800 MHz bands have different termination dates. In order to ensure a smooth migration, the July 2010 Decision stipulated that the existing GSM licences were being extended by a few months pending the completion of the re-assignment process of 900 MHz and 1800 MHz spectrum. These extensions were intended to be issued once off and non-renewable. The licences retained the terms and conditions of the initial licence and granted no additional rights to the existing licence holders.

**[Confidential material removed]**

## Netherlands

Two licences in the 900 MHz band (held by KPN and Vodafone), were renewed in 2008 in order to extend the length of licence from 2010 to 2013, resulting in co-termination with other 900 MHz licensees. The fee paid by KPN for the 3 year extension for their 2 × 12.4 MHz 900 MHz assignment was €39.8m, and Vodafone's fee was €36.6m for the 3 year extension of their 2 × 11.4 MHz 900 MHz assignment<sup>87</sup>.

In setting the fees, the Ministry for Economic Affairs calculated the financial advantage for the 900 MHz licence holders (KPN and Vodafone) of the prolongation of the licences, and charged accordingly. The method used was based on an estimate of the

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<sup>82</sup> <http://www.mca.org.mt/filesystem/pushdocmgmtfile.asp?id=695&source=1&pin=>

<sup>83</sup> <http://www.mca.org.mt/filesystem/pushdocmgmtfile.asp?id=895&source=1&pin=>

<sup>84</sup> <http://www.mca.org.mt/newsroom/openarticle.asp?id=923>

<sup>85</sup> <http://www.mca.org.mt/newsroom/openarticle.asp?id=944>

<sup>86</sup> <http://www.mca.org.mt/filesystem/pushdocmgmtfile.asp?id=1435&source=4&pin=>

<sup>87</sup> [http://www.cullen-international.com/report/5347/t4032#Table\\_21](http://www.cullen-international.com/report/5347/t4032#Table_21)

value of the licence (for the residual period, 2010 - 2013) for an alternative operator that did not have a 900 MHz licence, taking into account numerous factors such as existing market shares for Vodafone and KPN and sunk costs in network deployment to name but two.<sup>88</sup> The method was accepted by all license holders and most alternative operators.

All future spectrum rights in the 900 MHz and 1800 MHz bands will be awarded through an open auction, to be held one year in advance of expiry. It was also announced that current holders of spectrum in the 900 MHz and 1800 MHz bands can apply for a ministerial decree to liberalise these licences for their remaining term, but only after several ministerial decrees and decisions have been amended. The timing for the final amendment of the decrees and decisions is not yet known.

## Spain

In January 2010 the Ministry of Industry<sup>89</sup> published a draft law proposing to liberalise the 900 MHz and 1800 MHz licences following a review of existing spectrum holdings by Royal decree.

In June 2010, the Ministry published a consultation on its proposals for reforming the 800 MHz 900 MHz, 1800 MHz and 2.6 GHz bands.<sup>90</sup>

In relation to the 900 MHz band, the preferred option is to hold an auction in June 2011 for a block of  $2 \times 5$  MHz released by existing 900 MHz licensees. Two more blocks of  $2 \times 5$  MHz would be auctioned contemporaneously, but these would not be assigned until 2015<sup>91</sup>, following the expiry of a Telefonica licence and the release of a further 1 MHz of spectrum by Vodafone.

To compensate operators for the release of 900 MHz spectrum, the expiry dates for their remaining assignments in the band would be extended to 2030. 900 MHz licensees would be granted permission to deploy other technologies, subject to certain coverage requirements, and Telefonica and Vodafone would also be subject to wholesale obligations to provide national roaming to operators not licensed in the band.

In July the Spanish Competition Authority (CNC) raised some concerns about the Ministry's proposals<sup>92</sup>, noting;

- the potential competitive advantage that the winner of a 900 MHz licence commencing in 2011 may have over those acquiring licences that cannot be used before 2015.

