



Commission for
Communications Regulation

Information Notice

Publication of non-confidential submissions to ComReg Document 13/43 – Consultation on Hutchison 3G Ireland Limited's request for an amendment to its Liberalised Use Licence

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An Coimisiún um Rialáil Cumarsáide

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A.1 Non-confidential submissions to consultation 13/43.

1. Meteor Mobile Communications Ltd and eircom Ltd (together "eircom Group"): submission entitled "Response to ComReg Consultation Paper: Consultation on Hutchison 3G Ireland limited's request for an Amendment to its Liberalised Use Licence", dated 6 June 2013;
2. Telefónica Ireland Limited: submission entitled "Request by H3GI to Amend Liberalised Use Licence - Response to Document 13/43", dated 6 June 2013; and
3. Vodafone Ireland Limited: submission entitled "Vodafone Response to ComReg Consultation on Hutchison 3G Ireland Limited's Request for an Amendment to its Liberalised Use Licence", dated 6 June 2013.

1. Meteor Mobile Communications Ltd and eircom Ltd (together "eircom Group"): submission entitled "Response to ComReg Consultation Paper: Consultation on Hutchison 3G Ireland limited's request for an Amendment to its Liberalised Use Licence", dated 6 June 2013

eircom Group

Response to ComReg Consultation Paper:

Consultation on Hutchison 3G Ireland limited's request for an Amendment to its Liberalised Use Licence

ComReg Document 13/43

6th June 2013

eircom Group response to ComReg 13/43

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The comments submitted to this consultation are those of Meteor Mobile Communications Ltd. (MMC) and eircom Ltd (eircom) collectively referred to as eircom Group.

eircom Group response to ComReg 13/43

Response to Consultation

eircom Group has the following comments to make in respect of the issues raised in ComReg 13/43.

The Multi-Band Spectrum Award (MBSA) process was designed following extensive consultation over a number of years. The MBSA was a complex process aimed at addressing a number of objectives and seeking to promote an efficient outcome from the award process. It was never intended to ensure or indeed capable of ensuring the optimum outcome for each party participating in the process.

In the context of H3G's request the process afforded at least two tangible opportunities for H3G to seek to secure assignment options including the same spectrum in timeslice 1 and timeslice 2. These are the Assignment stage and the negotiation phase.

The award process design included *"an assignment stage, in which Winning Bidders and Existing GSM Licensees will be required to participate in which such parties are eligible to bid for their preferred locations in the relevant spectrum bands."*¹ This stage afforded Winning Bidders the opportunity to express the value they associated with each of the assignment options presented to them. Thus a bidder could express a preference for assignment options that did not require relocation between timeslices based on the cost avoided by not having to undertake relocation activities. The application of the second price rule meant that a bidder could safely submit bids up to an amount equal to the cost avoided without exposing them to any other financial liability.

It is our belief, which appears to be confirmed by the material appended to the consultation, that H3G did not submit any bids in the Assignment Round. H3G therefore expressed indifference between the assignment options. It now seems that H3G did have some preference between the assignment options and H3G appears to have decided to conceal its preferences in its approach to the Assignment round.

This in turn raises the question as to what might have been the outcome of the Assignment round if H3G had bid sincerely. It may be the case that the outcome of the Assignment round could have been different and indeed the alternative outcome may have been more preferable to some or all bidders.

The MBSA also included a Negotiation phase which was *"an opportunity, at the end of the assignment stage, but prior to the announcement of the final competitive selection procedure outcome, for Winning Bidders and Existing GSM Licensees to agree an alternative assignment agreement between themselves on the location of their respective spectrum assignments in each of the 800 MHz, the 900 MHz and the 1800 MHz bands"*.² This phase was built into the process acknowledging the uncertain nature of the outcome of the Assignment phase, particularly given the added complexity of bidders being required to participate in the assignment phase independently of any parties to infrastructure sharing agreements. This gave

¹ Paragraph 3.4.6 of ComReg Decision D04/12 set out in ComReg document 12/25

² Paragraph 3.4.9 of ComReg Decision D04/12 set out in ComReg document 12/25

eircom Group response to ComReg 13/43

Winning Bidders an opportunity to seek to agree an alternative assignment plan for one or more bands.

During the negotiation phase Meteor and O2 proposed an alternative assignment plan for the 1800MHz band which inter alia would have delivered H3G's objective of having the same blocks in its assignment for both timeslices. During the Negotiation phase H3G indicated that it had no objection to the Meteor / O2 proposal but that it would not be willing to make any financial contribution to secure such an outcome³. H3G's participation in the Negotiation phase was lukewarm at best and certainly did not appear to represent a departure from a position of indifference.

