



Commission for  
**Communications Regulation**

# **Proposal to Extend the Duration of Existing Interim GSM 900 MHz Rights of Use**

## **Response to Consultation and Decision**

**Reference:** ComReg 13/05

**Decision:** D02/13

**Date:** 15 January 2013

**An Coimisiún um Rialáil Cumarsáide  
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## Additional Information

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## Chapter 1

# 1 Introduction

- 1.1 The purpose of this document is to set out the Commission for Communications Regulation's (ComReg) response to consultation and decision on its proposal to extend the duration of existing interim GSM 900 MHz rights of use, as consulted upon in Consultation Document 12/127.<sup>1</sup>
- 1.2 Four interested parties submitted a response to Document 12/127, being:
  - Vodafone Ireland Ltd (Vodafone);
  - Telefónica Ireland Ltd (Telefónica);
  - eircom Group (eircom) comprising of Meteor Mobile Communications Ltd (MMC) and eircom; and
  - Hutchison 3G Ireland Ltd (H3GI).
- 1.3 ComReg has published non-confidential responses and correspondence received in relation to this consultation and in relation to the Transition Project Proposal and the Transition Project Plan in Document 13/06.<sup>2</sup>
- 1.4 This document is structured as follows:
  - **Chapter 2:** considers submissions received on, or relevant to chapter 2 of Document 12/127 which set out background information relevant to the potential extension of the duration of interim rights in the 900 MHz band and the potential issuing of interim rights in the 1800 MHz band, and in particular, the MBSA Transition process;
  - **Chapter 3:** considers submissions received on, or relevant to chapter 3 of Document 12/127 which contained ComReg's draft Regulatory Impact Assessment (RIA);

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<sup>1</sup> ComReg Document 12/127- Proposal to extend the duration of existing interim GSM 900 MHz rights of use – published 23 November 2012.

<sup>2</sup> ComReg Document 13/06- GSM Liberalisation Project: Publication of correspondence and other material provided by interested parties (and ComReg's written responses to same) relating to 'Transition' issues and Interim GSM 900 MHz licences dating from 18 September 2012 to 9 January 2013– published 15 January 2013.

- **Chapter 4:** considers submissions received on, or relevant to chapter 4 of Document 12/127 which set out the specifics of ComReg's proposal to extend the duration of Interim Rights in the 900 MHz band, and sets out ComReg's final position on each of its proposals.
- **Chapter 5:** contains ComReg's Decision on this matter;
- **Chapter 6:** sets out relevant next steps in relation to the extension of the duration of existing Interim Licences; and
- **Annex 1** – contains the Glossary of terms used in this document;
- **Annex 2** - summarises ComReg's statutory functions, objectives and duties relevant to the management of the radio frequency spectrum; and
- **Annex 3** - contains ComReg's final draft of the amending Statutory Instrument which is to be put before the Minister;
- **Annex 4** – contains ComReg's final Regulatory Impact Assessment ('RIA') in light of the responses received on the draft RIA contained in Document 12/127;



## Chapter 2

# 2 Background

- 2.1 This chapter sets out background information relevant to the matter of Interim Licences in the 900 MHz band and then sets out ComReg's view on the relevance of this information to the potential extension of the duration of Interim Licences in the 900 MHz band. It also briefly considers the potential grant of an Interim Licence in the 1800 MHz band at the end of Time-Slice 1.
- 2.2 The background information presented in this chapter discusses:
- the existing Interim Licences in the 900 MHz band; and
  - the Multi-Band Spectrum Award ('MBSA') process.

## 2.1 Interim Licences in the 900 MHz band

- 2.3 In May 2011, ComReg granted Interim Licences to each of Vodafone Ireland Limited (Vodafone) and Telefónica Ireland Limited (Telefónica) (together "the Interim Licensees"). These Interim Licences are for the provision of only GSM Mobile Telephony Services in the 900 MHz band and they were granted:
- pursuant to the substantive decisions set out in ComReg Document 11/29<sup>3</sup> (following consideration of responses from interested parties to ComReg's proposals set out in Consultation Documents 11/11<sup>4</sup> and 10/71<sup>5</sup>); and
  - under the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations 2011 (S.I. No 189 of 2011), ("Interim GSM Regulations").
- 2.4 Among other considerations, ComReg noted that the Interim Licences "*...should be viewed as a facilitating measure that is needed in the particular, current, circumstances to maintain and safeguard existing competition and eliminate probable serious disruption to consumer services for the time being, and until such*

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<sup>3</sup> Document 11/29 and Decision D03/11, "Interim Licences for the 900 MHz band", Response to Consultation and Decision, 13 April 2011.

<sup>4</sup> Document 11/11, "Interim Licences for the 900 MHz band", Response to Consultation and Draft Decision, 17 February 2011.

<sup>5</sup> Document 10/71, "800 MHz, 900 MHz & 1800 MHz spectrum release", Consultation, 17 September 2010.

*time that ComReg can finalise its broader spectrum release decision-making, implement same, and make available liberalised spectrum in a manner that would not distort competition.”* (at page 4 of Document 11/29).

- 2.5 The Interim Licences commenced on 16 May 2011 and they are due to expire on 31 January 2013.
- 2.6 Since granting Interim Licences in May 2011, ComReg finalised its decision on the MBSA process<sup>6</sup> and held an auction for the rights of use of spectrum, the results of which were published in November 2012<sup>7</sup>.
- 2.7 Following completion of the auction, it appeared unlikely to ComReg that the relevant Transition activities (i.e. Relocation<sup>8</sup>) in the 900 MHz band could be completed before 1 February 2013. ComReg therefore issued a Consultation and Draft Decision Document (Document 12/127) that proposed to provide for the extension of the duration of the Interim Licences in the 900 MHz band for the minimum time period necessary to enable the Existing GSM Licencees to complete their respective Transition activities in the 900 MHz band.

## **2.2 The Multi-Band Spectrum Award (MBSA) process**

- 2.8 In Document 12/127, ComReg provided an update on the status of the MBSA process and noted that while the majority of the MBSA process had been completed, a number of stages were then incomplete including:

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<sup>6</sup> See Document 12/25 and Decision 04/12, “*Multi-band Spectrum Release. Release of the 800 MHz, 900 MHz and 1800 MHz Radio Spectrum Bands*”, Response to Consultation and Decision, published March 2012.

<sup>7</sup> See Document 12/123, “*Results of the Multi-Band Spectrum Auction*”, Information Notice published 15 November 2012.

<sup>8</sup> Given the outcome of the Main Stage of the MBSA process it is now clear that only Relocation activities (and no Retuning activities) are required in the 900 MHz band. Note:

“*Relocation*” refers to the situation where an Existing GSM Licensee obtains an equal amount or a greater amount of spectrum rights in the 900/1800 MHz band and has to relocate its network to this new spectrum location: footnote 81 in Document 12/52; and

“*Retuning*” refers to the situation where an Existing GSM Licensee obtains less or no spectrum in the 900/1800 MHz band and has to retune its network to a point within this new spectrum bandwidth: footnote 82 in Document 12/52.

- the Negotiation Phase;
- the Transition Phase; and
- the Notification and Grant Stage.

2.9 Each of these stages is clearly relevant to its consideration of the need to provide for the extension of the duration of Interim Licences and is discussed further below.

### 2.2.1 The Negotiation Phase

2.10 The **Negotiation Phase** is the two week period allowed after the Assignment Round where Winning Bidders and Existing GSM Licensees could discuss and submit alternative assignment locations for the spectrum rights of use won in the MBSA process or retained as part of a Licensee's existing GSM Licence.

2.11 As discussed in Document 12/127, this two week period started on 14 November 2012, and the deadline for the completion of this phase and the notification of any revised spectrum assignments to ComReg by the Winning Bidders was 28 November 2012.

2.12 During the two week period, ComReg was not notified of any agreement entered into pursuant to the Negotiation Phase.

2.13 In early December 2012, ComReg wrote to each Winning Bidder regarding the end of the Negotiation Phase (which corresponds to the end of Assignment Stage) and confirmed that the results of the Assignment Round were then the spectrum assignment results for the MBSA process.

2.14 In that letter, ComReg also notified each Winning Bidder that the Auction had now ended and that in accordance with paragraph 4.239 of the Document 12/52, ComReg would make the results of the Auction public in due course. On 5 December 2012, ComReg published the frequency arrangements and results of the MBSA process in Document 12/131.<sup>9</sup>

### 2.2.2 The Transition Phase

2.15 The **Transition Phase** is the phase required to facilitate the network adjustments required by the Existing GSM Licensees (and potentially Winning Bidders in Time Slice 1 in advance of the commencement

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<sup>9</sup> Document 12/131, "Frequency Arrangements and Results of the Multi-Band Spectrum Award Process", published 5 December 2012.

date of Time Slice 2) to alter their networks to the new spectrum assignments determined by the MBSA process (the “Transition Phase”).

2.16 As noted in Document 12/127, this phase consists of a number of activities including:

- the submission of the **Transition Project Proposal** by the Existing GSM Licensees. The deadline date for the submission of any such proposal was 12 December 2012, and as discussed further below, no collectively formulated and agreed Transition Project Proposal was submitted by the deadline;
- the finalisation of the **Transition Project Plan** by ComReg. As discussed further below, ComReg is in the process of finalising this plan; and
- the **implementation of the Transition activities** by the Existing GSM Licensees in accordance with the Transition Project Plan.

### **The Transition Project Proposal**

2.17 On 27 November 2012, ComReg wrote to the Winning Bidders regarding the Transition Phase and, amongst other things, ComReg:

- noted that the four-week period permitted for Winning Bidders to collectively formulate and submit a Transition Project Proposal to ComReg was currently in progress, and the deadline for the submission of any such proposal was 12 December 2012;
- encouraged the Existing GSM Licensees to involve H3GI (as a Winning Bidder) in communications aimed at preparing and submitting the Transition Project Proposal. Amongst other things, ComReg believed that H3GI’s involvement could result in more efficient Transition activities and appropriate milestones being proposed, which in turn could reduce the time required to finalise the Transition Project Plan and minimise any delay in the availability of Lots to any or all Winning Bidders; and

- proposed that its consultants<sup>10</sup> Red-M Wireless Limited and Vilicom Limited ('Red-M/Vilicom'), and a ComReg representative, meet with each of the Winning Bidders to discuss the Transition activities required in the 900 MHz and 1800 MHz bands prior to the commencement of Liberalised Use Licences for certain Lots in Time Slice 1.

2.18 During the week commencing 3 December 2012, ComReg and Red-M/Vilicom held a meeting with each of the four Winning Bidders to discuss, and where appropriate collect information and documentation on, the Transition preparations of the Winning Bidders. As noted in ComReg's letter of 27 November 2012, these meetings were intended to enable ComReg to monitor the progress of the Transition Project Proposal discussions and to further inform its consideration of the appropriate milestones and deadline for Transition activities and, in particular, the preparation of a Transition Project Plan in the event that a Transition Project Proposal satisfying the requirements of the Information Memorandum was not submitted by 12 December 2012.

2.19 On 12 December 2012, the four Winning Bidders separately wrote to ComReg regarding the Transition Project Proposal. From these letters, it is apparent that the Winning Bidders had two meetings (on 10 December 2012 and 11 December (the second meeting by conference call)) to discuss the Transition Project Proposal, following which an agreement was not reached by all Winning Bidders. Consequently no collectively formulated and agreed Transition Project Proposal was submitted to ComReg. However,

- two Winning Bidders (Telefónica and Meteor) separately submitted an individual Transition Project Proposal; and
- the remaining two Winning Bidders (Vodafone and H3GI) separately submitted comments on the individual Transition Project Proposals they were aware were being submitted by Telefónica and Meteor.

2.20 Meteor submitted an individual proposal for its Transition activities in the 900 MHz band and proposed a completion date of 16 June 2013, although it also stated that its "*aggressive ambition*" was to have its Transition activities completed by 16 April 2013.

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<sup>10</sup> ComReg has contracted Red-M Wireless Limited and Vilicom Limited ('Red-M/Vilicom') to provide expert technical advice to ComReg on the Transition activities associated with the MBSA process.

- 2.21 Telefónica submitted an individual proposal for its Transition activities in the 900 MHz and 1800 MHz bands and proposed a 'Project Date' and a 'Deadline Date' for these Transition activities. The Project Date referred to the date that Telefónica would work towards having the project completed, and the Deadline Date was a later date that provided for contingencies.
- 2.22 In relation to the 900 MHz band, Telefónica noted that the completion of its 900 MHz Transition activities is dependent upon Meteor vacating Lots C and D. On Telefónica's understanding that Meteor expects to have vacated Lots C and D by 16 April 2013, Telefónica proposed:
- a Project Date of confirmed spectrum availability from Meteor + 3 Weeks (i.e. 7 May 2013); and
  - a Deadline Date of confirmed spectrum availability from Meteor + 6 Weeks (i.e. 28 May 2013).
- 2.23 In relation to the 1800 MHz band, Telefónica noted that it currently occupies three 2x200 kHz carriers within Lot L and it proposed to relocate these carriers to a position within Lots A, B or C ahead of its main 1800 MHz Transition. Telefónica proposed to implement its main 1800 MHz Transition immediately after the successful completion of its 900 MHz Transition, and it proposed:
- a Project Date of Telefónica 900 MHz Transition complete + 3 weeks (i.e. 28 May 2013); and
  - a Deadline Date of Telefónica 900 MHz Transition complete + 6 weeks (i.e. 18 June 2013).
- 2.24 Vodafone did not submit an individual Transition Project Proposal on its Transition activities, but instead provided comments on the proposals from Telefónica and Meteor, and stated that it had *"no objections to the dates proposed by Meteor and O2 for their required spectrum moves."*
- 2.25 H3GI provided comments on the proposals from Telefónica and Meteor and stated that *"as ComReg is aware, H3GI believes that the 900 MHz Transition activities can be completed by 1 February 2013. Without prejudice to this position, H3GI is willing to accept a transition project plan with a deadline for 900 MHz transitional activities of 16 April 2013 and three weeks ie 7 May 2013 (the "May Deadline")."*

2.26 Furthermore H3GI stated that *“it is not willing to accept a transition project plan with a deadline for 900 MHz transitional activities of 16 June 2013 and six weeks ie 28 July 2013 (the “July Deadline”). The May Deadline is more than generous and consistent with ComReg's position as stated in the Interim GSM 900 MHz Rights of Use Consultation ie the end of April 2013. Meteor and 02 have both stated that they can complete 900 MHz Transition activities by the May Deadline. The July Deadline is disproportionate and will result in, amongst other matters, an unacceptable delay to the provision of advanced services to consumers.”*

### **Summary of response received to Document 12/127**

2.27 On 14 December 2012, Comreg received four responses to Document 12/127. The following sets out a summary of respondents' views in relation to the Transition Phase of the MBSA process.

2.28 One respondent, H3GI, did not agree with ComReg's analysis of the time required for Transition as discussed in Document 12/127, and stated that:

- *“H3GI believes that the 900 MHz Transition activities can be completed by 1 February 2013.”; and*
- *“As the MBSA consultation process has been going on for in excess of four years, relocation was a credible scenario from the outset of this process and it is reasonable to expect that the existing GSM licensees have planned for this scenario well in advance of the auction outcome, why does ComReg believe that relocation activities still require four months of planning?”*

2.29 In addition, H3GI made the following statements related to the Transition phase:

- *“ComReg has failed to properly inform itself and prepare for transitional activities, including the creation of sufficient incentives for prompt completion.”; and*
- *“Given the duration of the MBSA consultation process, the relatively straightforward nature of the Transition activities and ComReg's statutory powers, H3GI does not believe that it is reasonable and/or legitimate for ComReg to fail to settle a transition project plan in advance of any decision regarding the interim 900 MHz GSM licences.”*

2.30 Three respondents, eircom Group, Telefónica and Vodafone, agreed with ComReg's view that there was insufficient time left to carry out

the Transition activities before 1 February 2013, and accordingly, supported ComReg's proposal to provide for the extension of the duration of Interim Licences in the 900 MHz band.