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<sup>88</sup> Detailed report on calculations available, <http://dare.uva.nl/record/323065>

<sup>89</sup> <http://www.mityc.es/telecomunicaciones/es-ES/Paginas/index.aspx>

<sup>90</sup> [http://www.cullen-international.com/report/5347/t4035#Table\\_25](http://www.cullen-international.com/report/5347/t4035#Table_25)

<sup>91</sup> [http://www.cullen-international.com/report/5347/t4030#Table\\_22](http://www.cullen-international.com/report/5347/t4030#Table_22)

<sup>92</sup> <http://www.cncompetencia.es/Inicio/Informes/Informes/tabid/166/Default.aspx>

- the extension of existing 900 MHz licences to 2030, in return for the early release of spectrum, may limit competition.

## Sweden

In 2009, following a joint proposal by five MNOs for renewal of 900 MHz licences, the Swedish Post and Telecom Agency (PTS) decided to redistribute existing spectrum assignments<sup>93</sup>, renew licences and permit the introduction of new systems into the band. As part of the decision<sup>94</sup>, PTS assigned additional spectrum to Hi3G who did not previously have any 900 MHz spectrum in the band. Existing operators intending to deploy new systems in the 900 MHz band will be required to meet their existing coverage conditions until the end of 2015 and this period may be extended further. The renewal of the licenses until 2025 (this term chosen in order to allow operators make a fair return on investment) was not statutory, but based on the legislative history including statements that a presumption should mean that a new licence is granted in conjunction with licence expiring.

Reasons offered by PTS supporting licence renewal in August 2009 include<sup>95</sup>:

- licence holders are completely dependent on a licence in the 900 MHz band in order to continue their operations;
- considerable proportion of the total amount of traffic will be carried by the GSM networks far beyond 2010;
- migration of subscribers to the licence holders' UMTS networks, in relevant cases, will be far from complete by the end of 2010;
- licence holders have made, and are still making, extensive infrastructure investments in the companies' GSM networks, which do not allow for a reasonable rate of return within the remaining licence period. The companies would be adversely affected by substantial operational and financial problems if these licences were not extended;
- consumers' mobile communications opportunities would also be strongly affected, since the rollout of any new GSM network would take several years to complete; and
- visiting foreign subscribers would also be affected as well as machine-to-machine services that are currently being developed within the framework of GSM technology.

Later in 2009 the PTS decision was investigated by the Swedish Competition Authority on foot of a complaint lodged with the EC. The Authority reached the preliminary conclusion that the joint proposal presented by five MNOs to the PTS constituted an agreement restricting competition that is prohibited under Article 81 of

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<sup>93</sup> <http://www.pts.se/en-gb/News/Press-releases/2009/PTS-issues-decision-concerning-space-in-the-900-MHz-band-which-will-ensure-continued-high-coverage-for-mobile-telephony-in-Sweden/>

<sup>94</sup> <http://www.pts.se/upload/Beslut/Radio/2009/08-12019-decision-900-mhz-march-2009.pdf>

<sup>95</sup> <http://www.pts.se/upload/Beslut/Radio/2009/08-12019-decision-900-mhz-march-2009.pdf>

the EC Treaty<sup>96</sup>. In June 2010, the Competition Authority concluded its investigation into the 2009 PTS decision, noting that the regulation of spectrum as a resource limited the potential for the inter-operator agreement to restrict competition in the market, and the Competition Authority closed its investigation as it determined the PTS decisions was not against competition rules<sup>97</sup>. The legal proceedings in court are not finalised, nor the complaint based on state aid arguments to the Commission. The investigation by the Competition Authority is however closed without any further legal actions.

PTS has intended to allow for liberalised usage of 900 MHz and 1800 MHz assignments from March 2010, however this was appealed in the Stockholm Administrative Court<sup>98</sup> and is not currently in force.

## Switzerland

A 2007 decision to renew existing 900 MHz GSM licences led to unexpected legal delays resulting in the Federal Communications Commission (ComCom) provisionally extending the licences. GSM licences were extended in May 2009 until December 2013 in order to harmonise their expiry dates.<sup>99</sup> The decision to extend these licences also included measures which came into effect early in 2010 allowing the regulator to redistribute spectrum in the bands and for *technology neutral* usage of the 900 MHz and 1800 MHz spectrum. The redistribution of spectrum was completed in March 2010 and each operator now has access to at least  $2 \times 5$  MHz of technology neutral spectrum in the 900 MHz band.