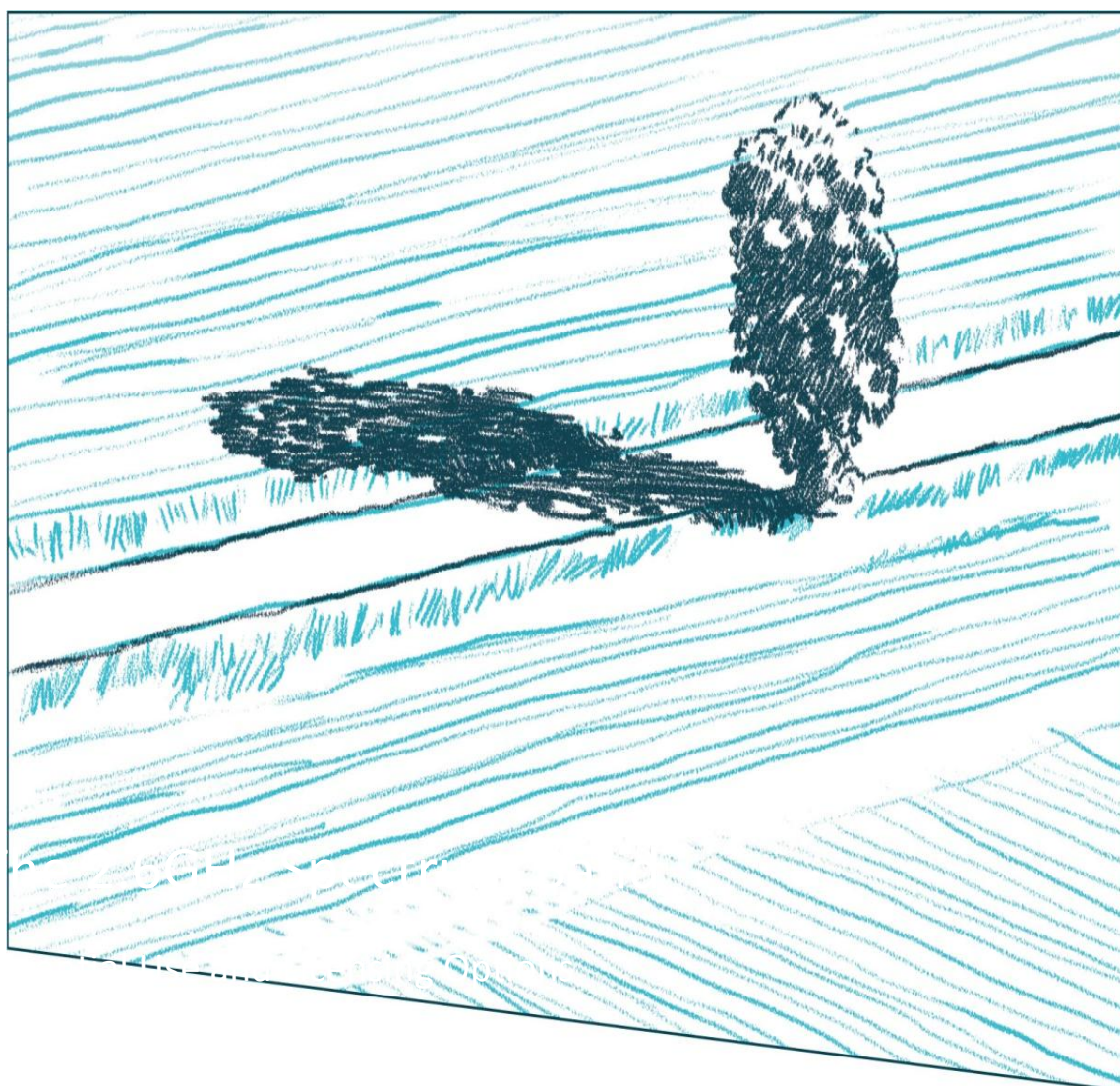
It is clear from the rules that ComReg would "*retain its discretion regarding how it might treat any unsold spectrum lots depending on the factual circumstances arising from the award process, save for the decision that unsold lots will not be allocated for a reasonable period after the process, and, in any event, will not be allocated for a period of at least 1 year.*"⁴ [emphasis added] All Winning Bidders would have been aware of these rules during their participation in the Assignment stage and the Negotiation phase.

We do not believe it is disputed that the MBSA process was appropriately designed to afford all participants the opportunity to secure their preferred spectrum assignment. H3G, for whatever reasons, failed to engage with the opportunities in the process and must accept the auction outcome consistent with the indifference it expressed in the Assignment stage and Negotiation phase. As noted above if H3G had participated sincerely in the process its assignment bids in combination with the assignment bids of others may have resulted in an assignment outcome in the 1800MHz band more preferable to some or all of the bidders. Unfortunately it is not feasible or practicable to re-run the Assignment round. We do not believe ComReg can or should make adjustments to the outcome to suit one party. As such we firmly believe that the outcome of the Assignment stage, determined in accordance with the MBSA rules stands and ComReg should therefore reject H3G's request.

³ In the context of a request to Vodafone to place a value on the inconvenience of accommodating the Meteor / O2 proposed alternative outcome in the 1800Mhz band

⁴ Paragraph 3.4 of ComReg Decision D04/12 set out in ComReg document 12/25

2. Telefónica Ireland Limited: submission entitled "Request by H3GI to Amend Liberalised Use Licence - Response to Document 13/43", dated 6 June 2013



**Request by H3GI to Amend Liberalised Use Licence
Response to Document 13/43
6th June 2013**

Telefonica

Introduction

Telefonica Ireland Ltd (Telefonica) is pleased to respond to ComReg document 13/43. ComReg, together with the industry and other interested parties has been through a long process of consultation and execution of the Multi-Band Spectrum Auction (MBSA). The process was governed by a detailed information memorandum and the outcome of the bidding and assignment process was a detailed set of decisions regarding the quantity of spectrum allocated to each bidder, and the position in each band. Telefonica does not believe that the MBSA is a completed and closed process yet as there remain issues still to be resolved, and the MBSA terms specified that there would be no new assignments for a minimum period of one year following the Award Process. Telefonica believes ComReg should now amend this consultation to address and resolve all remaining issues. This could include any decision regarding new assignments to be made from the first anniversary of completion of the Award Process.