2.31 Eircom Group stated that *"The MBSA process managed by ComReg was late and as a consequence there is insufficient time to ensure that Transition activities in the 900MHz band are completed in advance of 1st February 2013. We agree that it is appropriate that the Interim Licences of Vodafone and O2 be extended by short durations to ensure continuity of service for their customers."*

2.32 Telefónica stated that: *"When the decision was taken to issue interim 900MHz licences, it was expected that the MBSA would be completed significantly earlier than it actually did, allowing sufficient time for an orderly transition to the new assignments. The delayed commencement and conclusion of the auction has created a situation where there is now insufficient time for a transition to new assignments before the Interim Licences expire." ... "the Interim Licences will need to be extended to provide for an orderly transition."*

2.33 Vodafone's stated that: *"Ideally Vodafone would wish to have access to its full 10 MHz allocation of 900 MHz frequencies no later than 1 February 2013, as originally envisaged in ComReg's Information Memorandum. However our discussions with the other Licensees to date as part of the development of the Transition Project Proposal have confirmed that it is very unlikely to be possible for them to complete their Relocation activities within the very limited time now remaining to the current expiration date of the existing Interim GSM 900 MHz Rights of Use held by Telefonica O2 and Vodafone on 31 January. This is consistent with Vodafone's own knowledge and expectations about feasible timelines for completion of Transition Activities as set out in a number of our previous submissions to ComReg during the MBSA consultation process, and with ComReg's own conclusions in the present consultation document."*

2.34 In addition, Vodafone stated that:

- it *"will not need to undertake any significant Relocation Activities on our own part to comply with the new spectrum rights of use allocations that have been determined."*; and
- *"Vodafone is in broad agreement with both the high level description of the steps required to complete necessary Transitional activities, and the indicative timelines within which*



*these can be achieved, as set out in the consultation document.”*

### **ComReg’s recommended Transition Project Plan**

2.35 In accordance with the Document 12/52, and noting that no collectively formulated and agreed Transition Project Proposal was submitted by the Winning Bidders, ComReg requested Red-M/Vilicom to review all relevant Transition material and to recommend a Transition Project Plan to ComReg that would take into account:

- the activities as outlined in each operator's individual Transition proposal of 12 December 2012;
- other relevant responses (including the responses to Document12/127) and materials; and
- the desirability of enabling all Winning Bidders to deploy advanced services as early as reasonably practicable.

2.36 Having considered the Transition information supplied by the Winning Bidders, Red-M/Vilicom set out its analysis and recommendations to ComReg on the MBSA Transition plan in its report of 20 December 2012. As set out in that report, Red-M/Vilicom recommended that ComReg adopt a Transition Project Plan that:

- requires that the Transition activities in the 900 MHz band be completed by the end of week 17 (26 April 2013);
- requires that the Transition activities in the 1800 MHz band be completed by end of week 14 (5 April 2013); and
- incorporates a fortnightly reporting period.

2.37 In arriving at these recommendations, Red-M/Vilicom stated: *“we consider that the Recommended Transition Plan is both viable and achievable within the proposed timescales while avoiding any undue delay in the availability of liberalised spectrum. We therefore recommend that ComReg adopt this Recommended Transition Plan as its finalised Transition Project Plan for both the 900MHz and 1800MHz bands.”*

### **ComReg’s proposed Transition Plan**

2.38 Having carefully considered the Transition information provided by the Winning Bidders and the analysis and recommendations set out by Red-M/Vilicom, on 21 December 2012 ComReg wrote to the

Winning Bidders regarding the proposed Transition Project Plan and the immediate next steps to finalise this plan.

2.39 In that letter, ComReg stated that:

- it was of the view that “*the Recommended Transition Plan* [in the Red-M/Vilicom report of 20 December 2012] *is achievable by all of the relevant parties without imposing overly onerous obligations on Winning Bidders and would therefore be a proportionate measure*”; and
- it proposed to adopt “*the Recommended Transition Plan* [as set out in Annex 2 of the Report in the Schedule to this letter] *as the finalised Transition Project Plan.*”

2.40 ComReg noted that, should this proposal be adopted, then the following Transition-completion dates would be set for the 900 MHz and 1800 MHz bands.

**Table 1: The proposed Transition-completion dates**

<b>GSM Licensee</b>	<b>900 MHz Transition-completion date</b>	<b>1800 MHz Transition-completion date</b>
Vodafone	No Transition necessary	31 January 2013
Meteor	5 April 2013	No Transition necessary
Telefónica	Meteor’s 900 MHz Transition-completion date + 3 Weeks (i.e. 26 April 2013)	5 April 2013

2.41 In addition, ComReg proposed to add a **two-week grace period** to the Transition-completion dates proposed above during which Liquidated Damages shall not trigger even if the above-mentioned 900 MHz and 1800 MHz Transition-completion dates are not achieved. In arriving at this view, ComReg:

- noted that two GSM Licensees (namely Meteor and Telefónica) suggested that a later deadline date be set in order to provide for contingencies and/or matters not within their control; and
- stated that, while it understands that unforeseen events could lead to delays in the implementation of a Transition plan and

thus require provision for additional contingencies, it was of the view that some contingency-provision may, in effect, already be built into the Transition-completion dates for Meteor and Telefónica.

- 2.42 ComReg requested the Winning Bidders' views on the above proposals, and asked that all views be submitted by 8 January 2013.

#### Responses to ComReg's proposed Transition Plan

- 2.43 At the time of publishing this document, three Winning Bidders (H3GI, eircom Group and Telefónica) have submitted a response to ComReg's proposed Transition Plan.
- 2.44 H3GI supported ComReg's proposed Transition Project Plan and stated that: *"without prejudice and subject to the following comment, Hutchison 3G Ireland Limited ("H3GI") welcomes ComReg's proposed transition project plan. ComReg should adopt all of the reporting mechanisms recommended by Red-M and Vilicom in section 1.2.3 of their joint report dated 20 December."*
- 2.45 eircom Group did not support ComReg's proposed Transition Project Plan and stated that it believed that *"the Red-M / Vilicom Report has reached erroneous conclusions and cannot be relied upon by ComReg to justify shorter timescales"*. In this response, eircom Group provided information on the areas where it believed that the Red-M/Vilicom report was incorrect. Overall, eircom Group:
- believed that the *"aggressive target"* for the completion of Meteor's 900 MHz Transition activities should be 16 April 2013 and not the 5 April 2013 date as proposed in ComReg's proposed Transition Plan;
  - believed that the recommendation that Telefónica's 1800 MHz Transition activities be carried out at the same time as Meteor's 900 MHz Transition activities *"creates unnecessary exposure for Meteor in respect of successfully implementing its 900MHz transition in an effective and timely manner"*. It stated that *"a more pragmatic approach would be for Telefonica to migrate from the few channels it occupies in Block 1800/L during March, allowing Meteor full access to its 1800MHz blocks. Telefonica can then complete its 1800MHz transition in an orderly manner after the 900MHz transition is fully complete."*

- stated that *“the [network] retune will occur 29<sup>th</sup> March followed by optimisation and resolution of performance issues and a stabilisation period bringing us to 16<sup>th</sup> April”*;
- stated that its *“aggressive target date of 16<sup>th</sup> April 2013 does not contain any buffer or contingency timescale. This must be addressed through the establishment of an appropriate grace period.”*; and
- proposed that *“the completion date including the grace period (i.e. the date from which liquidated damages would accrue) should at the very least be 16<sup>th</sup> May 2013”*;

#### 2.46 Telefónica:

- expressed a willingness to agree to ComReg’s proposed Transition Project Plan as regards the 900 MHz band, subject to the caveat that, if an attempted transition fails, it would be necessary to roll this back and redesign, in which case it was of the view that 2 weeks would be insufficient to rectify the issue; and
- expressed concern that the dates proposed by ComReg for the Transition activities in the 1800 MHz band could impact on its ability to deliver on the proposed timescales in the 900 MHz band.

2.47 ComReg is currently considering the views received on its proposed Transition Project Plan with the aim of finalising this plan shortly. The finalised Transition Project Plan will be notified to the Winning Bidders and made public in due course.

2.48 ComReg notes that no Interim Licences are currently required in the 1800 MHz band and accordingly no decision needs to be made in this document in that regard.

### **ComReg’s position on the responses received to Document 12/127**

#### The time required for Transition

2.49 In relation to the responses received to Document 12/127, ComReg notes that these responses, as well as the other Transition material available to ComReg at that time, have already been considered by Red-M/Vilicom in preparing its report of 20 December 2012, and by ComReg in presenting its proposed Transition Plan of 21 December 2012. As set out above, this plan proposed that:

- the Transition activities in the 900 MHz band could be completed by 26 April 2013 (i.e. Meteor's 900 MHz Transition-completion date + 3 Weeks); and
- the Transition activities in the 1800 MHz band could be completed by 5 April 2013.

2.50 As noted above, the proposed Transition Plan is currently under consultation with the Winning Bidders, and ComReg notes that it has recently received responses on this proposed plan from H3GI, Telefónica and eircom Group. These views are currently being considered in the process to finalise the Transition Project Plan, which ComReg aims to finalise in the near future.

2.51 Given the above, it is not ComReg's intention to assess the respondents views on the specific time required for transition in this document (these views are being considered in the process to finalise the Transition Project Plan), with the exception that ComReg notes that:

- three respondents to Document 12/127, Vodafone, Telefónica and eircom Group, all believed that the 900 MHz Transition could not be completed by 1 February 2013; while
- one respondent to Document 12/127, H3GI, believed that all 900 MHz Transition activities could be completed by 1 February 2013.

2.52 In relation to the H3GI view, ComReg notes that whilst H3GI asserted, on the one hand, that 900 MHz Transition activities could be completed by 1 February 2013, it nevertheless stated that it was "*...willing to accept a transition project plan with a deadline for 900 MHz transitional activities of 16 April 2013 (for Meteor to complete its Transition activities) and three weeks (for Telefónica to complete its Transition activities) i.e 7 May.*". Accordingly, while ComReg notes H3GI's view in relation to the possible timing of completion of transition activities, it recognises H3GI's above-quoted 'bottom line' acceptance of transition project plan deadlines of 16 April, 2013 and 7 May, 2013, respectively. Furthermore, while again having had regard to H3GI's view that transition activities could be completed by 1 February, 2013, ComReg notes that H3GI did not particularise, or supply any evidence to support this view. Recognising that there is a certain limit to the extent to which H3GI could adduce material relating to the timing required by parties other than itself to complete transition activities, ComReg nevertheless must note that no material

of this kind was provided to ComReg. Accordingly, whilst noting H3GI's submissions regarding disadvantage to itself, and to competition generally, that it had claimed would arise from ComReg's proposals, ComReg considers that the weight to be given to these must be limited, on the basis of the lack of material or particularisation put forward by H3GI to support a Transition project deadline of 1 February 2013, and on the basis that there is a sufficiency of countervailing material before ComReg, from Red-M/Vilicom and from Meteor and Telefónica.

- 2.53 Finally, ComReg notes H3GI's position in its latest submission on the current draft Transition Project Plan of 8 January 2013 where it states that: *"without prejudice and subject to the following comment, Hutchison 3G Ireland Limited ("H3GI") welcomes ComReg's proposed transition project plan. ComReg should adopt all of the reporting mechanisms recommended by Red-M and Vilicom in section 1.2.3 of their joint report dated 20 December."* As such, ComReg assumes it is no longer necessary to further consider H3GI's original assertion that 900 MHz Transition activities could be completed by 1 February 2013.

#### Specific points on Transition

- 2.54 ComReg notes that a number of specific points on Transition were raised by the respondents in their replies to Document 12/127.
- 2.55 Firstly, ComReg notes that H3GI, asserted that *"ComReg has failed to properly inform itself and prepare for transitional activities, including the creation of sufficient incentives for prompt completion"*.
- 2.56 ComReg does not accept this assertion as, amongst other things, ComReg has:
- engaged and has had the benefit of independent expert technical advice in relation to Transition activities from Red-M/Vilicom from as early as 2010, and ComReg continues to have the benefit of this independent expert technical advice;
  - put the Existing GSM Licensees on notice at an early stage in the process that it would expect them to carry out planning for Transition activities in advance of the Auction;
  - sought, by way of formal information gathering powers under section 13D of the 2002 Act, information concerning the preparedness of each Existing GSM Licensee for Transition activities in advance of the outcome of the Assignment Stage of the MBSA process;

- with the assistance of Red-M/Vilicom, carefully considered the submissions regarding Transition activities provided by each of the Winning Bidders in response to its section 13D information requests and, subsequently, further information received on 12 December 2012 (including the submission from H3GI) and the responses to Document 12/127;
- based on this consideration, proposed a Transition Plan which indicated a number of areas where the Transition activities might be efficiently completed earlier than the timeframes identified in the proposals put forward by Meteor and Telefónica, and requested further information from each of Meteor and Telefónica in this regard; and
- required all Auction participants to agree to the imposition of Liquidated Damages where they do not meet the timeframes set out in the Transition Project Plan.

2.57 Secondly, ComReg notes that *“H3GI does not believe that it is reasonable and/or legitimate for ComReg to fail to settle a transition project plan in advance of any decision regarding the interim 900 MHz GSM licences.”*

2.58 Given the very limited time to the expiry of the Interim Licences and ComReg’s view that it is not possible to complete the Transition activities before 1 February 2013, ComReg believes that it is appropriate to finalise the Decision on Interim Licences in advance of the finalisation of the Transition Project Plan. The time is not available to obtain absolute clarity on the Transition Project Plan and then proceed to consider Interim Licence extensions. Indeed, such an approach would lead to both legal and regulatory uncertainty in the mobile sector.

2.59 Thirdly, ComReg notes that two respondents (Telefónica and eircom Group) both suggested that there was a delay in running the MBSA process, as managed by ComReg, and that this is the reason why there is insufficient time available now to complete the Transition process before 1 February 2013.

2.60 While ComReg does not accept that it is solely responsible for the timing of completion of the MBSA process, it is obliged, in accordance with its statutory functions, objectives and duties, to deal with the situation that currently presents itself. Accordingly, the reasons why the current situation exists can have no bearing on

ComReg's consideration of whether to provide for the extension of the duration of Interim Licences.

### 2.2.3 The Notification and Grant Phase

2.61 The **Notification and Grant stage** is the stage where the Winning Bidders are notified of their entitlement to apply for and be granted a Preparatory and a Liberalised Use Licence in accordance with the outcome of the MBSA process, subject to certain conditions including the payment of outstanding licence fees. As discussed in Document 12/127, ComReg noted that this stage could only occur following the finalisation of the specific frequency assignments in the Assignment Stage. As noted above, ComReg notified the Winning Bidders of these specific frequency assignments in early December 2012.

2.62 On 18 December 2012, ComReg wrote to each Winning Bidder notifying it of its entitlement to be granted a Preparatory and a Liberalised Use Licence subject to its compliance with certain administrative obligations including:

- the submission of a completed Application Form for a Liberalised Use Licence;<sup>11</sup>
- the submission of a completed Application Form for a Preparatory Licence;<sup>12</sup> and
- the payment of the relevant licence fees.

2.63 In that letter, ComReg notified the Winning Bidders about the commencement date of Lots in their Liberalised Use Licence, and in that regard, ComReg notified each Winning Bidder of the Lots:

- that would have a commencement date of 1 Feb 2013 (or earlier if Advanced Commencement was availed of) in its Liberalised Use Licence;
- that would have a commencement date of 13 July 2015 in its Liberalised Use Licence; and
- where the commencement date had yet to be determined (TBD) in line with the MBSA Transition Process.<sup>13</sup>

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<sup>11</sup> Document 12/135, "Application Form for a Liberalised Use Licence in the 800 MHz, 900 MHz and 1800 MHz bands", published 18 December 2012.

<sup>12</sup> Document 12/136, "Application Form for a Preparatory Licence in the 800 MHz, 900 MHz and 1800 MHz bands", published 18 December 2012.



## Summary of response received to Document 12/127

2.64 In the responses to Document 12/127, two respondents (H3GI and Vodafone) provided comments relevant to the Notification and Grant stage of the MBSA process.

2.65 Vodafone noted that the start date for Lots may vary depending upon the Transition activities required and stated that:

- *“As 1800 MHz Transition activities are likely to take a few months to complete, there is the clear potential for at least some 1800 MHz lots awarded in the MBSA process to have a commencement date later than 1 February 2013.”*

2.66 H3GI on the other hand believed that the start date of Lots should not vary and stated that:

- *“In relation to the 900 and 1800 MHz bands and with the exception of Meteor’s liberalised use licence in the 900 MHz band, H3GI does not believe that one operator’s liberalised use licence should commence before another’s - they should commence once the transitional activities in each band have been completed. This process was not consulted upon as part of the MBSA process, is not the basis upon which interested parties participated in the award process and fails to promote competition in accordance with ComReg’s statutory obligation under section 12 of the Communications Regulation Act, 2002, as amended.”*
- *“In relation to the 800 MHz band, H3GI does not believe that an operator’s liberalised use licence should be granted unless they accepted and have complied with the auction rules and in particular, the auction rules in respect of transitional activities.”*

## ComReg’s position on the responses received to Document 12/127

2.67 In considering this issue, ComReg notes that the rules of the MBSA process, as consulted upon and set out in Document 12/52 (as amended), provide for the possibility of staggered commencement dates. In particular, ComReg notes:

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<sup>13</sup> As noted in chapter 2, the Transition Project Plan has progressed further since 18 December 2012, and ComReg expects to finalise this plan in the near future.