The current 900 MHz licences will expire in 2013 respectively and the regulator is now planning a 2011 “big bang” auction<sup>100</sup> of 550 MHz of spectrum in the 800 MHz, 900 MHz, 1.8 GHz, 2.1 GHz and 2.6 bands. Auction conditions issued in November 2010 invited expressions of interest until March 18 2011, with an auction planned before summer 2011. Licence duration will be from 2014 until 2028.<sup>101</sup> The auction will be open to all companies.

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<sup>96</sup> now article 101 of the TFEU

<sup>97</sup> <http://www.kkv.se/upload/Filer/Konkurrens/2010/Beslut/08-0688.pdf>

<sup>98</sup> [http://www.cullen-international.com/report/5347/t4030#Table\\_22](http://www.cullen-international.com/report/5347/t4030#Table_22)

<sup>99</sup> <http://www.comcom.admin.ch/aktuell/00429/00457/00560/index.html?lang=en&msg-id=27081>

<sup>100</sup> <http://www.bakom.admin.ch/dokumentation/medieninformationen/00471/index.html?lang=en&msg-id=30007>

<sup>101</sup> [http://www.cullen-international.com/report/5347/t4030#Table\\_22](http://www.cullen-international.com/report/5347/t4030#Table_22)



## Annex 5 – Summary of Draft RIA in Tabular Format

Note: This table provides a summary in tabular form of a number of key points in the draft RIA which is set out in full in chapter 3.

<b>Option 1: Interim licences to Vodafone and O2 on a GSM-only basis until early 2013.</b>			
<b>Criterion</b>		<b>Advantages</b>	<b>Disadvantages</b>
<b>IMPACT ON INDUSTRY STAKEHOLDERS</b>	<b>EXISTING GSM LICENSEES</b>	<p>Vodafone and O2 would be granted interim licences for GSM use only from mid 2011-2013. They would be free to delay moves to roll out advanced services at 900 MHz until the results of the final allocation of usage rights for 2013 to 2030 was known.</p> <p>Meteor would remain in the same position as it is now. It would not be disadvantaged by any move to liberalise parts of the 900 MHz band at an earlier date.</p>	<p>Relative to some other options Vodafone and O2 would not be able to roll out advanced services at 900 MHz and obtain the expected cost savings. However, any such move to obtain this benefit would likely not be taken in advance of knowing the final allocation of usage rights for the longer 2013 to 2030 period. Even then the operators would likely wish to ensure that all transition issues were dealt with in advance of rolling out services. Options that would give Vodafone and O2 a first mover advantage would likely be preferred by them but this would come at a heavy cost in terms of the risk of distortion of competition.</p>
	<p><b>H3GI</b></p> <p><b>Potential New Entrant</b></p>	<p>H3GI would remain in the same position as it is currently in the market. No other operator, with which it competes, would gain access to the cost advantage associated with delivering advanced services at 900 MHz in advance of it being able to acquire the same advantage at the same time.</p> <p>Potential new entrants would likely strongly support Option 1 compared to the other options. It gives them the best opportunity to come into the market on an even basis to provide advanced services using 900 MHz spectrum.</p>	<p>H3GI argued that Option 1 was disadvantageous to them as it prolonged their reliance on national roaming (for 2G) purposes relative to any option that also allowed them to gain access to 900 MHz spectrum usage rights for the period up to 2013. However, it is not clear how much this reliance on their national roaming agreement with Vodafone would reduce if H3GI had spectrum usage rights as much of this roaming occurs in areas where H3GI would have to build new network to deliver advanced services using 900 MHz spectrum. Given the large sunk cost element in any such build, such works would not be undertaken until the final allocation of spectrum usage rights for the 2013 to 2030 period was known. In reality, the ability of H3GI to reduce substantially its need for national roaming could be met to some degree through</p>