Comments

As ComReg itself is all too well aware, the process leading up to the MBSA involved multiple lengthy and detailed consultations. The first document was issued in Autumn 2008, and the bidding in the auction itself did not commence until Autumn 2012 – four years later. It is understandable that such lengthy and detailed consultation was necessary given the significance of the decisions that were to be made. During that time, bidders and other interested parties were given opportunities to understand, comment on, and seek changes to the rules that were applied. Telefonica notes that with a small number of exceptions, the process proposed by ComReg was fully examined, and applicants entered the MBSA on that basis. Bidders made decisions in the auction process on the basis of the rules as they were outlined in advance by ComReg. ComReg must be careful not to alter the terms under which applicants entered and participated in the MBSA, at least until the entire process has been completed. To do so could undermine the basis on which bidders approached and participated in the auction.

In Decision D4/12, ComReg stated that there would be a moratorium on further assignments in the bands included in the MBSA of at least one year: *“unsold lots will not be allocated for a period after the Award Process of an appropriate period of at least 1 year”*. Telefonica considers this moratorium to be an important factor that would have influenced bidder behaviour during the auction, and ComReg should be cautious about modifying that rule.

While it is noted that the request by Hutchison 3G Ireland (H3GI) would not require a change to the number of lots assigned at any point in time, assignment was nevertheless an important part of the auction. It was consulted on by ComReg and operators had a chance to bid according to the rules. Telefonica is not aware of H3GI having reserved its position regarding any aspect of the assignment round prior to the commencement of the MBSA.

Telefonica also notes that H3GI does not claim that there was any flaw in either the auction mechanism, or in its execution – so it seems that there is no question that the assignments are correct according to rules and the bids placed.

The rules regarding contiguity between time slices were known to H3G just as they were to all other bidders. There was no Additional Price paid by either Telefonica or H3G for their 1800MHz assignments. If Telefonica had denied/displaced a bid by H3G that would otherwise have given H3G contiguity across time-slices, then Telefonica would have paid an Additional Price to reflect the opportunity cost of the bid denied. This would indicate that H3G failed to bid appropriate values in order to differentiate between different outcomes in the assignment round, or that they failed to place any bids at all. Either way, it is strange that they now seek to have ComReg amend the outcome of the assignment round, even though there is no question as to the validity of the outcome as decided by the MBSA process. It appears as though H3G did not bid according to its preferences during the assignment round, and now wishes to change the outcome.

It is also noted that all winning bidders were given the opportunity to negotiate alternative assignments during the Negotiation Phase of the assignment round. H3G did not negotiate any amendment to its assignment.

In its letter of 26th April, H3G states that it “ . . . *did not have an effective opportunity to avoid the situation in which it now finds itself*”. This statement does not seem sustainable in light of the above facts. ComReg should be cautious about amending the outcome of the MBSA, particularly in circumstances such as this, where a bidder failed to take the opportunities presented during the MBSA process, but now wishes to change the outcome.

ComReg must adhere to its obligation of non-discrimination when considering this application. The contiguity rule applied equally to all bidders in the auction. Telefonica notes that both Meteor and Vodafone will need to make amendments to their assignments/networks between time-slice 1 and time-slice 2. This is the outcome of the process and has been accepted. It is also noted that H3G has cited its Netshare with Vodafone as the reason for requesting the change, however Vodafone do not seem to have any difficulty with the assignments decided by the MBSA, or how they operate with Netshare.

Telefonica does not agree that spectrum efficiency is a consideration for ComReg in this matter. The same bandwidth of spectrum and the same technology will be used by H3G regardless of whether ComReg amends its licence or not. It does not seem credible that H3G would decide not to use the spectrum in time slice 1 because of the position within the band. This would clearly be at odds with the decision to buy the spectrum in the first place.

The opportunity for H3G to apply to amend its assignment in time-slice 1 only arose because Telefonica relocated its current GSM assignment from lots I – K as part of the transition process to occupy lots A - C. This aligns with Telefonica’s 1800MHz assignment in time-slice 2. It should be noted that Telefonica’s original GSM licence was not amended during the auction. There remains a gap in continuity of 1800MHz licence for Telefonica – from January 2015 to July 2015. This gap emerged as a result of the choices made by ComReg regarding time slices. This issue was highlighted by Telefonica during the consultations and in advance of the auction. Telefonica specifically stated in advance of the auction that if this gap emerged from the process, then it would expect ComReg to take action necessary to remedy the situation. In the absence of this expectation, Telefonica would not have relocated its assignment to lots A – C. If the six-month licence gap was to remain, then it

would make no sense to go through the cost and disruption of retuning a live network which might have to be switched off for a 6-month period.

Telefonica regards this as the most significant unresolved issue to emerge from the MBSA. It would be wrong for ComReg to proceed to make a decision on H3GI's post-auction application to amend the outcome of the MBSA without first resolving this matter which was brought to ComReg's attention in advance of the auction, and Telefonca believes this would be contrary to ComReg's non-discrimination obligation. Telefonica fully reserves its rights in relation to all aspects of the above matters.

Proposed Way Forward

Rather than proceed to a decision on H3GI's application, Telefonica proposes that ComReg should now re-issue this consultation covering all outstanding issues. This would necessarily include ComReg's proposal to remedy the 1800MHz gap in Telefonica's licence, and any other outstanding issues should also be included in this revised consultation. The issues surrounding H3GI's application to amend the assignments could also be addressed in this revised consultation, and ComReg's decision could be published to provide certainty to H3GI as early as is possible. Telefonica believes it would be possible to amend H3GI's licence with effect from the first anniversary of the completion of the Award Process (February 2014), but not before then as to do so would amount to a change to the rules under which all other assignments were made in the MBSA.