- that the possibility of staggered start dates is considered in section 2.2.2 of Document 12/52, where.
  - Paragraph 2.25 of that section stated that *“It should be noted that circumstances outside ComReg’s reasonable control could lead to ComReg being unable to make any or all Lots in the 800 MHz, 900 MHz and/or 1800 MHz Bands available for Liberalised Use by a Winning Bidder by the commencement dates of Time Slice 1 and/or Time Slice 2 identified above”*; and
  - Footnote 20 of that section noted that such potential circumstances include *“Transitional Activities by Existing GSM Licensees in the 900 MHz and/or 1800 MHz band resulting in delayed access to Lot/s in Time Slice 1 and/or 2 in these bands”*.
- paragraph 3.36 of Document 12/52 which states that *“in submitting its Application Form, an Applicant agrees to be bound by terms and conditions associated with the Award Process as set out in this Information Memorandum, which amongst other things, include ... its acknowledgement that the commencement date of Lots in the 800 MHz, 900 MHz and 1800 MHz Bands in Time Slice 1 and/or Time Slice 2 may be delayed as specified by ComReg”*;
- ComReg’s answer to Question 46 as set out in Document 12/73,<sup>14</sup> which states that *“ComReg confirms that it is possible that the commencement date of Lots in the 800 MHz, 900 MHz and 1800 MHz bands in Time Slice 1 could differ.”*

2.68 Given the above, ComReg does not agree with the suggestions as set out in H3GI’s response. Furthermore ComReg notes that chapter 3 of this document sets out ComReg’s view on H3GI’s comments related to competition in this regard.

2.69 ComReg notes Vodafone’s comments regarding the possibility of delayed commencement of some lots in the 1800 MHz plan and will deal with this comment in finalising its Transition Project Plan.

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<sup>14</sup> Document 12/73, “Multi-band Spectrum Release: Questions & Answers and Clarifications”, Information Notice, published 06 July 2012.

## **2.3 Relevance of the MBSA process for Interim Licences**

### **2.3.1 The possibility of extending Interim Licences in the 900 MHz band**

2.70 As discussed above, ComReg remains of the view that the Transition activities in the 900 MHz band cannot be completed by 1 February 2013.<sup>15</sup>

2.71 Given that the Interim Licences expire on 31 January 2013, ComReg is of the view that it is appropriate to consider the possibility of extending the Interim Licences as discussed in this document.

### **2.3.2 The possibility of an Interim Licence in the 1800 MHz band**

2.72 In Document 12/127, ComReg noted that there is a 6 ½ month gap between the expiry of Telefónica's GSM 1800 MHz licence on 31 December 2014 and the commencement date of its 1800 Lots on 13 July 2015 in its Liberalised Use Licence.

2.73 Given that there remained approximately 2 years until the expiry of Telefónica's GSM 1800 MHz licence, ComReg proposed to consider the issue of potential Interim Licences in the 1800 MHz band closer to the end date of the licence (which is 31 December 2014) following a substantiated requested from the affected Licensee.

### **2.3.3 Summary of responses received**

2.74 Two respondents, Telefónica and Vodafone, commented upon the possibility of granting an Interim Licence in the 1800 MHz band.

2.75 Telefónica asserted that the *“existence of a six-and-a-half month gap in the 1800MHz spectrum assigned to Telefonica has come about directly as a result of decisions made by ComReg on the structure and timing of licences to be issued following the MBSA and as a result of the auction outcome”* and it stated that:

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<sup>15</sup> While the Transition Plan has yet to be finalised, ComReg notes that its proposed Transition Plan of 21 December 2012 suggested that the Transition activities in the 900 MHz band could be completed by 26 April 2013 (i.e. Meteor's 900 MHz Transition-completion date + 3 Weeks). Furthermore, on the basis of all information received to date, ComReg is confident that the deadline for completion of Transition activities identified in the final Transition Project Plan will be a date after 1 February 2013.

- *“It is incorrect for ComReg to state as it does in paragraph 2.45 that Telefonica “did not avail of the Early Liberalisation Option” when in fact Telefonica’s three existing 1800MHz lots were not liberalised as a result of the overall auction outcome rather than an isolated decision taken by Telefonica.”*

2.76 In addition, Telefónica urged ComReg to deal with this issue in a shorter timeframe, and Telefónica stated that *“we need to have ComReg’s decision on this point as part of this consultation process”* and called on ComReg to *“proceed with the process to make its decision on the 1800MHz gap by publishing its proposal in Q1 2013.”*

- *Telefónica added that “[t]here is no advantage in delaying this process and we do not see how developments in the market or in technology will in any way change the decision to be made. ComReg propose to deal with this issue significantly prior to Telefonica’s licence expiry – that time is now. ComReg has a duty to act reasonably and proportionately. Delay now causes harm to O2. ComReg has given no justification for that delay.”*

2.77 Vodafone also commented upon the timeframe for dealing with this issue, and stated that *“in the case where a substantiated request is made [by Telefónica], Vodafone believes that it would clearly be optimal that assessment of, and a decision on, the request be made expeditiously rather than deferred to a date closer to the expiration of the GSM 1800 MHz licence.”*

- *In addition Vodafone stated that “[e]arly visibility of whether or not Interim GSM 1800 MHz Rights of Use are to be granted would put the Licensee in the best position to utilise one or more of the ‘other mechanisms’ outlined by ComReg in paragraph 2.46, if required. Full clarity at an early stage on this issue, by maximising regulatory certainty, would also be of benefit to other stakeholders (including other 1800 MHz Licensees and their customers)”*

### **2.3.4 ComReg’s position**

2.78 In relation to the views submitted by the respondents, ComReg does not accept that the existence of a 6 ½ month temporal gap in the Telefónica’s 1800MHz spectrum assignments is solely a result of the decisions made by ComReg. Rather it is a result of a combination of factors.

- 2.79 In particular, and as Telefónica is aware, ComReg provided an early liberalisation option in the MBSA process, thereby allowing an Existing GSM Licensee to win an equivalent amount of Lots in a Liberalised Use Licence (i.e. the Party-Specific Lots) provided that these Lots were won in open competition with other eligible Bidders. Given this, ComReg is of the view that Telefónica's commercial decision not to bid a sufficient amount to win these Party Specific Lots played a significant role in the existence of this gap. ComReg notes that the other party which was potentially affected by this issue, Vodafone, won 1800 MHz Lots for a Liberalised Use Licence via the early liberalisation option.
- 2.80 In relation to the remaining points raised by the respondents, ComReg notes that these relate to the timeframe for dealing with this issue. In this regard, ComReg notes that:
- there remains approximately 2 years until the expiry of Telefónica's GSM 1800 MHz licence, and thus ComReg is of the view that there is sufficient time for Telefónica to submit a substantiated request to ComReg on this issue, or for ComReg to initiate a process without such a request, and for ComReg to carry out consultation and assessment on same as appropriate; and
  - the situation in relation to the 900 MHz band, where the existing GSM licences expire within the next month is materially different and clearly an urgent matter necessitating ComReg's focus.
- 2.81 In light of the above, ComReg is of the view that it should maintain the immediate focus on resolving the issues in relation to the 900 MHz band. Accordingly, it is not appropriate to deal substantively with issues in relation to the 1800 MHz band as part of this consultation, ComReg proposes to deal with the issue of potential Interim GSM Rights of use in the 1800 MHz band in due course.
- 2.82 For the avoidance of doubt and in the interests of regulatory certainty, ComReg will continue to review the situation and, if necessary, will issue a consultation on proposals aimed at addressing material issues arising from this temporal gap in sufficient time prior to Telefónica and Vodafone's 1800 MHz licence expiry.

## Chapter 3

# 3 Regulatory Impact Assessment (RIA)

3.1 This Chapter considers those submissions received which are relevant to ComReg's draft Regulatory Impact Statement (draft RIA) as set out in Chapter 3 of Document 12/127, and sets out ComReg's position on same. ComReg's final RIA can be found in Annex 4 of this document.

## 3.1 ComReg's position in Document 12/127

3.2 In Chapter 3 of Document 12/127, ComReg carried out a draft RIA in accordance with the RIA framework set out therein, in order to identify a preferred approach to addressing certain licence expiry related concerns. ComReg considered the two regulatory options available to it, namely:

- Option 1: Do not extend the duration of Interim Licences – essentially a 'do nothing' option whereby the existing Interim Licences would expire on 31 January 2013; or
- Option 2: Extend the duration of the interim licences for the minimum period necessary to enable the existing GSM Licensees to complete their respective Transition activities (i.e. Relocation) in the 900 MHz band.

3.3 On the basis of that draft RIA, ComReg considered, on balance, that Option 2 was the most proportionate of the two options and accordingly proposed Option 2 as the preferred option.

## 3.2 Summary of responses received

3.4 Four responses were received to ComReg's proposal in Document 12/127 regarding the principle to extend the duration of any existing Interim GSM 900 MHz rights of use.

3.5 eircom Group and Vodafone did not comment directly on the draft RIA.

- 3.6 Telefónica, while questioning the need for a RIA<sup>16</sup> voiced no opposition to the proposal that Option 2 is the preferred option. H3GI disagreed with ComReg's preferred option and submitted three main comments on the draft RIA itself:
- In relation to paragraph 3.14 of the draft RIA, H3GI commented that it has explicitly stated on a number of occasions its belief that the 900 MHz Transition activities can be completed by 1 February 2013. As a result it stated that "*it is disingenuous and unhelpful of ComReg to state that H3GI might see some merit in extending the interim 900MHz GSM licences of Vodafone/O2*".
  - In relation to paragraph 3.26 of the draft RIA, H3GI contended that ComReg makes no reference to the competition issues previously raised by H3GI and its independent economic consultants Value Partners in respect of the interim 900MHz GSM licences.
  - H3GI additionally stated that ComReg has no certainty that "*the potential delay would be only for the minimum period necessary to facilitate the existing GSM licensees' respective Relocation Activities.*"

### 3.3 ComReg's position

- 3.7 ComReg has carefully considered the responses submitted and the following sets out ComReg's position on the responses submitted in relation to the draft RIA.
- 3.8 In relation to Telefónica's suggestion that "*the decisions have already been taken*", ComReg must assume that Telefónica is merely expressing its own view that there are good reasons to extend the duration of Interim Licences. However, to the extent that Telefónica is suggesting that ComReg has already come to a decision on such an important matter prior to carrying out a RIA and carefully considering the impact of its proposal on all stakeholders and competition, ComReg rejects such an assertion. In the interests of continuing to ensure openness and transparency, and given that the expiration of Interim Licences has the potential to significantly impact

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<sup>16</sup> Telefónica stated that "it does not believe the Regulatory Impact Assessment in document 12/127 to be of great significance – essentially decisions have already been taken, and we are now taking practical measures to allow for implementation." However, Telefónica in its submission does appear to implicitly acknowledge that a decision must be taken as to "how long" an extension would be required.

on the electronic communications sector in Ireland, ComReg has conducted and prepared a RIA on the option to extend, or not, the duration of the Interim Licences. For the avoidance of doubt, ComReg's decision set out in this document has been made after consideration of the RIA set out in Annex 4 and has taken account of all of the responses to this consultation.

- 3.9 In relation to H3GI's response, as discussed in section 2.2.2 of this document, ComReg assumes that it is no longer necessary to further consider H3GI's original assertion that 900 MHz Transition activities could be completed by 1 February 2013.
- 3.10 Furthermore, ComReg notes that the duration of any extension actually required will ultimately be determined by the implementation of the soon to be published Transition Project Plan. As discussed in chapter 2, ComReg is currently in the process of finalising the Transition Project Plan for the MBSA process, and H3GI's views as well as those of other Winning Bidders are being considered in the finalisation of same.
- 3.11 In relation to H3GI's comment that it is "*disingenuous and unhelpful of ComReg to state that H3GI might see some merit*" in Option 2, ComReg notes that this statement was clearly made on the assumption that Transition activities could not be completed by 1 February 2013 and that H3GI could suffer disruption to its services as a result. The remainder of paragraph 3.14 clearly sets out ComReg's rationale for this view, and states that:
- "*ComReg notes that H3GI has a roaming agreement with Vodafone for the provision of voice and text (i.e GSM) services and it might therefore see some merit in Option 2 insofar as this option might avoid any disruptions to H3GI's services.*"
- 3.12 The rationale as set out above was predicated on Vodafone not being in a position to complete its Transition activities by 1 February 2013 and ComReg does not accept that the proposition was "*disingenuous and unhelpful*".
- 3.13 H3GI also states that "*ComReg makes no reference to the competition issues previously raised by H3GI and its independent economic consultants Value Partners in respect of the interim 900 MHz GSM licences*". In response, ComReg notes that H3GI does not specify which particular issues it considers relevant to the current consultation process and that ComReg should have referenced, nor does H3GI explain why it considers those issues would justify



ComReg amending its current proposals. Indeed, H3GI's submission does not engage in any substantive analysis of the points contained in the draft RIA including, for example, the important point that proposed extensions of such short duration are less likely to act to the detriment of competition. H3GI's statement also ignores the fact that ComReg has already previously addressed all of those competition issues in detail, primarily in Chapter 2 of Document 11/29. ComReg is satisfied that its analysis contained therein remains valid.

- 3.14 Finally, ComReg would point out that H3GI's proposed solution to the 'competition issues' it raised previously was that ComReg administratively assign a single block of 900 MHz spectrum to H3GI. As the Auction has now taken place and H3GI has won a single block of 900 MHz spectrum, such a proposal is no longer relevant. Essentially, H3GI having access to 900 MHz spectrum is now a short term technical issue (i.e. related to imminent Relocation) rather than a licensing one, and so it is not clear why H3GI considers this argument to be relevant in the current circumstances.
- 3.15 In light of the above, ComReg is satisfied that the draft RIA appropriately assessed the impact of its proposal on competition.
- 3.16 In response to H3GI's comment that ComReg has no certainty that the potential delay would be only for the minimum necessary to facilitate the existing GSM licensees respective relocation activities, it is important to note that ComReg has sought the views of all Winning Bidders including H3GI on a Transition Project Plan for the MBSA process. As discussed in chapter 2, ComReg is currently in the process of finalising the Transition Project Plan for the MBSA process, and H3GI's views as well as those of other Winning Bidders are being considered in the finalisation of same. Furthermore ComReg's proposed plan included the:
- setting of transition-completion dates. These were based upon the minimum expected period necessary to facilitate Relocation;
  - setting of a date from which liquidated damages would apply. In this regard ComReg proposed to add a two-week grace period to the Transition-completion dates proposed above during which Liquidated Damages shall not trigger even if the above-mentioned 900 MHz and 1800 MHz Transition-completion dates are not achieved;

- reporting requirement that the GSM Licensees update ComReg and other Winning Bidders on a fortnightly basis as to the progress being made. This will therefore allow ComReg the opportunity to engage with operators if the potential for a delay arises and avoid any undue delay in the availability of liberalised spectrum.

3.17 Furthermore, in an effort to ensure the Transition process occurs in the most efficient time reasonably possible, any decision to grant additional extensions will have to be demonstrated by the Interim Licensee to ComReg's satisfaction to be objectively justified, non-discriminatory and proportionate.

### **3.4 Conclusion**

3.18 ComReg has carefully considered the comments made by the respondents in respect of the draft RIA. ComReg is of the view that it has not received any further information tending to suggest that it is appropriate to amend the option preferred in Document 12/127 or to put forward any alternative option. Therefore, ComReg intends to adopt Option 2 as set out in its final RIA at Annex 4 of this document.

## Chapter 4

# 4 ComReg's Proposals

### 4.1 This chapter:

- provides, by way of background, a brief summary of ComReg's proposals as set out in Chapter 4 of Document 12/127;
- summarises the submissions received which are relevant to those proposals and sets out ComReg's consideration of same; and
- sets out ComReg's final positions on its proposals.