			Option 1, given the potential to bring forward liberalisation of 900 MHz spectrum in advance of 2013 once transition measures had been undertaken (see Chapter 2). <b>[CONFIDENTIAL MATERIAL REMOVED]</b>
<b>IMPACT ON CONSUMERS</b>		<p>Would facilitate the full liberalisation of the use of spectrum in the 900 MHz band by early 2013 via a competitive process, combining the 800 MHz band and potentially the 1800 MHz band.</p> <p>It addresses the policy issue in a proportionate manner in that it seeks to preserve the <i>status quo</i> before a final decision is made on what spectrum bands to release and by what means. On the basis that this approach maximises the incentive for new entry, and on the basis that a competitive or comparative method of awarding spectrum usage rights is ultimately chosen, this approach to interim measures gives the greatest chance that competition in the provision of advanced mobile services is enhanced in the medium to long term as no operator will be granted a first mover advantage in rolling out advanced services at 900 MHz. This would ensure that competition between operators would be on the merits of their various offerings rather than their ability to obtain licences based on incumbency. This in turn should favourably impact on consumers.</p> <p>It would not prejudice the final decision on what means might be used to allocate spectrum usage rights and, in the event that a competitive auction remains the preferred option, would ensure that competition for these rights would be maximised. This would, in turn, ensure that consumers benefited the most over the longer term in the envisaged 2013 to 2030 period.</p>	Advanced services using 900 MHz spectrum could potentially be rolled out earlier than 2013 using other options

	<p>This option does not preclude the possibility that operators will be able to move to early liberalisation once the allocation of future usage rights is known, so long as this does not distort competition. Any move to early liberalisation would benefit consumers.</p>	
	<p>The difference in timing of rolling out advanced services using 900 MHz spectrum (as between Option 1 and other options) is not, in ComReg's view, material enough to overcome the potential long term gain in terms of the benefit of potential new entry and in terms of increased competition and innovation over the much longer 2013 to 2030 period. Consumers would benefit more from a transition mechanism that did not gainsay decisions on the future allocations of longer term spectrum usage rights.</p>	
<p><b>IMPACT ON COMPETITION</b></p>	<p>On the basis that it would maximise incentives for new entry, Option 1 would strongly encourage competition for spectrum usage rights and by extension long term competition in the downstream retail market, if a competitive or comparative procedure was in the end selected to assign spectrum usage rights. Option 1 would not favour one means of allocating spectrum usage rights over another and would be substantially better than other options if a competitive auction were to remain the preferred option. Options which could be seen as favouring incumbent operators would likely reduce interest from new entrants. This could lead to a misallocation of spectrum usage rights and this could potentially have a serious long term impact on competition and innovation in the sector.</p> <p>Option 1 would not distort the existing level of competition that exists in any of the related retail markets. Other options, which may look on the surface to deliver liberalisation earlier would also come with a substantial lessening of competition as operators would have very different abilities to deliver</p>	<p>It could be argued that operators that have taken the necessary steps to be prepared to roll out advanced services at 900 MHz (on the assumption of acquiring long term rights) should be able to exploit this advantage and increase their ability to compete on the retail market. Option 1 allows more operators to be in a position to launch their services simultaneously. It could be argued that if this were to occur other operators would be given strong incentives to quickly roll out such services too. However, to the extent that such operators would incur sunk costs in such a roll out, these investments would likely not be undertaken in advance of knowing the long term position on spectrum rights. On the other hand it could be argued that operators in the industry should be given time to ready themselves to roll out advanced services at 900 MHz and any option that allowed an operator to gain a first mover advantage in a manner that was not predictable would be a random change to the competitive process as opposed to competition on the merits.</p> <p>Were options that favour incumbents to be chosen, it could drive new entrants from the market and this would potentially have a large negative impact on competition over the longer term.</p>