3. Vodafone Ireland Limited: submission entitled "Vodafone Response to ComReg Consultation on Hutchison 3G Ireland Limited's Request for an Amendment to its Liberalised Use Licence", dated 6 June 2013



Vodafone Response to ComReg Consultation on Hutchison 3G Ireland Limited's Request for an Amendment to its Liberalised Use Licence

Introduction

Vodafone welcomes the opportunity to provide our views on Hutchison 3G Ireland's (H3GI's) application for an amendment to its Liberalised Licence in the 1800 MHz band. It is appropriate that other interested parties, including other licensees in the 1800 MHz band, have the opportunity to make representations on H3GI's application given its implications both for the validity of the outcome of the recently concluded multi-band spectrum award (MBSA) process, and the effectiveness of other competitive award processes for the allocation of spectrum that may be held in future.

We note at the outset that significant sections of H3GI's correspondence with ComReg that provide the rationale for its licence amendment application have been redacted from the versions published in ComReg document 13/43. This information limitation inevitably restricts Vodafone's capacity to comment on the points that H3GI has made to ComReg to support its application. We would ask that ComReg have due regard to the incomplete information available to Vodafone and other interested parties in respect of H3GI's arguments in the consideration of this consultation response.

On the basis of the information set out in the correspondence contained in ComReg document 13/43 Vodafone considers that it would be entirely inappropriate, and contrary to the achievement of ComReg's statutory regulatory objectives, for ComReg to accept the application of H3GI to change the specific 1800 MHz frequencies covered by its Licence in Time Slice 1 from Blocks D and E awarded to it in the recently concluded MBSA process, to either Blocks I and J, or J and K, that were left unallocated in the outcome of that competitive award process.

Vodafone does not believe that Regulation 7 (3) of the Wireless Telegraphy (WT) Regulations (S.I. 251 of 2012) cited by H3GI is currently applicable to spectrum in the sub-1 GHz and 1800 MHz bands given that a competitive award process including frequencies in the 1800 MHz band has only very recently concluded, and particularly given the inclusion of features in that award process, such as the Assignment Round and Negotiation Stage, that were specifically designed to obtain the most efficient configuration of spectrum frequency locations among the Licensees in each of the bands in an objective and non-discriminatory manner.

The factors listed in the WT Regulations as being relevant to assessing whether an application for licence amendment should be granted, such as ensuring the efficient allocation and use of spectrum, were central to ComReg's decisions to hold the recent competitive award process for the allocation of spectrum, including 1800 MHz spectrum, and these objectives informed all aspects of the format and design of the MBSA process. Consequently, assuming at least a reasonable level of competence and engagement on the part of bidders participating in the MBSA process, these objectives should be regarded as having been effectively achieved in the outcome of the MBSA process, at least for the medium term.

As the MBSA process was the specific mechanism adopted by ComReg to achieve its statutory regulatory objectives such as the efficient allocation and use of spectrum, and the promotion of efficient investment, it is entirely unjustified and unacceptable for H3GI to now seek to invoke the WT Regulations to seek to circumvent the MBSA framework and outcome, within mere months of its conclusion.

The key question raised by H3GI's application to change the frequency location of its 1800 MHz allocation is how it was unable to secure the objective of its current application - Blocks I and J, or

J and K - during the Assignment Round of the MBSA process. Although the information available to Vodafone is limited to the published outcome of the MBSA process, and the non-confidential information in ComReg document 13/43, it appears probable that H3GI's application for licence amendment is driven by either:

1. Errors in its bidding strategy during the MBSA process, during which it either chose not to participate in the Assignment Round, or did not accurately express its actual value differences between the different frequency location options in its bids or;
2. A calculation at the time of the MBSA process that the option to make an application under the WT Regulations (S.I. 251 of 2012) to amend its liberalised licence was a means of potentially obtaining its desired frequency location for its spectrum allocation outside of the MBSA process, and at no cost. This may have led H3GI either not to participate in the Assignment Round, or to bid in a manner that did not maximise its chances of obtaining Blocks I and J, or J and K as an outcome of the MBSA process.

Only ComReg has sufficient information to determine whether H3GI's bidding behaviour during the MBSA process was in fact consistent with full expression of its value differences between frequency locations in the 1800 MHz band. If ComReg assesses that H3GI's bidding strategy in the Assignment Round of the MBSA process was not consistent with the value differences between 1800 MHz frequency location options that it is now expressing in its application (the cost of combiners that it would have to incur if it were to utilise Blocks D and E, rather than I and J, or J and K, in Time Slice 1) then it would be entirely unjustified and inappropriate for ComReg to accept H3GI's licence amendment application. To grant the application would be to effectively allow H3GI to compensate for shortcomings in its own bidding strategy during the MBSA process, obtain its most preferred frequency locations in the 1800 MHz band in TS1 at no additional cost, and circumvent the Assignment Round in which other bidders such as Vodafone had participated in good faith – paying significant additional amounts of money in order to secure their preferred frequency locations in both the 1800 MHz and sub-1 GHz bands.