### 4.1 Background - Chapter 4 of Document 12/127

#### 4.2 In summary, ComReg proposed:

- a discretion on ComReg's part to grant a **primary extension** of sufficient duration to enable each of the Interim Licensees to complete their respective Relocation activities in accordance with the timeframes and milestones that will be set out in the Transition Project Plan ("Primary Extension"). Based on the estimates previously provided by Red-M/Vilicom in their joint technical reports<sup>17</sup>, ComReg considered that a Primary Extension of up to 3 months would appear to be required;<sup>18</sup>
- a discretion on ComReg's part to grant up to **two additional extensions** of up to 2 months' duration each further to receipt of written applications from one or both Interim Licensee(s) and where demonstrated to be objectively justified, non-discriminatory and proportionate by such Interim Licensees to the satisfaction of ComReg ("Additional Extensions");

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<sup>17</sup> See in particular Documents 12/22, 10/105b and 10/71c.

<sup>18</sup> In that regard, noting that more specificity regarding the actual Relocation timeframes for the Existing GSM Licensees will be known as ComReg progresses the development and finalisation of the Transition Project Plan, ComReg stated that to the extent that information relating to the expected completion of Relocation activities by the Interim Licensees will be known prior to ComReg's decision on this matter, ComReg's proposal anticipates that the duration of any Primary Extension decided upon would appropriately take account of this information.

- to update the spectrum fees that would apply during any potential period of extension to Interim Licences (including both Primary and Additional Extensions) to account for subsequent changes in overall CPI. In particular, ComReg proposed to apply the CPI increase from March 2011 (being the date of computation in Document 11/29) to the spectrum fees set in Document 11/29<sup>19</sup>; and
  - that it would not vary the terms of the licence conditions set out in the Interim Licensees' Existing Interim GSM Rights (other than in relation to its licence fee proposal).
- 4.3 ComReg also identified various reasons as to why it considered its proposals regarding duration and licence fees to be objectively justified, proportionate and non-discriminatory.
- 4.4 ComReg sought views on its proposals as follows:

Q.1 Do you agree with the proposals set out in this chapter? Please provide reasons, evidence and other relevant material in support of your view.

## 4.2 ComReg's proposal regarding duration

### 4.2.1 Summary of responses received

- 4.5 Four responses were received regarding ComReg's proposal for the duration of any extension to Interim 900 MHz Rights.
- 4.6 Views provided which were supportive of ComReg's proposal included that:
- i. there is insufficient time to ensure that Transition activities in the 900MHz band are completed in advance of 1 February 2013 (eircom, Vodafone, Telefónica);<sup>20</sup>

<sup>19</sup> Based on this methodology and using the latest CPI data available to ComReg, this would have resulted in spectrum fees of €73,064 for a duplex channel of 200 kHz per annum. Given that it would be appropriate to rely upon the latest CPI data available to it at the time at which it makes its decision on this matter, ComReg proposed to do so at the time of making its decision.

<sup>20</sup> Vodafone submits that this is consistent with its own knowledge and expectations about feasible timelines for completion of Transition Activities as set out in a number of its previous submissions to ComReg during the MBSA consultation process, and with ComReg's own conclusions in the present consultation document.

- ii. it is appropriate that the Interim Licences of Vodafone and Telefónica be extended by short durations to ensure continuity of service for their customers (eircom);
- iii. ComReg's approach is appropriate and the maximum period of seven months is sufficient time for Transition activities to be completed in the 900MHz band (eircom);
- iv. ComReg's conclusion in paragraph 2.24 of Document 12/127 that Existing GSM Licensees should be able to complete their Relocation activities within a timeframe of approximately 5 months is reasonable. On the basis of the available information on the nature of required Relocation activities, ComReg's proposal for a Primary Extension of up to 3 months duration to existing Interim 900 MHz Rights of Use is objectively justified, necessary and proportionate (Vodafone); and
- v. allowing scope for some additional flexibility (beyond the 5 months period identified above) on the length of the Transition timeframe in practice is appropriate and prudent. Vodafone is therefore in agreement with ComReg's proposal that up to two Additional Extensions to existing Interim 900 MHz Rights of Use, of up to two months duration each, can be granted upon application where the holder(s) of Interim 900 MHz Rights of Use can provide sufficient objective justification that this is necessary to complete Transition Activities (Vodafone)<sup>21</sup>.

4.7 Views provided which were not supportive of ComReg's proposal included that:

- vi. ComReg's proposal amounts to a complete u-turn and a failure on its part to promptly complete the MBSA process and, in its original decision to grant the Interim Licences, ComReg emphasised the finality of their duration (H3GI);
- vii. As ComReg is aware, H3GI believes that the 900 MHz transition activities can be completed by 1 February 2013 (H3GI);

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<sup>21</sup> Vodafone also submitted that any significant delay beyond the end of April 2013 in completing necessary Transition activities, by deferring the introduction of enhanced 3G mobile broadband services, would be undesirable from the perspective of the interests of 900 MHz Licensees, their customers, and society as a whole. In the event that such a delay were to become unavoidable then all reasonable measures must be taken to minimise its extent as far as possible, subject to avoiding significant disruption to consumers.

- viii. ComReg has failed to properly inform itself and prepare for transitional activities, including the creation of sufficient incentives for prompt completion (H3GI);
- ix. ComReg does not have any finalised transition plan and would appear to be relying on incomplete information (H3GI);
- x. ComReg has no proof that an extension, as proposed, will facilitate efficient implementation of the Transition activities (H3GI);
- xi. H3GI does not believe that it is reasonable and/or legitimate for ComReg to fail to settle a transition project plan in advance of any decision regarding the interim 900 MHz GSM licences; and
- xii. ComReg's proposal, in paragraph 4.23 of Document 12/127, that applications for licence extension must be submitted six-weeks in advance is not practical. In that regard, Telefónica noted that it is proposing to implement its relocation within six-weeks and if something goes wrong that brings about a requirement for a further extension, then this might not be known until shortly before the primary licence extension expires. Accordingly, Telefónica submits that ComReg needs to be able to react quickly in this case, otherwise it will be necessary to apply for Additional Extensions in advance of the transition, just-in-case. In Telefónica's view, the process proposed by ComReg is over-complicated – where a further licence extension is required, ComReg must assess the facts, make a decision, and publish afterwards if necessary (Telefónica).

4.8 Other relevant views provided in relation to ComReg's proposal included that:

- xiii. references to "*unforeseen circumstances*" should be qualified by reference to reasonableness i.e. "*reasonably unforeseen circumstances*". Otherwise, existing 900 MHz GSM licensees could unfairly avoid their obligations (H3GI);
- xiv. the licence extension dates should be determined by reference to the Transition Plan (Telefónica);
- xv. Telefónica's preference would be to have a Primary Extension to the date when Lots C and D are vacated plus six weeks (the Deadline Date in Telefónica's letter of 12 December), and the two Additional Extensions would then be available on application as contingencies. This would give Telefónica a set

period for carrying out the activities that are within its control. In that regard, Telefónica stated:

- in ComReg's proposal, any delay by Meteor in releasing lots C and D could use all of the time available to Telefónica during the primary extension, and perhaps also the two additional extension periods;
- it understands from industry discussions on this matter that, at present, the earliest date by which lots C and D can be available, and as a result the earliest date by which Telefónica can begin implementation of its relocation lies between 16th April, and 16th June;
- given that it requires between 3 and 6 weeks for implementation, this already means that even in the case of the earliest availability, the Primary extension would have expired before Telefónica could relocate to lots C and D; and
- ComReg should change the approach it has taken in the Draft Decision and Statutory Instrument so that it has the flexibility to determine the appropriate Primary extension date.

#### **4.2.2 Analysis of responses received**

4.9 ComReg welcomes and is grateful for the responses provided by interested parties on this aspect of its proposals.

#### **Views supportive of ComReg's proposal**

4.10 ComReg notes that 3 out of the 4 respondents generally supported its proposal regarding duration (albeit with one of these respondents suggesting a modification to the timeframe of the Primary Extension and that timeframes should be linked to the Transition Plan). ComReg further notes that the reasons provided by these respondents (being points numbered (i) to (v)) reflect or otherwise accord with those provided by ComReg when setting out its proposal in Document 12/127.<sup>22</sup>

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<sup>22</sup> For example, in relation to the 5 month estimate provided by Red-M/Vilicom which, in turn, informed the proposed 3 month maximum duration of the Primary Extension and, further, that it is appropriate and prudent to provide some flexibility to the duration of the Primary Extension (such as to address unforeseen circumstances arising).

## Views not supportive of ComReg's proposal

- 4.11 ComReg has also carefully considered the criticisms made by H3GI and would respond as follows.
- 4.12 In relation to point (vi), ComReg notes that whilst it has progressed the MBSA process with all reasonable expedition with a view to having all Transition activities completed by 31 January (so as to enable commencement of liberalised rights on 1 February), at no time did it guarantee that this would be the case. Indeed, and as H3GI is aware, prospective applicants were expressly put on notice of the potential for delayed commencement of Liberalised Use Licences in Time Slice 1 or Time Slice 2 for Lots in the 800 MHz, 900 MHz and 1800 MHz bands (see section 2.2.2 of the IM and, in particular, footnote 20, which specifically refers to the potential for delayed commencement arising from Transition activities in the 900 MHz and/or 1800 MHz bands). In relation to the point made regarding the emphasis placed by ComReg on the finality of the duration of Interim rights granted pursuant to ComReg Document 11/29 (and Decision 03/11), ComReg notes that, at that time, it believed, when that decision was made that it could progress its decision making on, and implementation of, its award proposals such that Transition activities in the 900 MHz band could be completed by 31 January 2013.
- 4.13 In relation to point (vii), as discussed in section 2.2.2 of this document, ComReg assumes that it is no longer necessary to further consider H3GI's original assertion that 900 MHz Transition activities could be completed by 1 February 2013,
- 4.14 In relation to point (viii), ComReg does not accept that it has failed to properly inform itself or prepare for Transition activities, including creating sufficient incentives for prompt completion because, amongst other things, ComReg has:
- engaged and has had the benefit of independent expert technical advice in relation to Transition activities from Red-M/Vilicom from as early as 2010 and, as noted in Chapter 2, continues to have the benefit of this advice;
  - put GSM Licensees on notice at an early stage in the process that it would expect them to carry out planning for Transition activities in advance of the Auction;
  - sought, by way of formal information gathering powers under section 13D of the 2002 Act, information concerning the



preparedness of each Existing GSM Licensee for Transition activities in advance of the outcome of the Assignment Stage of the MBSA process;

- with the assistance of Red-M/Vilicom, carefully considered the submissions regarding Transition activities provided by each of the Winning Bidders in response to its section 13D information requests and, subsequently, further information received on 12 December (including the submission from H3GI) and the responses to Document 12/127;
- based on this consideration, proposed a Transition Plan which indicated a number of instances where the Transition activities might be efficiently completed earlier than the timeframes identified in the proposals put forward by Meteor and Telefónica and requested further information from each of Meteor and Telefónica in this regard; and
- required all Auction participants to agree to the imposition of Liquidated Damages where they do not meet the timeframes set out in the Transition Project Plan.

4.15 ComReg does not accept the points made by H3GI numbered (ix)-(xi) above because, amongst other things:

- the purpose of the Transition Project Plan is to determine and establish the timeframes for the efficient completion of Transition Activities;
- ComReg's progress towards finalisation of the Transition Project has already had the benefit of the views of the Existing GSM Licensees, other interested parties, detailed consideration of both by ComReg with the assistance of Red-M/Vilicom;
- given the very limited time in which to finalise the Transition Project Plan and any Interim Licence extension, it is appropriate to advance the Transition Project Plan and the proposals set out in this document concurrently. The time is not available to obtain absolute clarity on the Transition Project Plan and then proceed to consider Interim Licence extensions. Indeed, such an approach would lead to both legal and regulatory uncertainty in the mobile sector;;
- ComReg's proposal, as set out in Document 12/127, included that its decision on the duration of any Primary Extension would appropriately take account of the latest available

information on the expected completion of Transition activities and, in this regard, ComReg notes that the draft Transition Project Plan provides for a completion date of 26 April 2013;

- given the above, it is therefore reasonable to conclude that the duration of the Primary Extensions decided upon by ComReg will properly reflect the timeframes required for efficient implementation of Transition Activities; and
- in relation to Additional Extensions, ComReg acknowledges that any decision with regards to the requirement for, or duration of, Additional Extensions cannot be made in advance of finalisation of the Transition Project Plan and receipt of appropriate application for same. ComReg is not therefore making any such decision at this point in time.

4.16 In relation to point (xii), which was made by Telefónica, ComReg notes that this concern is misplaced because it ignores ComReg's proposal that an application for an Additional Extension may be made "*where there [this] is demonstrated to not be possible, as soon as practicable after becoming aware of the events or circumstances claimed to justify an Additional Extension*". In other words, if it is clear to an applicant that it will require an extension it should apply six weeks in advance (to provide clarity to all parties). However, if reasonably unforeseen circumstances give rise to the necessity to seek an extension within that 6 week period, an application should be submitted as soon as it is possible for the applicant to demonstrate that it would be objectively justified, non-discriminatory and proportionate for ComReg to grant such an extension. Where such application is made within the six week period, ComReg has made clear its position on consultation with interested parties in paragraph 4.24 of Document 12/127 and, in particular, footnote 61 of same. ComReg will in all cases act expeditiously and in accordance with its statutory obligations in coming to a decision on the matter.

### Other views

4.17 ComReg notes and welcomes H3GI's submission (at point (xiii) above) that references to "*unforeseen circumstances*" should be qualified by reference to reasonableness i.e. "*reasonably unforeseen circumstances*" because, otherwise, existing 900 MHz GSM licensees could unfairly avoid their obligations.

4.18 For the avoidance of doubt, ComReg would have, under its present proposals, acted to prevent a Licensee from seeking to rely upon

circumstances that it should reasonably have foreseen, or otherwise avoiding its obligations under the Transition Project Plan. Nevertheless, ComReg recognises that the inclusion of “reasonably” would provide additional clarity and certainty to all Winning Bidders as to the nature of circumstances that would support an application for an Additional Extension (which might, in turn, dissuade any unnecessary applications), and will therefore incorporate this suggestion into its final decision. ComReg notes that this minor amendment to its proposal involves no additional burden for Interim Licensees and is consistent with its stated objective of ensuring that extensions are for the minimum duration necessary so that there is no undue delay in the availability of liberalised spectrum.

- 4.19 In relation to point (xiv), ComReg has already discussed above the appropriateness of issuing a Decision on the duration of Primary Extensions as soon as possible even where that Decision must issue prior to finalisation of the Transition Project Plan. In any case, ComReg notes that the draft Transition Project Plan, which is based on the latest available information on Transition activities and which has influenced ComReg’s decision with regards to the duration of a Primary Extension, is close to finalisation. ComReg can also confirm that its consideration of Additional Extensions will be determined by reference to, amongst other things, the finalised Transition Project Plan.
- 4.20 In relation to point (xv) ComReg notes that the duration of a Primary Extension accords with both its original 5 month estimate for completion of Transition activities and the latest draft of the Transition Project Plan which is based on the latest available information on the expected completion of Transition activities. In that light, ComReg does not consider it appropriate, or in accordance with its objective of avoiding any undue delay in the availability of liberalised spectrum, to provide for a longer Primary Extension. ComReg notes that Telefónica is also free to seek an Additional Extension where it can demonstrate that such extension would be objectively justified, non-discriminatory and proportionate. ComReg is therefore of the view that its overall approach acts to incentivise timely and efficient Transition activities without prejudice to the position of Telefónica or other Licensees.

### **4.2.3 ComReg's final position regarding duration**

- 4.21 On the basis of the analysis and reasons provided by ComReg in Document 12/127 when setting out its proposal regarding duration,

currently available information regarding timeframes for efficient completion of Transition Activities in the 900 MHz band (see Chapter 2), and its analysis of the views of interested parties on its proposal, ComReg's final position is that it will implement its proposal on duration, as set out in section 4.2.2 of Document 12/127. However, where ComReg makes reference to "unforeseen circumstances", that should now be read as meaning "reasonably unforeseen circumstances".

## **4.3 Other Licensing aspects - Licence Fees**

### **4.3.1 Summary of responses received**

4.22 Three responses were received on its proposal regarding licence fees (as set out in section 4.3 of Document 12/127).