		the cost savings in a speedy manner.  Option 1 ensures that efficient and effective use of radio spectrum is ensured, thus promoting competition.	
<b>Option 2 (Option 1 but extend interim licences to mid-2015)</b>			
<b>Criterion</b>		<b>Advantages</b>	<b>Disadvantages</b>
<b>IMPACT ON INDUSTRY STAKEHOLDERS</b>	<b>EXISTING GSM LICENSEES</b>	Similar to Option 1. Co-termination of 2G licences would likely be seen by Vodafone and O2 as a benefit. Meteor has a stated preference for Option 1.	Operators could find themselves post auction being willing to roll out advanced services at 900 MHz without being able to do so.
	<b>H3GI</b>  <b>Potential New Entrants</b>		H3GI would see this as an even worse option than Option 1 as it extends the time by two years that it will be reliant on national roaming.  Potential new entrants may lose interest given the delay in the roll out of advanced services at 900 MHz relative to the maturing of the advanced services market generally. De novo entry would thus, be less attractive with a delay of two years.
<b>IMPACT ON CONSUMERS</b>		Similar to Option 1	This option would impose costs on consumers to the extent that operators in the industry would not be in a position to roll out advanced services using 900 MHz spectrum, without any distortion to competition, prior to this date.  While being similar to Option 1 in terms of advantages to consumers, this Option would delay the benefits of liberalised 900 MHz spectrum for two years relative to Option 1.
<b>IMPACT ON COMPETITION</b>		None relative to Option 1	Option 2 would likely reduce interest from new entrants in the auction as the advanced services market would likely have matured in the intervening time period. This would make de novo entry more

		difficult.  Competition to deliver advanced services using 900 MHz spectrum would be delayed by 2 years.
<b>Option 3 – Liberalise for interim period for all current holders of 900 MHz spectrum</b>		
<b>Criterion</b>	<b>Advantages</b>	<b>Disadvantages</b>
<b>IMPACT ON INDUSTRY STAKEHOLDERS</b>	<b>EXISTING GSM LICENSEES</b>	This option would benefit existing GSM licencees to the extent that they would have the potential to roll out advanced services at 900 MHz in advance of H3GI.
	<b>H3GI</b>	There is no benefit for H3GI or potential new entrants under this option.
	<b>Potential New Entrants</b>	To the extent that current 900 MHz licence holders could roll out advanced services in this band H3GI would have its position in the market undermined. At the same time H3GI would still have to rely on national roaming.  Potential new entrants would not be able to access 900 MHz spectrum at the same time as the incumbents. Moreover, they would perceive a discrimination in favour of operators already in the band which could eliminate any desire on their part to enter the Irish market.
<b>IMPACT ON CONSUMERS</b>	To the extent that current 2G operators can roll out advanced services quickly at 900 MHz this would have a positive impact on consumers. However, given the often expressed need for these operators to have 2 blocks of 900 MHz spectrum to run both 2G and advanced services at the same time, this is unlikely to occur. Also operators that have to make potentially sunk investments to roll out such services will not likely make them before knowing their position in the band for the longer term. Putting these issues to the	This option would involve the <u>administrative assignment of liberalised spectrum</u> to existing 2G operators on a short term basis (mid 2011 – early 2013), accounting for much of the 900 MHz band. There is no guarantee that the existing operators value the spectrum more highly than other parties, and if not then such an approach could impair the delivery of new and innovative consumer services in the longer term.  A short term administratively granted liberalised licence is of little benefit to an operator unless they are successful in getting a long

	side, Option 3 would leave H3GI with a serious cost disadvantage in the interim period.	term licence from 2013 onwards as investments in network rollouts would not be justified.  H3GI and potential new entrants would be prevented from acquiring liberalised spectrum until early 2013. The short term grant would affect opportunities for new entrants as it would result in later entry opportunities which could make entry more difficult/costly thus raising prices and/or reducing the scope of services for consumers.
<b>IMPACT ON COMPETITION</b>	There would not likely be a favourable impact on competition (in the related downstream market) in the short term as current 900 MHz licence holders could not easily use their current holdings to provide both 2G and advanced services in the period up to 2013.	Competition in any competitive process to award spectrum usage rights would be seriously undermined. This would translate into a long term loss in the competitive dynamic over the period up until 2030.