Even if H3GI's bidding behaviour in the Assignment Round of the MBSA process was fully consistent with its valuations across the various frequency location options available to it in the 1800 MHz band, as now indicated by the information supplied in its Licence Amendment application, then Vodafone considers that it would not be justified nor consistent with ComReg's statutory regulatory obligations to grant H3GI's current application. This is because of the severely prejudicial effect that granting the application would have both on the integrity of the outcome of the recently concluded MBSA process and on the efficacy of future competitive spectrum award processes (particularly those involving an Assignment Round where operators would be afforded the opportunity to bid additional amounts to seek to secure preferred frequency locations). Moreover granting H3GI's application would be entirely contrary to ComReg's conclusion on the approach to assignment of unallocated lots arising from the MBSA process as set out in paragraph 4.211 of ComReg's MBSA Information Memorandum (ComReg document 12/52).

If, despite the issues of serious concern outlined above, ComReg were to decide to amend H3GI's Liberalised Use Licence in line with what it is now requesting in its application, then the outcome of the Assignment Round of the MBSA process would be irretrievably compromised. Accordingly Vodafone believes that all Bidders who paid additional amounts of money in order to secure particular frequency locations across both the 1800 MHz and sub-1 GHz bands would have a compelling case to obtain, at a minimum, the full refund of all such Assignment Round fees paid by them for their frequency locations in these bands.

In summary, it is Vodafone's position that H3GI's licence amendment application cannot be appropriately assessed in isolation from the very recently concluded spectrum award process, and the position on treatment of unallocated lots from the MBSA process as set out in paragraph 4.211 of the MBSA Information Memorandum. When considered in this proper context it is clear that the disadvantages of acceding to H3GI's application, in terms of undermining the integrity of the outcome of the recent MBSA process and the risks of undermining the effectiveness and integrity of future competitive spectrum award processes, far exceed any benefits claimed by H3GI (such as avoiding the cost of investment in combiners). Vodafone considers that it is therefore imperative that ComReg exercise its duty consistent with the achievement of its regulatory objectives in the widest sense, including on a forward-looking basis, by refusing H3GI's application to amend its 1800 MHz licence.

Legal and Regulatory Framework

ComReg's statutory functions, objectives and duties under Irish and EU Law in the area of radio spectrum and the licensing of spectrum rights of use are well known to all existing holders of spectrum licences operating in the electronic communications sector. Vodafone does not therefore propose to recount these fully here but will refer to those that we believe require particular consideration in the context of H3GI's licence amendment application.

Vodafone notes that ComReg's statutory functions and objectives in the licensing of spectrum rights of use in the 1800 MHz and sub-1 GHz bands were fully taken into account in all aspects of the design of the recently concluded MBSA process. The effective execution and implementation of the MBSA process was therefore a key mechanism utilised by ComReg to achieve its statutory objectives, such as ensuring the efficient management and use of the radio spectrum, in respect of the sub-1 GHz and 1800 MHz bands, at least over the medium term. ComReg must therefore adhere to the provisions of its MBSA Decision and Information Memorandum, for example in relation to the treatment of unallocated lots subsequent to the conclusion of the MBSA process, in any assessment of applications that would seek to change the organisation of spectrum allocations and assignments that was reached as a result of that competitive spectrum award process.

Vodafone believes that full adherence to relevant provisions of the MBSA Decision and Information Memorandum is also fully in line with the requirement for ComReg, when applying objective, transparent, non-discriminatory and proportionate regulatory principles, to promote regulatory predictability by ensuring a consistent regulatory approach.¹ Vodafone considers that any deviation by ComReg from its previous decisions on the treatment of unallocated lots in the MBSA Decision and Information Memorandum, on which bidders had relied when formulating their bidding strategies would, among other consequences, create enormous regulatory unpredictability that would almost certainly compromise the achievement of ComReg's statutory objectives and duties in the future. It is Vodafone's position however, as explained below, that H3GI's licence amendment application is effectively seeking a decision from ComReg that would contravene the provisions of the MBSA Decision and Information Memorandum.

We observe that H3GI relies to a significant extent on text from a letter from ComReg to H3GI of 20 November 2012 to support its application. The quoted text is reproduced below with emphasis added in bold by Vodafone to the text considered most relevant:

¹ Paragraph A2.13, ComReg document 13/05

“In the IM (see for example paragraph 4.211) ComReg stated that any unallocated lots would be located contiguously in the presentation of assignment options in the Assignment Round. Winning Bidders will note that there are three unallocated Lots in a contiguous block (Lots I, J, K) in Time Slice 1 in the 1800 MHz band. Noting ComReg’s position in Decision D04/12 that unsold lots will not be allocated for a reasonable period after the process, and in any event will not be allocated for a period of at least 1 year, ComReg considers that it would be appropriate, in terms of ensuring the effective management and encouraging the efficient use of radio frequencies and in the circumstances of avoiding the requirement for Transition Activities between Time Slice 1 and Time Slice 2, to permit assignment outcomes where the location of one o[r] more of these unallocated Lots would vary from its current location in Lots I,J or K. Winning Bidders should therefore consider the above when considering and suggesting alternative assignment outcomes in the Negotiation Phase [.]”

Vodafone notes that Vodafone, as a Winning Bidder received essentially the same letter of notification as sent to H3GI above, and in a letter to ComReg of 21 November expressed our strong opposition to this proposal on a number of grounds, including that it was outside of the parameters of the IM, unfair, unacceptable, and could potentially grant to Vodafone’s competitors an advantage they could not have otherwise obtained. Without prejudice to our view in that letter, Vodafone notes that ComReg’s conclusion to permit assignment outcomes where the location of one or more of the unallocated Lots would vary from its current location in Lots I,J or K was confined solely to the Negotiation Phase of the MBSA process. However as the MBSA process has concluded without any alternative assignment outcome arising as a result of the Negotiation Phase, that decision is not relevant to H3GI’s current licence amendment application.