4.23 Two respondents were supportive of ComReg's proposal:

- i. eircom submits that it has no objection to ComReg's proposal to continue to apply the established spectrum fees for interim licences updated for CPI; and
- ii. Telefónica agrees with ComReg's proposal regarding licence fees and submits that the extended licences will be of short and limited duration, so the proposal is pragmatic.

4.24 One respondent, Vodafone, did not agree and submits that:

- iii. its position in relation to the appropriate spectrum fees for 900 MHz Interim Rights of Use has not changed from that set out in its response to ComReg Document 11/11;
- iv. the arguments that it raised against increasing annual spectrum fees to account for changes in the Consumer Price Index (CPI) in that response are equally valid in respect of ComReg's approach to the determination of the spectrum fees proposed to be applied to an extension of the duration of Interim Licences;
- v. it accepts that spectrum fees should be charged for an extension of the duration of Interim 900 MHz spectrum rights of use that are proportionate to the very limited period of the extension required to complete Transition Activities. However while it would be impractical, in the context of ComReg's previous decision on Interim Licences (ComReg Document 11/29 and D03/11), for ComReg to now fully revise its methodology for the determination of annual spectrum fees for

the proposed extension of Interim Licences in line with Vodafone's previous recommendations, it considers that there should, at a minimum, be no CPI indexation of the annual spectrum fee to cover the period March 2011 to October 2012. Fees applying to extensions of the duration of existing 900 MHz Interim Rights of Use should therefore be no higher than €71,338 per duplex channel of 200 kHz on an annualised basis.

### **4.3.2 Analysis of responses received**

#### **Views supportive of ComReg's proposal**

4.25 ComReg notes that two of the three respondents who expressed a view on this issue are generally supportive of ComReg's proposal.

#### **Views not supportive of ComReg's proposal**

4.26 In relation to points (iii) and (iv) above, ComReg notes that Vodafone simply reiterated the views that it put forward in response to Document 11/11 opposing the indexation of licence fees by CPI. Vodafone has put forward no new arguments, or evidence in support of its earlier arguments. ComReg is of the view that there has been no material alteration in circumstances that would require ComReg to reconsider its analysis of this issue as set out in Document 11/29.

### **4.3.3 ComReg's final position regarding Licence Fees**

4.27 Having carefully considered the submissions made, ComReg intends to apply the combined spectrum usage fees and access fees which applied in respect of the Interim Licences, indexed by CPI from March 2011 to November 2012, being the latest date to which figures are available on the date of publication of this document. Over the relevant period, CPI has increased by 2.01%. The proposed fees are set out in detail in the table below:

**Table 2: The Spectrum Fees for the Interim Licence Extensions (€)**

	<b>Historical Fees set in 11/29 in respect of the Interim Licences</b>	<b>Fees updated to current prices levels (CPI 2.01%)</b>
<p><b><u>Interim Licence Spectrum Fees</u></b></p> <p>(based on 1 year usage fee + 1 year access fee)</p> <p><b>Fee for 1 duplex channel (200 kHz) for 1 year</b></p> <p><b>Fee for 2 x 7.2 MHz (36 duplex channels of 200 kHz) for 1 year</b></p>	<p><b>€1,338</b></p> <p><b>€2,568,168</b></p>	<p><b>€2,772</b></p> <p><b>€2,619,792</b></p>

- 4.28 Where a Licence is granted or renewed for a part of a year, then the fee in respect of the Licence shall be calculated on a *pro-rata* daily basis until its expiry.
- 4.29 In the interests of regulatory predictability, proportionality and simplicity, it is not proposed that the above fees be altered to reflect any change in CPI between the date of publication of this document and the date of commencement of the Primary Extensions. Moreover, given the short time periods involved, ComReg does not propose any further indexation of fees if one or more Additional Extensions are required.

#### **4.4 Other Licensing aspects - Other Licence Conditions**

- 4.30 Two responses were received on its proposal regarding other licence conditions (as set out in section 4.3 of Document 12/127).
- 4.31 Both respondents agreed with ComReg's proposal, and reasons provided in this regard included that:

- i. as extended licences will be of short and limited duration, the proposal is pragmatic (Telefónica); and
- ii. it is difficult to conceive how changes to existing licence conditions that would be in effect for a period of only a few months could possibly be objectively justified (Vodafone); and
- iii. there has been no material change in the competitive and market environment since March 2011 that would lead to the conclusion that Interim 900 MHz Rights of Use for provision of GSM services exclusively should vary from those that have governed the provision of GSM services since the award of the original 900 MHz GSM Licences (Vodafone)<sup>23</sup>.

4.32 One respondent asserted that changes to licence conditions arising from other consultation processes could be discriminatory. ComReg does not propose to fetter its statutory discretion in relation to such matters in this consultation process and is of the view that it would be inappropriate to render the Interim Licences immune from amendment during the period of any extension. Accordingly, ComReg does not deal with this issue further in this document.

#### **4.4.1 Analysis of responses received and ComReg's final position regarding Other Licence Conditions**

4.33 ComReg notes that reasons provided by these respondents reflect or otherwise accord with those provided by ComReg when setting out its proposal in Document 12/127.

4.34 On the basis of the analysis and reasons provided by ComReg in Document 12/127 when setting out its proposal regarding Other Licence Conditions, and the views of interested parties on its proposal, ComReg's final position is that it will implement its proposal on Other Licence Conditions, as set out in paragraphs 4.33 – 4.35 of Document 12/127.

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<sup>23</sup> Vodafone also submits that it is highly unlikely that other consultations and decisions issued by ComReg during the time period of the proposed Interim Licence extensions would require amendments to the licence conditions attached to the Existing Interim Rights for the factors outlined above.

## 4.5 Requirements of objective justification and proportionality

### 4.5.1 ComReg's proposal regarding duration

#### Summary of responses received

4.35 Four responses were received on the requirements of objective justification and proportionality of ComReg's proposal regarding the duration of any extension to the duration of existing Interim GSM 900 MHz rights of use and ComReg's assessment of same as set out in section 4.4 of Document 12/127.

4.36 In summary, views provided which were supportive of ComReg's proposal included that:

- i. there is insufficient time to ensure that transition activities in the 900MHz band are completed in advance of 1 February 2013 (eircom);
- ii. it is appropriate that the Interim Licences of Vodafone and Telefónica be extended by short durations to ensure continuity of service for their customers (eircom, Telefónica, Vodafone) and to "avoid the clear and substantial negative impact on...competition" (Vodafone);
- iii. the principle of whether or not to grant GSM licence extensions has already been examined, consulted on, and decided on by ComReg in Document 11/29 (D3/11)<sup>24</sup>, all of the considerations that led to D3/11 still apply<sup>25</sup> and, essentially,

<sup>24</sup> In that regard, Telefónica noted that:

- "At that time, ComReg decided that it was necessary to extend the existing 900MHz GSM licences "for a limited period until such time as a final decision on ComReg's broader spectrum release proposals could be made and realised" (emphasis added)."; and
- "ComReg's own consultants have reported that a transition period of five months would be required for relocation activities post auction. This does not allow for the sequential nature of some of the relocation steps as is the case for example where Telefónica must wait for Meteor's relocation to be complete before it can implement its own."

<sup>25</sup> In that regard, Telefónica submits that:

- "between the time of finalisation of the new assignments (5th December 2012) and Interim Licence Expiry on 31st January 2013 there was insufficient time for existing licensees to transition from current



the decisions have already been taken, and ComReg's proposal represents practical measures to allow for implementation of same (Telefónica);

- iv. the proposal is also proportionate as the extension of the duration of Interim 900 MHz Rights of Use will be short term (a matter of a few months at most) and the minimum necessary to enable Telefónica, and in the context of a sequential Relocation process – Vodafone, to complete all Transition Activities required to give effect to the outcome of the recently concluded MBSA process (Vodafone);
- v. ComReg's approach is appropriate and the maximum period of seven months is sufficient time for transition activities to be completed in the 900MHz band (Eircom).

4.37 In summary, views provided which were not supportive of ComReg's proposal included that:

- vi. ComReg's proposal amounts to a complete u-turn and a failure on its part to promptly complete the MBSA process and, in its original decision to grant the interim 900 MHz GSM licences, ComReg emphasised the finality of their duration (H3GI);
- vii. As ComReg is aware, H3GI believes that the 900 MHz Transition activities can be completed by 1 February 2013 (H3GI);
- viii. ComReg has failed to properly inform itself and prepare for Transitional activities, including the creation of sufficient incentives for prompt completion (H3GI);
- ix. ComReg does not have any finalised transition plan and would appear to be relying on incomplete information (H3GI);
- x. ComReg has no proof that an extension as proposed will facilitate efficient implementation of the Transition activities (H3GI); and

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*assignments to new assignments. When the decision was taken to issue interim 900MHz licences, it was expected that the MBSA would be completed significantly earlier than it actually did, allowing sufficient time for an orderly transition to the new assignments. The delayed commencement and conclusion of the auction has created a situation where there is now insufficient time for a transition to new assignments before the Interim Licences expire."*

- xi. H3GI does not believe that it is reasonable and/or legitimate for ComReg to fail to settle a Transition Project Plan in advance of any decision regarding the interim 900 MHz GSM licences (H3GI).

### **Analysis of responses received and ComReg's final position**

4.38 ComReg welcomes and is grateful for the responses provided by interested parties on this aspect of its proposals.

#### Views supportive of ComReg's assessment

4.39 ComReg notes that the reasons provided by respondents supportive of its assessment reflect or otherwise accord with those provided by ComReg when setting out its proposal in Document 12/127.

#### Views not supportive of ComReg's assessment

4.40 ComReg again notes H3GI's criticisms of its proposal and considers that it has fully addressed these issues in section 4.2.2 above.

4.41 On the basis of the analysis and reasons provided by ComReg in Document 12/127 when assessing its proposals regarding duration against the requirements of objective justification and proportionality, the views of interested parties on this issue, and ComReg's consideration of same, ComReg continues to believe that its proposal in relation to the duration of any extension to Existing Interim Rights is objectively justified and proportionate.

### **4.5.2 ComReg's proposal regarding Licence Fees**

4.42 ComReg received no submissions bearing directly on whether or not its proposal in relation to licence fees was objectively justified and proportionate.

4.43 However, ComReg notes that Vodafone referred to its submissions in response to Document 11/11 which did raise the contention that the application CPI was not objectively justified.

4.44 ComReg is of the view that there have been no substantive developments to change its view of this issue as set out in Document 11/29.

4.45 Accordingly, for the reasons set out in Document 12/127<sup>26</sup> and in reliance on the reasoning that it set out in Document 11/29, ComReg

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<sup>26</sup> At paragraph 4.39.

is of the view that its proposal regarding licence fees is objectively justified and proportionate.

## **4.6 Requirement of non-discrimination**

### **4.6.1 ComReg's proposal regarding duration**

- 4.46 One response was received specifically addressing the issue of whether ComReg's proposal regarding duration satisfied the requirement of non-discrimination. That respondent, Vodafone, submits that ComReg's proposal and Draft Decision is non-discriminatory as all entities that are in an equivalent factual and legal situation are treated equally by the decision, and no artificial or unfair advantage is being conferred on the Interim 900 MHz Licensees relative to their competitors.
- 4.47 On the basis of the analysis and reasons provided by ComReg in Document 12/127 when assessing its proposals regarding duration against the requirements of non-discrimination, and the views of interested parties on this issue, ComReg continues to believe that its proposal in relation to the duration of any extension to Existing Interim Rights is non-discriminatory.
- 4.48 ComReg notes that the onus is on the applicant to demonstrate that any Additional Extension is objectively justified, non-discriminatory and proportionate,<sup>27</sup> and that this will be evaluated by ComReg in considering such applications.

### **4.6.2 ComReg's proposal regarding Licence Fees**

- 4.49 No responses were received specifically addressing whether or not ComReg's proposals in relation to licence fees were non-discriminatory.
- 4.50 ComReg is of the view that its proposal treats similarly situated operators equally as regards the proposed licence fees and that, accordingly, the proposal is non-discriminatory.

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<sup>27</sup> As set out at paragraph 4.23 of Document 12/127.

## **4.7 Other issues**

### **4.7.1 Draft Decision**

- 4.51 One respondent, Telefónica, provided the following suggested changes to the Draft Decision and Draft Statutory Instrument
- i. the licensee is Telefónica Ireland Ltd., rather than Telefónica O2 Ireland Ltd;
  - ii. “Relocation Activities” appears to be a defined term (capitalised), however the definition is not included; and
  - iii. The Decision and Statutory Instrument will need to be amended slightly to allow for changes to the timing of licence extension to coincide with the Transition Plan.
- 4.52 ComReg welcomes suggestions (i) and (ii), considers these to be appropriate and has addressed these in the final decision instrument.
- 4.53 In relation to suggestion (iii), as discussed above, ComReg notes that the duration of the Primary Extension accords with the latest draft of the Transition Project Plan.

### **4.7.2 Procedural issues**

- 4.54 One respondent, H3GI, asserted that ComReg has failed to act transparently, in that regard, and refers to a letter from its solicitors, Matheson, to ComReg dated 13 November 2012.
- 4.55 ComReg does not accept this assertion and, in that regard, notes:
- the reasons set out in its letter to Matheson dated 20 November (which was published by ComReg in Document 13/06);
  - that ComReg subsequently published and invited views on its proposals;
  - that H3GI submitted a response in relation to same to which ComReg has had due regard;
  - that H3GI was involved in discussions with Existing GSM Licensees on Transition;
  - that H3GI made its views on transition known by way of its letter of 12 December, to which ComReg and its technical advisers, Red-M/Vilicom have had due regard; and

- that ComReg has published relevant correspondence and other material regarding transition and interim licensing to-date in Document 13/06<sup>28</sup>.

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<sup>28</sup> Noting that ComReg has not published correspondence relating to the MBSA process, since the publication of Document 12/94, on the basis that such publication could reveal the identity of a prospective Applicant, an Applicant or a Qualified Bidder.

## Chapter 5

# 5 Decision

### DECISION

#### 1. DEFINITIONS AND INTERPRETATION

In this Decision, save where the context otherwise admits or requires, the following terms, words and expressions shall bear the meanings set out below.

Save where the context otherwise admits or requires, a word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular.