**Option 4 - All incumbent operators get liberalised spectrum on an interim basis until 2013**

Criterion		Advantages	Disadvantages
<b>IMPACT ON INDUSTRY STAKEHOLDERS</b>	<b>EXISTING GSM LICENSEES</b>	<p>This option would facilitate <u>all four Mobile Network Operators</u> by extending and upgrading (in the case of Vodafone and O2) or 'upgrading' (in the case of Meteor) their current GSM licences for liberalised spectrum without facing any competition for spectrum, on a short term basis.</p> <p>It would also benefit each of the GSM operators as it would give them a headstart on new entrants in terms of reaping the benefits of being able to use 900 MHz spectrum to provide mobile broadband to customers. This could make later entry into the market more difficult or costly.</p>	Existing GSM licensees have argued that they would each need 2 × 10 MHz of spectrum to maintain GSM services and roll out new 3G networks at 900 MHz. Under Option 4, each existing licensee would be guaranteed 2 × 7.2 MHz (their existing spectrum holding), and only on a short term basis, until early 2013. Therefore it is questionable how useful such a grant would be in practice.

	<b>H3GI</b>	H3GI would obtain a block of liberalised spectrum for the 2011-2013 period. It would roll out advanced services using this once its future position with regard to this spectrum was known. It could reduce its dependency on national roaming depending on where it was roaming but may have to build network in many places to be in a position to do this.	H3GI would not obtain any advantage from this interim licence if it were not successful in the process that will award spectrum usage rights for the 2013 to 2030 period.
	<b>Potential new entrants</b>	We do not see any advantage arising out of this option for potential new entrants.	Option 4 would discriminate against new entrants as, unlike incumbent MNOs, they would not be given the right to acquire liberalised spectrum in advance of 2013 (subject to an early liberalization approach being acceptable to all those holding 900 MHz spectrum, including the new entrant, after the proposed auction of the residual 900 MHz spectrum which was not administratively assigned). This would likely reduce substantially the interest of potential new entrants in the Irish market.
<b>IMPACT ON CONSUMERS</b>		<p>Consumers could potentially benefit from earlier access to new services or cheaper mobile BB (compared to Option 1) if it were the case that operators were in a position to launch new services using liberalised 900 MHz spectrum prior to early 2013 and thereby reduce their costs.</p> <p>Note that this assumes that all operators would be able to utilise liberalised 900 MHz spectrum. GSM operators may have an issue as they may need to maintain GSM services but they also have existing networks. 2 x 7.2 MHz of spectrum may limit their options to continue providing GSM services and launch new services (according to their submissions). Meteor made this point forcefully in its subsequent response to consultation 10/105 and made a strong call for an Option 1 to be favoured on the basis that all operators would</p>	<p>This option would involve the <u>administrative assignment of liberalised spectrum</u> to existing mobile operators on a short term basis (mid 2011 – early 2013), accounting for much of the 900 MHz band. There is no guarantee that the existing operators value the spectrum more highly than other parties, and if not then such an approach would be economically inefficient and could impair the delivery of new and innovative consumer services.</p> <p>A short term administratively granted liberalised licence is of little benefit to an operator unless they are successful in getting a long term licence from 2013 onwards as investments in network rollouts would not be justified.</p>

	<p>have the same opportunity to roll out advanced services at 900 MHz at the same time.</p> <p>Given that new networks would have to be put in place before any new services can be provided over them, the granting of a licence would not equate to the provision of advanced services to consumers.</p>	<p><u>New entrants</u> would be prevented from acquiring liberalised spectrum until early 2013. The short term grant would affect opportunities for new entrants as it would result in later entry opportunities which could make entry more difficult/costly and could deter entry.</p>
<p><b>IMPACT ON COMPETITION</b></p>	<p>To the degree that all operators could speedily roll out advanced services at 900 MHz, there could be more intense competition between all operators in relation to advanced services in the short term. However, this is unlikely to be the case. Existing GSM operators have stated clearly the need for 2 × 10 MHz of spectrum to run with 2G and advanced services. Also given the likely investments that would need to be made such actions would not likely be taken until after the allocation of long term usage rights was clear. Hence, any supposed impact on competition would be likely to be patchy with operators that are more easily able to roll out advanced services at 900 MHz obtaining a competitive advantage. This would, of itself, lead to fewer gains being passed onto consumers relative to the situation where all operators were able to launch simultaneously.</p>	<p>Competition in any competitive process to award long term spectrum usage rights would be immediately reduced if potential new entrants were deterred from participation. This would likely have a substantial knock-on effect on competition and on innovation in the related retail markets over the period until 2030.</p>