It is Vodafone’s position that the provisions of paragraph 4.211 of the IM, such that unallocated lots are located contiguously, must be adhered to in a decision concerning H3GI’s present licence amendment application, both in the interests of promoting regulatory predictability and in best ensuring that ComReg’s statutory objectives can be effectively achieved in future spectrum award processes that may be held.

Notwithstanding Vodafone’s view on the necessity of contiguous location of unallocated lots, we also believe that it is essential, in the interests of promoting regulatory predictability, that ComReg abide by its decision in paragraph 4.15 of Decision D04/12 that unsold lots from the MBSA process not be allocated for a reasonable period, that in any event would not be less than one year. As lots I, J and K in Time Slice 1 were unsold in that process, any change in their current status cannot be permitted until December of this year at the very earliest. Moreover Vodafone would submit that objective consideration of current circumstances indicates that a reasonable period before any allocation of these lots could be considered should significantly exceed the 1 year minimum period specified by ComReg in its Decision.

Vodafone notes that ComReg’s undertakings in respect of the reasonable period that must elapse before allocation of unsold lots from the MBSA process, as set out in Decision D04/12, was an important determinant of the valuation placed by bidders on spectrum lots in that process. Any deviation by ComReg from its previous decision would call into question the whole basis on which bidders participated in the MBSA process, and the amounts paid by them to secure their spectrum allocations and frequency assignments. Vodafone reserves its rights to take all necessary measures to defend its legal rights and commercial interests in the event that ComReg effectively reverses its decision on the reasonable period before re-allocation of un-sold lots could be permitted.

ComReg cannot consider H3GI's licence amendment application on the basis of Regulation 7(3) of the Wireless Telegraphy Regulations (S.I. 251 of 2012) in isolation from the recently concluded MBSA process and its outcome, particularly when acceptance of the application would conflict with the provisions of the MBSA Decision and Information Memorandum.

If, despite our objections, ComReg decides to grant H3GI's application then Vodafone considers that it would at a minimum be entitled to seek a rebate of all Assignment Round fees paid by it. This is based on the fact that if ComReg granted H3GI's Application then it would indicate that the basis on which Vodafone was led to participate in the Assignment Round was invalid.

Potential Errors in MBSA Bidding Strategy of H3GI

The recently concluded MBSA process was the specific mechanism adopted by ComReg to achieve its statutory regulatory objectives, including ensuring the efficient management and use of spectrum, and the promotion of efficient investment. These objectives fully informed ComReg's decisions in relation to the design of the overall award process, including its decision to incorporate features (particularly the Assignment Round and the Negotiation Stage) that facilitated an efficient configuration of the specific frequency locations of the spectrum allocations of Licensees in the 1800 MHz and sub-1 GHz bands. Assuming full and effective participation by bidders at all stages of the MBSA process, and bidding strategies aligned with those bidder's objectives, it should therefore be expected that the outcome of the process was consistent with ensuring the efficient management and use of the spectrum and ComReg's other statutory objectives and duties.

Given the wide scope provided by the MBSA process to enable H3GI to secure its objectives (which on the basis of H3GI's Licence Application clearly included an objective to secure frequency locations in the 1800 MHz band in both Time Slice 1 and 2 that would remove or minimise the need to purchase combiners or conduct other transition activities), it is not clear to Vodafone why H3GI was unable to achieve its desired 1800 MHz frequency location across both Time Slices within the framework of the spectrum auction.

The issue of H3GI's actions during the MBSA process is referred to by H3GI and ComReg in the correspondence published in ComReg consultation document 13/43, but the details have been redacted from the published versions of the correspondence and are therefore opaque to Vodafone. Vodafone notes however the assessment of ComReg in its letter of 9th April 2013:

“... that it was within H3GI's power to have avoided the situation in which it now finds itself. ComReg notes that (i) in the Assignment Round, H3GI opted to...”

Although the additional text detailing H3GI's actions has been redacted as confidential, Vodafone considers it reasonable to interpret the published text as indicating that ComReg, with full visibility of H3GI's behaviour in the auction, considered that H3GI had it within its power to adopt a bidding approach in the Assignment Round that would have allowed it to achieve within the framework of the MBSA process, what it is now seeking in its Licence Amendment request (1800 MHz TS1 lots in blocks I and J, or J and K) but for some reason did not do so.

H3GI, in its letter to ComReg of 26th April, responded that specific point raised by ComReg is 'not relevant' as it claims the rationale for the contiguity rule for unsold lots no longer exists and there are benefits from amending winning bidder's assignments. H3GI then goes on to state that it did not in fact have an opportunity to avoid the situation in which it now finds itself. Unfortunately, as the evidence provided by H3GI has been mostly redacted from the published version of the letter, it is not possible for Vodafone to determine the point raised by ComReg on H3GI's actions in the

Assignment Round, or to determine whether H3GI has effectively addressed this point in its 26th April correspondence. From the information available Vodafone can only infer that H3GI's arguments relate to claimed limited options faced by it in the Assignment Round that in some manner would have led to it having to make a large additional bid that it considers it would have been commercially unattractive for it to incur.