**“Additional Extension 1”** means an additional extension of the Interim Licence Term as previously extended by any Primary Extension, for a period not exceeding 2 calendar months, in accordance with such provisions of the Interim Licence Regulations, as amended, providing for same, such additional period commencing immediately following the date of the expiration of any Primary Extension that may have been granted by ComReg in accordance with such Regulations;

**“Additional Extension 2”** means a further extension of the Interim Licence Term as previously extended by any Primary Extension and Additional Extension 1, for a period not exceeding 2 calendar months, in accordance with such provisions of the Interim Licence Regulations, as amended, providing for same, such period commencing immediately following the date of the expiration of any Additional Extension 1 that may have been granted by ComReg in accordance with such Regulations;

**“Authorisation Regulations”** means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations, 2011 (S.I. No. 333 of 2011);

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

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

“**CPI**” means the Consumer Price Index published by the Central Statistics Office;

“**Existing GSM 900 MHz Licence**” means a licence relating to GSM-only rights of spectrum use in the 900 MHz band;

“**Existing GSM 900 MHz Licensee**” means a holder of an Existing GSM 900 MHz Licence;

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

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

“**Interim Licence**” means a licence 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. 189 of 2011);

“**Interim Licensee**” means a holder of an Interim Licence;

“**Interim Licence Amendment Regulations**” means the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) (Amendment) Regulations set out in draft form in Annex 3 to ComReg Document 13/05;

**“Interim Licence Term”** means the period from 16 May 2011 to 31 January 2013 provided for in the Interim Licence Regulations and in the Interim Licences granted thereunder to Interim Licensees;

**“Multi-Band Spectrum Award”** means the process by which rights of use in respect of some or all of the 800, 900 and 1800 MHz bands are being released jointly;

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

**“Primary Extension”** means an extension, for a period not exceeding 3 calendar months, of the Interim Licence Term, in accordance with such provisions of the Interim Licence Regulations, as amended, providing for same, that may be granted by ComReg in accordance with such Regulations;

**“Relocation Activities”** means the activities required of an Existing GSM 900 MHz Licensee to relocate to a different spectrum assignment within the 900 MHz band in line with the Transition Project Plan drawn up on foot of the Multi-Band Spectrum Award;

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

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

**“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, the following ComReg documents, which shall, where appropriate, be construed with this Decision:
- a. 10/71,
  - b. 11/11,
  - c. 11/29,
  - d. 12/25,
  - e. 12/52 as amended,
  - f. 12/73,
  - g. 12/127,
  - h. 13/05 and D02/13,
  - i. 13/06,

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

- the imminent expiry of Interim Licences held by each of Vodafone and Telefónica, on 31 January 2013;
- the fact that Vodafone and Telefónica may not be in a position to complete their Relocation Activities before their Interim Licences expire on 31 January 2013;
- the need to avoid potential undue effects on the sustainability of the businesses of industry operators and distortions of competition from 1 February 2013 until the completion of Relocation Activities by Vodafone and Telefónica;
- the need to avoid potential significant disruption to existing GSM services from 1 February 2013 until completion of Relocation Activities by Vodafone and Telefónica;
- the consequent need to provide for the extension of, and to extend as appropriate, the Interim Licence Term;
- the desirability of ensuring that extensions to the Interim Licence Term are only for the minimum duration necessary to facilitate the timely and efficient completion of Relocation Activities in the 900 MHz band;

- the desirability of ensuring that there is no undue delay in the availability of liberalised spectrum in the 900 MHz band;
  - 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 (i) above;
- (iii) the powers, functions, objectives and duties of ComReg, including, without limitation those under and by virtue of:
- a. the Communications Regulation Act 2002, and, in particular, sections 10, 12 and 13 thereof;
  - b. the Framework Regulations, and, in particular, Regulations 16 and 17 thereof;
  - c. the Authorisation Regulations, and, in particular, Regulations 9, 10, 11, 12, 15 and 19 thereof;
  - d. Sections 5 and 6 of the Wireless Telegraphy Act, 1926;
  - e. the applicable Policy Directions made by the Minister under Section 13 of the Communications Regulation Act 2002;

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

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

### **3. DECISION**

- 3.1 ComReg hereby decides that, subject to, and upon obtaining, the consent of the Minister to the making by it of regulations wholly or substantially in the terms of the draft Interim Licence Amendment Regulations set out in Annex 3 to ComReg Document 13/05, ComReg will make such regulations under section 6(1) of the Wireless Telegraphy Act 1926, prescribing relevant matters in regard to Interim Licences by way of amendment of the Interim Licence Regulations.
- 3.2 ComReg hereby decides that, upon application properly being made to it by an Interim Licensee within the terms of the Interim Licence Regulations, as so amended, it will grant to such Interim Licensee a Primary Extension.
- 3.3 ComReg hereby decides that, upon application properly being made to it within the terms of the Interim Licence Regulations, as so amended, by an Interim Licensee which has been granted a Primary Extension, it will grant to such Licensee an Additional Extension 1, and, thereafter, an Additional Extension 2, in circumstances where the exercise of its discretion to do so provided for in the Interim Licence Regulations, as amended, makes one, or both, of such extensions objectively justified, non-discriminatory and proportionate.
- 3.4 For the avoidance of doubt, ComReg makes no commitment or representation in this Decision regarding the extension of the Interim Licence Term beyond such extension or, as the case may be, extensions as may be provided for in the Interim Licence Regulations, as amended, whether at all, or for any particular period, or on any particular terms.
- 3.5 ComReg hereby decides that it will update the spectrum fees that would apply during any potential period of extension to Interim Licences (including both Primary and Additional Extensions) to account for subsequent changes in overall CPI. In particular, ComReg will apply the CPI increase from March 2011 (being the date of computation in Document 11/29) to the spectrum fees set in Document 11/29. Accordingly, expressed on a per annum basis, the spectrum fees payable per duplex 200 KHz channel will be €72,772.

**4. STATUTORY POWERS NOT AFFECTED**

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

**5. EFFECTIVE DATE**

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

**ALEX CHISHOLM**

**CHAIRPERSON**

**THE COMMISSION FOR COMMUNICATIONS REGULATION**

**THE 15<sup>th</sup> DAY OF JANUARY 2013**

## Chapter 6

# 6 Next Steps

- 6.1 ComReg sets out below the next steps in relation to the extension of duration of existing Interim Licences.
- 6.2 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>29</sup>.
- 6.3 Following the publication of this Response to Consultation and Decision Document, ComReg will immediately request that the Minister approve the making of the Statutory Instrument ('SI') in the form set out in Annex 3 of this Document. For the avoidance of doubt, ComReg explicitly reserves the discretion to make any amendments to the SI that it considers necessary or appropriate to obtain such approval.
- 6.4 Section 6.1 below sets out the application procedure that will apply on the assumption that ComReg obtains the required ministerial consent.

## 6.1 The Application Procedure

- 6.5 ComReg intends to make available to the Interim Licensees an application form for a Primary Extension to existing 900 MHz Interim Licences no later than 18 January 2013. It is intended that the same form of application will be used for any subsequent applications for Additional Extensions where required. For the avoidance of doubt, all applications must be made in accordance with, and will be assessed in light of, the provisions of this document, and in particular Chapter 4.
- 6.6 ComReg intends at this stage to set close of business on 28 January 2013 as the closing date for the receipt of completed application forms and the receipt of the full spectrum fees for the relevant licence period. This date will be finalised once Ministerial approval of the SI

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<sup>29</sup> ComReg 05/24 Response to Consultation - Guidelines on the treatment of confidential information - March 2005.

has been obtained and it will be published on ComReg's website at the same time as publication of the above application form.

6.7 In summary, the planned milestone dates associated with the application procedure are as follows;

- **18 January 2013:** ComReg to make available the Interim Licence application form to the potential applicants, namely Telefónica and Vodafone;
- **Close of business on 28 January 2013:** Closing date for receipt of the completed application form and the full spectrum fees for the Primary Extension period; and
- **30 January 2013:** ComReg to issue 900 MHz Interim Licence(s) extensions to the successful applicant(s).

# Annex 1: Glossary

## A1.1 Definitions

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

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

900MHz band	The frequency range 880 – 915 MHz paired with 925 – 960 MHz
1800MHz band	The frequency range 1710 – 1785 MHz paired with 1805 – 1880 MHz
2100 MHz Band	1920 – 1980 MHz paired with 2110 – 2170 MHz, and 1900 – 1920 MHz
Additional Extension	An Additional Extension means an extension of the duration of an Interim Licence in accordance with such provisions of the Interim Licence Regulations, as amended, providing for same;
Assignment Round	The single round of bidding in the Assignment Stage, scheduled simultaneously but run independently for each band, during which Winning Bidders (and Existing GSM Licensees if applicable) were entitled to submit one or more Bids to be assigned Specific Lots within the bands in which they have won Lots (or retain Lots for which they hold Existing GSM Licences).
Assignment Stage	The stage of the Auction where Winning Bidders (and Existing GSM Licensees if applicable) are allocated Specific Lots in accordance with the number of Lots they have been allocated.
Auction	The mechanism within the MBSA Process used to determine Winning Bidders and Winning Prices in the event a Main Stage or Assignment Stage is required.
CPI	Consumer Price Index published by the Central Statistics Office.
Document 10/71	“800 MHz, 900 MHz & 1800 MHz spectrum release.” Published 17 September 2010.
Document 11/11	“Interim Licences for the 900 MHz band Consultation.” Published 17 February 2011.
Document 11/29	“Interim Licences for the 900 MHz Band” Response to Consultation and Decision. Published 13 April 2011.



Document 12/25	Multi-Band Spectrum Release - Release of the 800 MHz, 900 MHz and 1800 MHz radio spectrum bands.” Response to Consultation and Decision, Published 16 March 2012
Document 12/127	Proposes to extend the Duration of Existing Interim GSM 900 MHz Rights of Use, Consultation and draft Decision, published 23 November 2012.
Draft Amendment	Means the draft Amendments to the Interim Licence Regulations as set out in Annex 3 of this document.
Early Liberalisation Option	The option available to an Existing GSM Licensee with GSM rights of use which are intended to continue after the commencement date for Time Slice 1 to relinquish all, or part, of its existing GSM 900 MHz and/or 1800 MHz spectrum rights of use, contingent on it winning an equivalent quantum of liberalised 900 MHz and/or 1800 MHz spectrum rights of use in Time Slice 1 in the MBSA process.
Existing GSM Licence	A Licence relating to GSM-only rights of spectrum use in the 900MHz and/or 1800MHz bands in Time Slice 1.
Existing GSM Licensee	A holder of a Licence relating to GSM-only rights of spectrum use in the 900MHz and/or 1800MHz bands in Time Slice 1.
Existing Licence	A Licence currently held under a Wireless Telegraphy Regulation.
GSM 900 MHz Licence	A Licence issued under the Wireless Telegraphy (GSM Mobile Telephony Licence) (Amendment) Regulations 2003 (S.I. 339 of 2003) for GSM use in the 900 MHz band.
GSM 1800 MHz Licence	A Licence issued under the Wireless Telegraphy (GSM Mobile Telephony Licence) (Amendment) Regulations 2003 (S.I. 339 of 2003) for GSM use in the 1800 MHz band.
GSM Licence	A GSM900 MHz Licence or a GSM1800 MHz Licence or an Interim GSM900 MHz Licence as the case may be an Existing GSM Licensee shall be construed accordingly.

Information Memorandum / IM	Document 12/52 as amended.
Indexation	The adjustment of prices for inflation. The index of inflation that will be used will be the Consumer Price Index (CPI) as published by the Central Statistics Office (CSO).
Interim Licence Regulations	The Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations, 2011 (S.I. 189 of 2011) for GSM use in the 900 MHz band
Interim Licence	A Licence issued under the interim GSM Regulations and Interim Licensees shall be construed accordingly.
Interim Licensing Proposal (ILP)	The Interim Licensing Proposal discussed and set out in ComReg's interim licensing process, namely Documents 11/29, 11/11 and 10/71.
Liberalised Use Licence (or a Liberalised Licence)	A Licence issued under Schedule 1 of SI 251 of 2012 which entitles the holder to use certain Specific Lots of spectrum in the Bands, subject to the terms and conditions set out therein.
Licence	A Liberalised Use Licence, a Preparatory Licence, an Existing GSM Licence or an Interim Licence as the case may be and "Existing Licensee" and "Licensee" shall be construed accordingly.
Lot / Block	A 2 × 5 MHz block of spectrum in a specified band (the 800MHz, 900MHz or 1800MHz band).
Multi-Band Spectrum Award (MBSA) Process	The process to award spectrum in the 800 MHz, 900 MHz and 1800 MHz bands in accordance with the substantive decisions set out in Document 12/25 and the processes and procedures set out in the Information Memorandum (Document 12/52) as amended.
Negotiation Phase	The two week period allowed after the Assignment Stage where successful Bidders can attempt to agree alternative assignment for spectrum rights of use won in the MBSA Process.

Notification and Grant Stage	The stage of the MBSA process as defined in Document 12/52
Preparatory Licence	A Licence issued under Schedule 2 of SI 251 of 2012 which entitles the holder to possess and install equipment designed or configured for operation in certain Lots of spectrum in the Bands, but which does not permit any wireless telegraphy transmissions, subject to the terms and conditions set out therein.
Primary Extension	A Primary Extension means an extension of the duration of an Interim Licence in accordance with such provisions of the Interim Licence Regulations, as amended, providing for same that may be granted by ComReg in accordance with those Regulations.
Relocation	The activities required of an Existing GSM 900 MHz Licensees to relocate to a different spectrum assignment within the 900 MHz band compared to its existing spectrum assignment.
Retuning	An Existing GSM Licensee reducing its existing spectrum assignments to a smaller assignment as a result of the MBSA Process.
Specific Frequencies	The frequency ranges associated with Specific Lots.
Spectrum Usage Fees (SUFs)	The annual Spectrum Fees associated with a Licence which a Winning Bidder / Licensee is required to pay over the duration of the Licence.
Time Slice	<p>A time period for which licences are being allocated within the MBSA Process. There are two distinct Time Slices for which Lots in all bands (800 MHz, 900 MHz, 1800 MHz) are being allocated, and each Licence shall be in respect of one Time Slice:</p> <ul style="list-style-type: none"> <li>• 1 February 2013 – 12 July 2015; and</li> <li>• 13 July 2015 – 12 July 2030.</li> </ul>
Time Slice 1	A time period from 1 February 2013 to 12 July 2015 (as may be amended by ComReg).
Time Slice 2	A time period from 13 July 2015 – 12 July 2030 (as may be

	amended by ComReg).
Transition	Relocating or Retuning of existing spectrum assignments
Transition Phase	The phase required to facilitate the network adjustments required by the Existing GSM Licensees (and potentially Winning Bidders in Time Slice 1 in advance of the commencement date of Time Slice 2) to retune or relocate parts of their networks to the new spectrum assignments determined by the MBSA process (the "Transition Phase").
Transition Project Plan	The plan which sets out the Transition activities, milestones and timeframes for completing the Transition Phase associated with the MBSA process.
Transition Project Proposal	A proposal submitted by Existing GSM Licensees and Winning Bidder for consideration by ComReg as input into the Transition Project Plan.
Transition Rules	Rules regarding transition, as set out in section 3.8 of the IM
Winning Bidder	A Bidder which won at least one Lot in the MBSA Process.

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

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

## **A1.3 Primary and Secondary Legislation**

SI	Statutory Instrument
2002 Act	The Communications Regulation Act 2002 (No. 20 of 2002), as amended <sup>30</sup>
Act of 1926	The Wireless Telegraphy Act 1926 (No. 45 of 1926) as amended
Authorisation Regulations	European Communities (Electronic Communication Networks and Services) (Authorisation) Regulations 2011 ( <a href="#">S.I. No 335 of 2011</a> )
EC Decision 2009/766/EC	European Commission Decision on the harmonisation of the 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community
EC Decision 2010/267/EU	European Commission Decision on harmonised technical conditions of use in the 790-862 MHz frequency band for terrestrial systems capable of providing electronic communications services in the European Union
EC Decision 2011/251/EU	European Commission Decision, amending Decision 2009/766/EC, on the harmonisation of the 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community
Framework Directive	Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended
Framework Regulations	European Communities (Electronic Communications Networks and Services) (Framework) Regulations

<sup>30</sup> Includes the Communications Regulation (Amendment) Act 2007 and the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010.

	2011 ( <a href="#">S.I. No 333 of 2011</a> )
The Minister	Minister for Communications, Energy and Natural Resources
Specific Regulations	Specific Regulations has the same meaning as set out in Regulation 2 of Framework Regulations 2011 (S.I. No. 333 of 2011)

## A1.4 Glossary of Technical Terms

3G	Third Generation Mobile System (e.g. UMTS)
2G	Second generation mobile services (e.g. GSM)
CPI	Consumer Price Index
CSO	Central Statistics Office
ECN	Electronic Communications Network as defined under the Framework Regulations
ECS	Electronic Communications Service as defined under the Framework Regulations
eircom/Meteor	eircom Group or Meteor Mobile Communications or Meteor
Guard-band	An unused spectrum bandwidth separating channels to prevent interference
GHz	Gigahertz (1,000,000,000 Hertz)
GSM	Global System for Mobile Communications
Hertz or Hz	Unit of Frequency
H3GI	Hutchison 3G Ireland

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

## Annex 2: Legal Framework and Statutory Objectives

- A 2.1 The Communications Regulation Acts 2002-201031 (the “2002 Act”), the Common Regulatory Framework (including the Framework and Authorisation Directives<sup>32</sup> as transposed into Irish law by the corresponding Framework and Authorisation Regulations<sup>33</sup>), and the Wireless Telegraphy Acts<sup>34</sup> set out, amongst other things, powers, functions, duties and objectives of ComReg that are relevant to this response to consultation and draft decision.
- A 2.2 Apart from licensing and making regulations in relation to licences, ComReg’s functions include the management of Ireland’s radio frequency spectrum in accordance with ministerial Policy Directions under Section 13 of the 2002 Act, having regard to its objectives under Section 12 of the 2002 Act, Regulation 16 of the Framework Regulations and the provisions of Article 8a of the Framework Directive. ComReg is to carry out its functions effectively, and in a manner serving to ensure that the allocation and assignment of radio frequencies is based on objective, transparent, non-discriminatory and proportionate criteria.

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<sup>31</sup> The Communications Regulation Act 2002, the Communications Regulation (Amendment) Act 2007 and the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010.

<sup>32</sup> Directive No. 2002/21/EC of the European Parliament and of the Council of 7 March 2002 (as amended by Regulation (EC) No. 717/2007 of 27 June 2007, Regulation (EC) No. 544/2009 of 18 June 2009 and Directive 2009/140/EC of the European Parliament and Council of 25 November 2009) (the “Framework Directive”) and Directive No. 2002/20/EC of the European Parliament and of the Council of 7 March 2002 (as amended by Directive 2009/140/EC) (the “Authorisation Directive”)

<sup>33</sup> The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) and the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011) respectively which revoked and replaced S.I.307 of 2003 and S.I. 306 of 2003 respectively.

<sup>34</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.



- A 2.3 This annex is intended as a general guide as to ComReg’s role in this area, and not as a definitive or exhaustive legal exposition of that role. Further, this annex restricts itself to consideration of those powers, functions, duties and objectives of ComReg that appear most relevant to the matters at hand and by way of example excludes those in relation to premium rate services or market analysis.
- A 2.4 All references in this annex to enactments are to the enactment as amended at the date hereof, unless the context otherwise requires.

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

- A 2.5 ComReg’s primary objectives in carrying out its statutory functions in the context of electronic communications are to:
- promote competition;<sup>35</sup>
  - contribute to the development of the internal market;<sup>36</sup>
  - promote the interests of users within the Community;<sup>37</sup>
  - ensure the efficient management and use of the radio frequency spectrum in Ireland in accordance with a direction under Section 13 of the 2002 Act;<sup>38</sup> and
  - unless otherwise provided for in Regulation 17 of the Framework Regulations, take the utmost account of the desirability of technological neutrality in complying with the requirements of the Specific Regulations<sup>39</sup> in particular, those designed to ensure effective competition.<sup>40</sup>

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<sup>35</sup>Section 12 (1)(a)(i) of the 2002 Act.

<sup>36</sup>Section 12 (1)(a)(ii) of the 2002 Act.

<sup>37</sup>Section 12(1)(a)(iii) of the 2002 Act.

<sup>38</sup>Section 12(1)(b) of the 2002 Act. Whilst this objective would appear to be a separate and distinct objective in the 2002 Act, it is noted that, for the purposes of ComReg’s activities in relation to 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.

<sup>39</sup>The ‘Specific Regulations’ comprise collectively the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333

## A2.1.1 Promotion of Competition

- A 2.6 Section 12(2)(a) of the 2002 Act requires ComReg to take all reasonable measures which are aimed at the promotion of competition, including:
- ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;
  - ensuring that there is no distortion or restriction of competition in the electronic communications sector; and
  - encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.
- A 2.7 In so far as the promotion of competition is concerned, Regulation 16(1)(b) of the Framework Regulations also requires ComReg to:
- ensure that elderly users and users with special social needs derive maximum benefit in terms of choice, price and quality, and
  - ensure that, in the transmission of content, there is no distortion or restriction of competition in the electronic communications sector.
- A 2.8 Regulation 9(11) of the Authorisation Regulations also provides that ComReg must ensure that radio frequencies are efficiently and effectively used having regard to Section 12(2)(a) of the 2002 Act and Regulations 16(1) and 17(1) of the Framework Regulations. Regulation 9(11) further provides that ComReg must ensure that competition is not distorted by any transfer or accumulation of rights of use for radio frequencies, and, for this purpose, ComReg may take appropriate measures such as mandating the sale or the lease of rights of use for radio frequencies.

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

<sup>40</sup> Regulation 16(1)(a) of the Framework Regulations.

## **A2.1.2 Contributing to the Development of the Internal Market**

- A 2.9 Section 12(2)(b) of the 2002 Act requires ComReg to take all reasonable measures which are aimed at contributing to the development of the internal market, including:
- removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level;
  - encouraging the establishment and development of trans-European networks and the interoperability of transnational services and end-to-end connectivity; and
  - co-operating with electronic communications national regulatory authorities in other Member States of the Community and with the Commission of the Community in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of Community law in this field.
- A 2.10 In so far as contributing to the development of the internal market is concerned, Regulation 16(1)(c) of the Framework Regulations also requires ComReg to co-operate with the Body of European Regulators for Electronic Communications (BEREC) in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of EU law in the field of electronic communications.

## **A2.1.3 Promotion of Interests of Users**

- A 2.11 Section 12(2)(c) of the 2002 Act requires ComReg, when exercising its functions in relation to the provision of electronic communications networks and services, to take all reasonable measures which are aimed at the promotion of the interests of users within the Community, including:
- ensuring that all users have access to a universal service;
  - ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;

- contributing to ensuring a high level of protection of personal data and privacy;
- promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services;
- encouraging access to the internet at reasonable cost to users;
- addressing the needs of specific social groups, in particular disabled users; and
- ensuring that the integrity and security of public communications networks are maintained.

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

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

### **A2.1.4 Regulatory Principles**

A 2.13 In pursuit of its objectives under Regulation 16(1) of the Framework Regulations and Section 12 of the 2002 Act, ComReg must<sup>41</sup> apply objective, transparent, non-discriminatory and proportionate regulatory principles by, amongst other things:

- promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods;
- ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;
- safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition;
- promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk

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<sup>41</sup> Pursuant to Regulation 16(2) of the Framework Regulations.

incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, while ensuring that competition in the market and the principle of non-discrimination are preserved;

- taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State; and
- imposing ex-ante regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled.

### **A2.1.5 BEREC**

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

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

### **A2.1.6 Other Obligations under the 2002 Act**

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

- seek to ensure that any measures taken by it are proportionate having regard to the objectives set out in Section 12 of the 2002 Act;<sup>42</sup>
- have regard to international developments with regard to electronic communications networks and electronic communications services, associated facilities, postal services, the radio frequency spectrum and numbering;<sup>43</sup> and

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<sup>42</sup>Section 12(3) of the 2002 Act.

<sup>43</sup> Section 12(5) of the 2002 Act.

- 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>44</sup>

### **A2.1.7 Policy Directions<sup>45</sup>**

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

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

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

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

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<sup>44</sup>Section 12(6) of the 2002 Act.

<sup>45</sup>ComReg also notes, and takes due account of, the Spectrum Policy Statement issued by the DCENR in September 2010.

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

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

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

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

#### **Policy Direction No.5 on Regulation only where Necessary**

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

#### **Policy Direction No.6 on Regulatory Impact Assessment**

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

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

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

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

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

## **General Policy Direction No.1 on Competition (2004)**

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

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

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

### **A2.2.1 Framework Regulations**

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

- the effective management of radio frequencies for electronic communications services;
- that spectrum allocation used for electronic communications services and issuing of general authorisations or individual rights of use for such radio frequencies are based on objective, transparent, non-discriminatory and proportionate criteria; and
- ensure that harmonisation of the use of radio frequency spectrum across the EU is promoted, consistent with the need to ensure its effective and efficient use and in pursuit of benefits for the consumer such as economies of scale and interoperability of services, having regard to all decisions and



measures adopted by the European Commission in accordance with Decision No. 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the EU.

- A 2.27 Regulation 17(2) provides that, unless otherwise provided in Regulation 17(3), ComReg must ensure that all types of technology used for electronic communications services may be used in the radio frequency bands that are declared available for electronic communications services in the Radio Frequency Plan published under section 35 of the 2002 Act in accordance with EU law.
- A 2.28 Regulation 17(3) provides that, notwithstanding Regulation 17(2), ComReg may, through licence conditions or otherwise, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to—
- avoid harmful interference,
  - protect public health against electromagnetic fields,
  - ensure technical quality of service,
  - ensure maximisation of radio frequency sharing,
  - safeguard the efficient use of spectrum, or
  - ensure the fulfilment of a general interest objective as defined by or on behalf of the Government or a Minister of the Government in accordance with Regulation 17(6).
- A 2.29 Regulation 17(4) requires that, unless otherwise provided in Regulation 17(5), ComReg must ensure that all types of electronic communications services may be provided in the radio frequency bands, declared available for electronic communications services in the Radio Frequency Plan published under section 35 of the Act of 2002 in accordance with EU law.
- A 2.30 Regulation 17(5) provides that, notwithstanding Regulation 17(4), ComReg may provide for proportionate and non-discriminatory restrictions to the types of electronic communications services to be provided, including where necessary, to fulfil a requirement under the International Telecommunication Union Radio Regulations.
- A 2.31 Regulation 17(6) requires that measures that require an electronic communications service to be provided in a specific band available for electronic communications services must be justified in order to

ensure the fulfilment of a general interest objective as defined by or on behalf of the Government or a Minister of the Government in conformity with EU law such as, but not limited to—

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

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

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

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

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

A 2.36 Regulation 17(11) requires ComReg to, in the fulfilment of its obligations under that Regulation, respect relevant international

agreements, including the ITU Radio Regulations and any public policy considerations brought to its attention by the Minister.

## **A2.2.2 Authorisation Regulations**

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

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

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

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

A 2.39 Regulation 9(7) also provides that:

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

### **Publication of procedures**

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

### **Duration of rights of use for radio frequencies**

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

### **Conditions attached to rights of use for radio frequencies**

A 2.42 Regulation 9(5) of the Authorisation Regulations provides that, when granting rights of use for radio frequencies, ComReg must, having regard to the provisions of Regulations 17 and 19 of the Framework Regulations, specify whether such rights may be transferred by the holder of the rights and under what conditions such a transfer may take place.

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

- Obligation to provide a service or to use a type of technology for which the rights of use for the frequency has been granted including, where appropriate, coverage and quality requirements.
- Effective and efficient use of frequencies in conformity with the Framework Directive and Framework Regulations.
- Technical and operational conditions necessary for the avoidance of harmful interference and for the limitation of exposure of the general public to electromagnetic fields, where such conditions are different from those included in the general authorisation.

- Maximum duration in conformity with Regulation 9, subject to any changes in the national frequency plan.
- Transfer of rights at the initiative of the rights holder and conditions of such transfer in conformity with the Framework Directive.
- Usage fees in accordance with Regulation 19.
- Any commitments which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure.
- Obligations under relevant international agreements relating to the use of frequencies.
- Obligations specific to an experimental use of radio frequencies.

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

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

A 2.45 Regulation 11(1) of the Authorisation Regulations provides that, where ComReg considers that the number of rights of use to be granted for radio frequencies should be limited or that the duration of existing rights of use for radio frequencies should be extended other than in accordance with the terms specified in the rights of use, it must, without prejudice to Sections 13 and 37 of the 2002 Act:

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

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

- A 2.47 Regulation 11(4) requires ComReg to publish any decision to limit the granting of rights of use for radio frequencies or to extend the duration of existing rights of use and to include the reasons for that decision.
- A 2.48 Regulation 11(4) provides that where it decides to use competitive or comparative selection procedures, ComReg must, inter alia, ensure that such procedures are fair, reasonable, open and transparent to all interested parties.

### **Fees for spectrum rights of use/licences**

- A 2.49 Regulation 19 of the Authorisation Regulations permits ComReg to impose fees for a licence which reflect the need to ensure the optimal use of the radio frequency spectrum.
- A 2.50 ComReg is required to ensure that any such fees are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives of ComReg as set out in Section 12 of the 2002 Act and Regulation 16 of the Framework Regulations.

### **Amendment of rights and obligations**

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

## **A2.3 Other Relevant Provisions**

### **Wireless Telegraphy Acts**

- A 2.52 Under Section 5 of the Wireless Telegraphy Acts, ComReg may, subject to those Acts, and on payment of the prescribed fees (if any), grant to persons licences to keep and have possession of apparatus for wireless telegraphy in any specified place in the State.
- A 2.53 Such licences are to be in such form, continue in force for such period and be subject to such conditions and restrictions (including conditions as to suspension and revocation) as might be prescribed in regard to them by regulations made by ComReg under Section 6.
- A 2.54 Section 5(3) also provides that, where it appears appropriate to ComReg, it may, in the interests of the efficient and orderly use of wireless telegraphy, limit the number of licences for any particular

class or classes of apparatus for wireless telegraphy granted under Section 5.

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

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

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

### **GSM Directive (as amended)**

A 2.57 In light of the rights of use of spectrum under consideration in this document, ComReg notes that the GSM Directive 87/372/EEC as transposed by S.I. 416 of 1994 and the Amending GSM Directive 2009/114/EC as transposed by S.I. 195 of 2010 are also of relevance.

A 2.58 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)<sup>46</sup>.”*

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

A 2.59 ComReg must comply with the provisions of the above Commission Decision which is aimed at harmonising the technical conditions for the availability and efficient use of the 900 MHz band, in accordance with Directive 87/372/EEC, and of the 1800 MHz band for terrestrial systems capable of providing electronic communications services. This decision was recently amended by Commission Decision 2011/251/EU.

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

A 2.60 ComReg must comply with the provisions of the above Commission Decision which is aimed at harmonising the technical conditions for the availability and efficient use of the 800 MHz band for terrestrial systems capable of providing electronic communications services.

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

A 2.61 Article 4 of the Competition Directive provides that: *“Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law:*

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

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<sup>46</sup> Now in accordance with Regulation 15 of the 2011 Authorisation Regulations.



## **Radio Spectrum Policy Programme**

A 2.62 On 14 March 2012, the European Parliament and the Council adopted Decision 243/2012/EU establishing the first Radio Spectrum Policy Programme.

# Annex 3: Draft Amendments to the Interim Licence Regulations

STATUTORY INSTRUMENTS

S.I. No. \_\_\_\_\_ of 2013

**Wireless Telegraphy (Interim GSM Mobile Telephony Licence)  
(Amendment) Regulations 2013**

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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 Regulations 11 and 15 of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011, 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:

### **Citation**

1. These Regulations may be cited as the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) (Amendment) Regulations 2013.
2. The Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations 2011 and these Regulations may be cited together as the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations 2011 and 2013 and shall be construed together as one.

### **Interpretation**

3. In these Regulations, unless the context otherwise requires:

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

“Additional Extension” means an extension of the duration of a Licence, being either Additional Extension 1 or Additional Extension 2;

“Additional Extension 1” means an extension of the duration of a Licence of up to 2 months’ duration, commencing from 1 May 2013 (or from whatever is the day and date immediately following the date of the expiration of a Primary Extension granted by the Commission), granted by the Commission in accordance with the decisions and procedures set out in Commission Document 13/05 and Commission Decision 02/13;

“Additional Extension 2” means an extension of the duration of a Licence of up to 2 months’ duration, commencing from 1 July 2013 (or from whatever is the day and date immediately following the date of the expiration of Additional Extension 1 granted by the Commission), granted by the Commission in accordance with the decisions and procedures set out in Commission Document 13/05 and Commission Decision 02/13;

“Apparatus” means apparatus for wireless telegraphy as defined in section 2 of the Act of 1926 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;

“Commission” means the Commission for Communications Regulation;

“Commission Decision 02/13” means the decision of the Commission, published on 15 January 2013 under Commission Document Number D02/13;

“Commission Document 13/05” means the response to consultation document entitled “Proposal to Extend the Duration of Existing Interim GSM 900 MHz Rights of Use - Response to Consultation and Decision” of the Commission, published on 15 January 2013 under Commission Document Number 13/05;

“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;

“Licence” means a licence under 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 issued under the Principal Regulations;

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

“Primary Extension” means an extension of the duration of a Licence of up to 3 months’ duration, commencing from 1 February 2013, granted by the Commission in accordance with the decisions and procedures set out in Commission Document 13/05 and Commission Decision 02/13;

“Principal Regulations” means the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations 2011, Statutory Instrument No. 189 of 2011.

### **Amendment of Regulation 5 of Principal Regulations**

4. The Principal Regulations are amended by substituting the following for Regulation 5(4):

“(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:

- a) 30 April 2013 (or such earlier termination date as may have been decided upon by the Commission in granting the Primary Extension concerned) where a Primary Extension has been granted by the Commission to a Licensee and where no Additional Extensions have been granted;

- b) a date two months after the expiry date that would be applicable pursuant to paragraph a ) (or such earlier termination date as may have been decided upon by the Commission in granting Additional Extension 1 concerned) where a Primary Extension and Additional Extension 1 have been each granted by the Commission to a Licensee, and where Additional Extension 2 has not been granted); or
- c) a date two months after the expiry date that would be applicable pursuant to paragraph b) where a Primary Extension, Additional Extension 1 and Additional Extension 2 have each been granted by the Commission a Licensee (or such earlier termination date as may have been decided upon by the Commission in granting Additional Extension 2 concerned).”