Assuming that H3GI has framed the issue validly, and in the context of the restricted information available to Vodafone, we consider that there are two main potential Assignment Round scenarios that must be assessed:

1. The amount that would have been required to be bid by H3GI to secure Blocks I-L in 1800 MHz Time Slice 2 and either Blocks I-J or J-K in 1800 MHz Time Slice 1 would have been equal to or less than the cost of the combiners it would have to incur to provide services using 1800 MHz in its present frequency assignment during the period of Time Slice 1. However H3GI did not bid in the Assignment Round, or did not bid effectively.
2. The amount that would have been required to be bid by H3GI to secure Blocks I-L in 1800 MHz Time Slice 2 and either Blocks I-J or J-K in 1800 MHz Time Slice 1 would have exceeded the cost of the combiners it would have to incur to provide services using 1800 MHz in its present frequency assignment during the period of Time Slice 1. Whether or not it participated in the Assignment Round, H3GI did not bid this value.

Scenario 1

It can be concluded either that (a) H3GI's valuation of the specific 1800 MHz frequency assignments across both Time Slices that it is now seeking is below the cost of the combiners that it would avoid in being located Blocks I-J or J-K in Time Slice 1 or (b) H3GI's valuation of the 1800 MHz frequency assignments that it is currently seeking exceeds the cost of the combiners but it made some error either in not bidding at all in the Assignment Round or failing to make bids consistent with this valuation. In either case Vodafone submits it would be entirely inappropriate and unjustified for ComReg to agree to H3GI's licence amendment requests. It cannot be permissible for H3GI to seek to use a licence amendment mechanism as a means to make up for errors in its bidding strategy, or in the implementation of that strategy, during the MBSA process that led to an outcome that it does not consider ideal. Neither can it be appropriate or objectively justified for ComReg to grant H3GI's licence amendment request so as to allow it to obtain a financial benefit (a cost saving in terms of entirely avoiding the payment of an Additional Price necessary to secure the blocks they are currently seeking in their licence amendment application, or alternatively avoiding expenditure on combiners) which would not have been available to it as an outcome of the MBSA process. If H3GI was not willing to make a sufficient bid for its preferred frequency assignments across both Time Slices in this scenario then Vodafone considers that the outcome of the MBSA process was efficient and should not therefore be circumvented through an acceptance of H3GI's licence amendment request.

Scenario 2

It can be concluded that the actual outcome of the Assignment Round was efficient as the valuation placed by H3GI on its preferred spectrum frequency assignment across both Time Slices was insufficient to secure it in an objective and non-discriminatory spectrum award process, consistent with all the objectively justified rules governing the MBSA process. It would therefore be contrary to the promotion of regulatory predictability, and unjustified for the settled outcome of that

MBSA process to be altered ex-post in the manner H3GI is currently seeking, even if it were the case that the adverse impact on the integrity of the MBSA process and the likely negative impacts on the effectiveness of future competitive award processes (detailed further in the subsequent sections of this response) of granting H3GI's licence request was not present.

Potential Regulatory Arbitrage

The above scenarios are based on an assumption that H3GI's bidding strategy in the Assignment Round of the MBSA process was not influenced by any consideration that it might be possible to subsequently obtain its preferred frequency assignment across both Time Slices in the 1800 MHz band outside of the framework of the MBSA framework, and on more favourable financial terms than were available to it from effective participation in the Assignment Round. However it is entirely feasible that H3GI may have come to the conclusion at the time of the MBSA process that the option to make an application under the WT Regulations to amend its liberalised licence was a superior means of potentially obtaining its desired frequency location for its 1800 MHz spectrum allocation outside of the MBSA process, and without the requirement to pay any Additional price. This may have led H3GI either not to participate in the Assignment Round, or to bid in a manner that did not maximise its chances of obtaining Blocks I and J, or J and K as an outcome of the MBSA process.

Vodafone considers that there is a non-negligible probability that this calculation may have influenced what ComReg has considered to be an apparent failure of H3GI to do everything in its power to secure during the Assignment Round the frequency assignments across both Time Slices in the 1800 MHz band that it is now seeking to achieve from ComReg approval of its licence amendment request. Given this possibility, it would be entirely inappropriate for ComReg to potentially reward a move to seek to alter the frequency locations resulting from the MBSA process ex-post, by granting H3GI's licence amendment request. Such a decision, by conferring an individual financial/commercial benefit on the operator making the licence amendment that was not available to it within the MBSA process itself, would create perverse incentives for operators to seek to have recourse in future to licence amendment requests to alter spectrum allocation outcomes outside of competitive spectrum award frameworks. As detailed in a subsequent section of this response, this would undermine the effectiveness of future auctions in achieving their intended objectives, such as the effective management and use of spectrum, by for example discouraging bidders from bidding their true valuations. The costs of the negative precedent of granting H3GI's licence amendment request would therefore far exceed any benefits that may be claimed for it.

Impact on Integrity of MBSA Process and Outcome

Vodafone considers that acceptance by ComReg of H3GI's Liberalised Licence amendment request would irretrievably compromise the outcome of the very recently concluded MBSA process (particularly the outcome of the Assignment Round of that process). This would be the case as H3GI's requested licence amendment would contravene the decisions made by ComReg in the MBSA Decision and MBSA Information Memorandum in respect of key issues (including the treatment of unallocated lots from the MBSA process, and the minimum time period before allocation of these unallocated lots could again be considered), on which Bidders had subsequently relied in calculating their valuations of spectrum lots and deciding on their bidding strategy during the MBSA process. H3GI appears to have omitted to consider this necessary

consequence of an acceptance by ComReg of its licence amendment request in its correspondence with ComReg to date.