### **Amendment of Regulation 9 of Principal Regulations**

- 5. The Principal Regulations are amended by substituting the following for Regulation 9(1):

“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 €12,772 for a one-year period.”

\*\*\*\*\*

GIVEN under the Official Seal of the Commission for Communications Regulation this  
2013

\_\_\_\_\_  
Commissioner  
On behalf of the Commission of 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  
2013

\_\_\_\_\_  
Pat Rabbitte 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 granted under the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations, 2011, including matters relating to the period(s) during which they continue in force and the fees payable in respect of them.

DRAFT

## Annex 4: Regulatory Impact Assessment (RIA)

- A 4.1 In Chapter 3 of Document 12/127, ComReg carried out a draft RIA in accordance with the RIA framework set out therein and summarised below. ComReg requested that interested parties review the draft RIA and submit any comments or information which they believed ComReg should consider in finalising its decision on the proposal to extend the duration of any of the Interim Licences. As set out in Chapter 3 of this document and as will be seen from the RIA below, ComReg is of the view that it has not received any further information causing it to amend the preferred option in Document 12/127 or to consider an alternative option.
- A 4.2 Accordingly, this Annex sets out ComReg's final RIA on its proposal to extend the duration of Interim Licences. It has been prepared in accordance with ComReg's RIA Guidelines (as set out in ComReg Document 07/56a<sup>47</sup>) ("ComReg's RIA Guidelines") and having regard to the RIA Guidelines issued by the Department of An Taoiseach in June 2009, 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").
- A 4.3 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.
- A 4.4 In the interests of continuing to ensure openness and transparency, and given that the expiration of Interim Licences has the potential to significantly impact on the electronic communications sector in Ireland, a RIA on the option to extend, or not, the duration of the Interim Licences has been conducted and prepared.

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<sup>47</sup> ComReg 07/56a – Guidelines on ComReg's approach to Regulatory Impact Assessment – August 2007.

A 4.5 As set out in ComReg's RIA Guidelines, there are five steps to this RIA. These steps are:

- Step 1: Identify the policy issue and identify the objectives;
- Step 2: Identify and describe the regulatory options;
- Step 3: Determine the impacts on stakeholders;
- Step 4: Determine the impacts on competition; and
- Step 5: Assess the impacts and choose the best option.

### **A4.1 Identifying the policy issues and objectives**

A 4.6 In light of the spectrum assignments resulting from the MBSA, ComReg notes that the commencement date of some Lots in the 900 MHz band is likely to be affected by the implementation of Transition activities by the Existing GSM Licensees.<sup>48</sup>

A 4.7 Document 12/127 stated that the timeframes for Transition activities would not be known until the Transition Project Plan had been finalised, but that Transition activities in the 900 MHz band were likely to take a few months to complete and accordingly, Liberalised Use Licences in respect of some Lots in the 900 MHz Band would have a commencement date later than 1 February 2012. Chapter 2 of this document provides further information on the status of the Transition Project Plan and the likely timeframes for Transition activities to be completed. As set out in that chapter, Transition activities in the 900 MHz band should be completed by end April 2013 thus indicating that the Liberalised Use Licences in respect of 900 MHz Lots won by Vodafone and Telefónica will have a commencement date later than 1 February 2013.

A 4.8 Accordingly, there may be a period during which Vodafone and Telefónica would have reduced or no rights of use in the 900 MHz band prior to the commencement of their Liberalised Use Licences. This could lead to significant disruption to competition and consumer services. It is therefore appropriate to consider extensions to the duration of Interim Licences to enable these Transition activities to be completed such that Vodafone and Telefónica can commence use of their 900 MHz Lots in an orderly fashion while minimising the risk of

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<sup>48</sup> ComReg does not consider the matter of potential Interim 1800 MHz rights in this draft RIA.



significant disruption to consumer services and competition that could otherwise arise during this time.

A 4.9 ComReg is thus faced with the policy issue of how to address these licence expiry related concerns while, at the same time, giving effect to the MBSA outcome in a timely and efficient manner.

A 4.10 The options considered in this RIA are assessed against ComReg's statutory functions, duties and objectives,<sup>49</sup> and, in particular, ComReg's obligations in relation to:

- the promotion of competition<sup>50</sup>, which include:
  - ensuring that there is no distortion or restriction of competition in the electronic communications sector;<sup>51</sup>
  - promoting efficient investment and innovation in new and enhanced infrastructures;<sup>52</sup> and
  - encouraging efficient use and ensuring the effective management of radio frequencies;<sup>53</sup>
- promoting the interests of users in the community;<sup>54</sup> and
- safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition.<sup>55</sup>

A 4.11 Accordingly, the principal policy issues and objectives that ComReg considers to be relevant to this RIA are:

- whether the duration of Interim Licences should be extended in order to ensure the continued availability of GSM services; and
- the impact of ComReg's proposal on competition and consumers;

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<sup>49</sup> Set out at Annex 2.

<sup>50</sup> ComReg has a broad discretionary power in relation to achieving this general obligation.

<sup>51</sup> Section 12(2)(a)(ii) of the 2002 Act.

<sup>52</sup> Regulation 16(2)(d) of the Framework Regulations.

<sup>53</sup> Section 12(2)(a)(iv) of the 2002 Act.

<sup>54</sup> Section 12(1)(a)(iii) of the 2002 Act.

<sup>55</sup> Regulation 16(2)(c) of the Framework Regulations.

## Identifying the regulatory options

A 4.12 ComReg considers that the two regulatory options now available to it are:

- Option 1: Do not extend the duration of Interim Licences – whereby the existing Interim Licences would expire on 31 January 2013; or
- Option 2: Extend the duration of Interim Licences<sup>56</sup> for the minimum period necessary to enable the Existing GSM Licensees to efficiently complete their respective Transition activities (i.e. Relocation) in the 900 MHz band.

## Determining the impacts on stakeholders

A 4.13 There are two broad stakeholder groups, the impacts upon which each option is considered, in the RIA, being:

- mobile network operators (including MVNOs<sup>57</sup>):
  - H3GI as a new entrant to the 900 MHz band;
  - Existing GSM Licensees, who can be further distinguished between:
    - Meteor (which retains GSM rights of use); and
    - Interim Licensees;
- consumers.

A 4.14 In determining and assessing the stakeholder impacts, ComReg has had regard to the following offsetting factors, which would in its view moderate some of the potential drawbacks of particular options:

- the timeframes for Relocation which are to be determined by ComReg in the Transition Project Plan and which will be the minimum expected duration appropriate to enable Licensees to carry out Transition activities in a timely and efficient manner;

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<sup>56</sup> A collateral effect of such an extension would be that Meteor would not be required to relocate by 1 February 2013.

<sup>57</sup> For the purpose of this draft RIA ComReg assumes that MVNOs are likely to have similar interests to their MNO host.

- the availability of refunds in the event of delayed access to Lots (as set out in the MBSA processes in Document 12/52 as amended) noting that liquidated damages may also be levied against an undertaking delaying Relocation;
- the availability of Preparatory Licences, which entitles the holder of same to possess and install equipment in preparation for the commencement of its Liberalised Use Licence; and
- Winning Bidders had an opportunity to obtain Lots which would not be required for Relocation<sup>58</sup>, although ComReg acknowledges that at least one Existing GSM Licensee would have been required to relocate in the 900 MHz band given the current spectrum assignments.

### Impacts on stakeholders

A 4.15 H3GI has stated that it is of the view that Transition activities could be completed by 1 February 2013.<sup>59</sup> It would clearly prefer an option which would result in the earliest commencement date for its 900 MHz Lot. As such, it is reasonable to assume that H3GI favours Option 1 as this would involve Interim Licences expiring on 31 January 2013, therefore theoretically enabling the commencement of its 900 MHz Lot on 1 February 2013. ComReg also notes that Vodafone has minimal Transition activities to complete in the 900 MHz band.<sup>60</sup> Accordingly, Option 1 should have limited impact on H3GI's roaming agreement with Vodafone for the provision of voice and text (i.e. GSM) services. Notwithstanding the above, H3GI has stated<sup>61</sup> that it is willing to accept a Transition Project Plan with a deadline of 7 May 2013. ComReg notes that this is a timeframe which is more in line with Option 2. ComReg is of the view that this is a reasonable and pragmatic position in light of the circumstances in which all operators find themselves as they transition to their new

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<sup>58</sup> In particular on 12 November 2012, prior to the Assignment Round, winning bidders were notified in relation to inter alia the Advanced Commencement Method 2 for Lots A & B in the 900 MHz band in Time Slice 1. See also ComReg's answers to Question Number 56 of Document 12/73, 06 July 2012.

<sup>59</sup> Page 1 of H3GI's submission in response to 12/127.

<sup>60</sup> Depending on what technologies are deployed by its neighbours it may need to clear a single 200 KHz channel.

<sup>61</sup> In a letter dated 12 December 2012.

spectrum assignments. Eircom Group did not explicitly state any preference for one option over another, but appears to indicate a preference for Option 2 when stating that a seven month period of extension is “*sufficient time for transition activities to be completed in the 900 MHz band*”. It is reasonable to assume that eircom Group would prefer Option 2 over Option 1 because a Transition Project Plan based on Option 1 would presumably require Meteor to carry out its Transition activities before 1 February 2013 in order to allow Telefónica to Relocate into Blocks C and D (which Meteor currently occupies) and thereby commence use of its Lots on 1 February 2013. In addition, Meteor has a roaming agreement with Telefónica for the provision of voice and text (GSM) services and it is therefore reasonable to assume that Meteor would see some merit in Option 2 insofar as this option might avoid any disruptions to its services.

- A 4.16 From the perspective of Vodafone, which (as noted above) has minimal Transition activities to carry out in the 900 MHz band, it is relatively unaffected by the choice of Option. However, in its response to Document 12/127, Vodafone indicated support for Option 2, while at the same time acknowledging that any significant delay beyond the end of April 2013 would be undesirable.
- A 4.17 Telefónica is unlikely to favour Option 1, as this would mean that it would, after 31 January 2013, no longer be licensed to provide GSM services in the 900 MHz band under its Interim Licence and, amongst other things, this could:
- result in potential significant disruption to competition and consumer services provided using these rights of use;
  - increase the cost of Transition by potentially requiring the Interim Licensee to incur additional and arguably inefficient investment expenditure in an attempt to ameliorate the above consumer service issues. For instance, requiring the Interim Licensees to temporarily use higher frequency spectrum (e.g. the 1800 MHz band) to provide existing GSM services (noting this spectrum does not have the same coverage footprint as 900 MHz spectrum) and/or building additional base stations<sup>62</sup>; and

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<sup>62</sup> ComReg notes that, as a practical matter, it is of the view that neither use of alternative frequencies nor construction of new base stations could be effective in mitigating disruption to consumer services in the time now available.

- require the Interim Licensees to complete their Transition activities faster than they might prefer or be capable of achieving.

A 4.18 In summary:

- Vodafone and Telefónica have indicated that they would prefer Option 2 and Meteor has also, at least implicitly, expressed a preference for Option 2;
- H3GI has indicated a preference for Option 1 but, in separate correspondence, also indicated a willingness to accept a Transition Project Plan with a deadline of 7 May 2013.

### Impacts on consumers

A 4.19 By way of background, consumers continue to place a high value on existing GSM services (voice and SMS text) and ComReg notes that mobile originating voice minutes accounted for 65.3% of all voice minutes in Q3 2012 (compared to 62.7% in Q3 2011). In addition the total number of SMS messages sent by mobile users in Ireland was just under 3.2 billion in Q2 2012. Although down 1.5% on the previous quarter this figure was up 4.2% on Q2 2011.<sup>63</sup>

A 4.20 In addition, together the Interim Licensees account for circa 75 % market share of retail mobile customers in the State and have the highest level of coverage, which H3GI and Meteor rely upon via their respective roaming agreements.

A 4.21 In the present context there are likely to be a number of key preferences for consumers when assessing the regulatory options. In particular, consumers are, on balance, likely to prefer the option:

- which avoids significant disruption to existing services;
- that results in the availability of new services sooner rather than later; and
- that promotes competition so as to maximise the long term benefits in terms of choice, price and quality.

A 4.22 It is reasonable to assume that consumers would prefer Option 2 because of the potential significant negative impacts to voice and SMS services for MNOs given (a) the direct effects of Option 1 on Vodafone and Telefónica's retail customers (and potentially Meteor's retail customers where a Transition Project Plan based on Option 1

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<sup>63</sup> Document 12/134, 12 December 2012

requires it to vacate Blocks C and D prior to completion of its own Transition activities) and (b) the indirect effects on Vodafone and Telefónica's wholesale customers, i.e. Meteor, H3GI and MVNOs.

- A 4.23 It is also recognised, however, that consumers would see a positive side to Option 1 to the extent that it would, in effect, require Transition activities to be completed by 1 February 2013 which could avoid a delay to new services provided using 900 MHz Lots. Whilst new services could in theory be provided by all Winning Bidders in the 900 MHz band by 1 February 2013 under Option 1, in reality, however, it is likely that Meteor and Telefónica (and possibly Vodafone) would not be in a position to provide such services until they reconfigured their networks to their new frequency assignments (i.e. implemented their respective Transition activities and carried out any other necessary adjustments (e.g. retuning their networks such that GSM services can be provided with 2 x 5 MHz) to allow them to provide advanced services). Moreover, it is not clear whether H3GI would be in a position to provide advanced services in the 900 MHz band from 1 February 2013, as it may also need a period of time after 1 February 2013 to install and upgrade equipment to be in a position to commercially deploy advanced services in this band. Furthermore, it should also be noted that new services could be provided from 1 February 2013 using Lots in the 800 MHz and 1800 MHz bands. In any case, given the high value still placed by consumers on existing GSM services, it is unlikely that consumers would prefer Option 1 over Option 2 on this basis alone. As such, on balance, it is reasonable to assume that consumers would prefer Option 2 over Option 1.

## **Impacts on competition**

- A 4.24 Under Option 1, the potential advantage is that competition for new and advanced services in the 900 MHz band could commence from 1 February 2013. As noted above, however, it is unlikely that many of these services would be commercially available with significant coverage on 1 February 2013, in any event.
- A 4.25 The disadvantage for competition under Option 1 is that there could be significant distortions to existing competition if Vodafone, Telefónica (and potentially Meteor as explained above) were limited in their ability or unable to service their respective existing retail and wholesale GSM customers until the respective Transition activities in the 900 MHz band are complete. In addition, Option 1 could promote inefficient infrastructure investment if Vodafone and Telefónica were

required to incur additional investment expenditure in an attempt to ameliorate the above consumer service issues.

A 4.26 Under Option 2, the potential significant distortions to existing competition identified above would be avoided, by maintaining and safeguarding the present state of competition in the market for the minimum period necessary to facilitate the Existing GSM Licensees' respective Relocation Activities in the 900 MHz band. Whilst it is recognised that Option 2 facilitates a Transition Project Plan with timelines which would likely result in delayed commencement of Lots in the 900 MHz band (and thereby competition in advanced services using spectrum rights in this band), there are several reasons why such delays would be unlikely to affect competition in the long run including that:

- the potential delay would be only for the minimum period necessary to facilitate the Existing GSM Licensees' respective Transition Activities (noting that the proposed durations are very short relative to the overall duration of liberalised rights of use); and
- advanced services could be provided from 1 February 2013 via liberalised rights of use in other spectrum bands released in the MBSA process (i.e. 800 MHz and 1800 MHz).

A 4.27 In light of the fact that Option 2 safeguards existing competition with minimum delay in the introduction of new services in the 900 MHz band, in ComReg's view Option 2 is, on balance, the preferred Option in terms of impacts on competition in the mobile sector.

### **Selecting the preferred option**

A 4.28 Given the above, ComReg considers that, on balance, Option 2 is the most proportionate of the options considered in this RIA. In particular, ComReg notes that it is reasonable to assume that consumers would prefer Option 2 over Option 1 as Option 2 safeguards competition and services while allowing a delay in the introduction of new and advanced services for the minimum period necessary. For largely the same reasons, it is also reasonable to assume that Option 2 is preferred over Option 1 in terms of its impact on competition.

A 4.29 Finally, ComReg notes that all MNO's (either explicitly or implicitly) other than H3GI have indicated a preference for Option 2 over Option 1. However, it is noteworthy that H3GI has stated that it is willing to accept a Transition Project plan with a deadline of 7 May 2013 which

is more in line with the timeframe under Option 2. Accordingly, ComReg has identified Option 2 as the preferred option.