If all Bidders had been aware before the MBSA process that the conditions set out in the Information Memorandum on the treatment of unallocated lots could be effectively bypassed or revoked post-auction through the mechanism of a Liberalised Licence amendment request by an operator under the provisions of the WT Regulations 2012 then they may well have adopted a different bidding approach or put different valuations on spectrum that would have changed the level of their bids, and potentially the auction outcome. However Vodafone, and likely other Bidders - with the possible exception of H3GI, made what we considered the entirely justified assumption that the provisions of the MBSA Information Memorandum in respect of the treatment of unallocated lots were not subject to being reversed post-auction.

An amendment of H3GI's Liberalised Use Licence in line with what it is currently seeking would mean that the rules detailed in the ComReg Decision D04/12 relating to unallocated lots, on the basis of which Bidders had participated in the MBSA process, were not valid. As bidders in the Assignment Round of the MBSA process may well have had different valuations or adopted a different bidding strategy (which could have resulted in much lower amounts being paid by them to obtain their preferred frequency locations in the 1800 MHz and sub-1 GHz bands) if they had been aware that the rules on treatment of unallocated lots were not binding, it is clear that a decision by ComReg to grant H3GI's Licence Amendment request would be discriminatory and have a prejudicial effect on those bidders. In this situation Vodafone considers that all liberalised use licensees would be entitled, at a minimum, to the full refund of all Assignment Round fees paid by them for their frequency locations across both the 1800 MHz and sub-1 GHz bands.

Impact on Incentives and Effectiveness of Future Spectrum Award Processes

If ComReg were to grant H3GI's application to amend its 1800 MHz Licence then this would clearly have a serious detrimental impact on the effectiveness of any future competitive award processes for the allocation of spectrum, particularly those in which an Assignment Round would appear optimal with respect to ComReg's statutory regulatory objectives. Indeed, granting H3GI's current application would greatly reduce, and in some cases even eliminate, the incentives of bidders to participate effectively in any Assignment Round of future competitive award processes. This would compromise ComReg's objective of ensuring efficient use of spectrum over the longer term.

If H3GI were to secure the frequency locations in the 1800 MHz band in Time Slice 1 that it is now seeking outside of the MBSA process (via ComReg granting its licence amendment application under the provisions of Regulation 7 (3) of the WT Regulations 2012) then the ability to apply for licence amendments to circumvent the outcome of competitive spectrum award processes in this manner ex-post would rationally be factored into the decisions of all bidders in future competitive spectrum award processes. Other things equal, the incentives of operators to participate in an Assignment Round, and the amounts that they would bid, would likely be considerably reduced if there was a viable option for them to utilise the mechanism of a licence amendment application to secure their preferred frequency location outside of the spectrum award process itself. Moreover there would be an additional significant benefit in that the bidder could potentially avoid or minimise the requirement to pay any premium to secure their most preferred frequency locations.

For example, in the presence of a licence amendment application route to altering the outcome of a spectrum award process, a rational approach for a bidder to seek to achieve its most preferred frequency location in a band while avoiding the expenditure of any additional amounts over what it paid in the Main Stage of a competitive award process would be to not participate during the Assignment Round, omitting to bid any additional amount on any of the frequency location options available in the spectrum band, gambling on the possibility that it may obtain its preferred frequency location as an outcome of the auction anyway based on its assessment of that value that other bidders would attach to that frequency location. In the event that the outcome of the spectrum award process led to their being assigned a non-preferred spectrum location (or non-contiguous spectrum locations across Time Slices), but their preferred frequency location was not assigned in the auction, then it would be open to them to apply to ComReg to amend their licence to change their frequency location to the most preferred option, likely on the basis of costs that they would have to 'inefficiently' incur if they were to operate in their assigned spectrum location, and which would be avoided if they were in their most preferred frequency location in the band. While not without risk, the benefit of such an approach, if successful, in terms of avoiding the cost of bidding additional amounts in the Assignment Round for its most preferred location, may plausibly outweigh the costs and risks in the assessment of a bidder.

The availability of such a feasible option to alter the outcome of a spectrum award process shortly after its conclusion, when factored into the decisions of all bidders in an award process, would clearly dampen incentives to participate and reflect their full valuation differences between options in their bids in an Assignment Round, which could not only materially reduce any revenues from the Assignment Stage of the auction itself, but would more importantly undermine the effectiveness of the Assignment Round in achieving its objective of assigning spectrum locations to those that value them most highly based on an open and non-discriminatory process. For example, it could be expected that it would be more likely that there would be a number of claims by different bidders to amend licences to obtain different frequency locations that would conflict with one another (i.e. two or more operators each seeking the same frequency locations left unallocated from the competitive award process). These conflicting applications could be very difficult to effectively arbitrate in the absence of objective information on the economic value placed on spectrum locations by individual operators, information that would have been elicited only in an Assignment Round that had not been compromised by the existence of a licence amendment application mechanism capable of circumventing the outcome of a competitive spectrum award process.

ComReg must take account of the potential that a granting of H3GI's application may have in terms of considerable perverse incentive effects, such as those outlined above, that would undermine the effectiveness of future spectrum award processes. Vodafone considers that the disadvantages and risks to the objective of ensuring efficient use of spectrum over the longer term if H3GI's current licence amendment application were granted, though difficult to quantify, likely far outweigh any benefits claimed by H3GI. Accordingly, it is Vodafone's view that it is important in the interests of providing efficient incentives through the regulatory framework that H3GI's licence amendment application be declined by ComReg.