



Commission for  
**Communications Regulation**

Response to Consultation and Decision

## **Interim Licences for the 900 MHz Band**

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## 1 Introduction

The purpose of this document is to set out the Commission for Communications Regulation's ("ComReg") Response to Consultation and Decision on its Interim Licence Proposal for the 900 MHz band, as originally consulted upon in Consultation 10/71<sup>1</sup> and Response to Consultation and Draft Decision Document 11/11 "(Document 11/11)".<sup>2</sup>

Four interested parties submitted a response to Document 11/11. These were:

- Vodafone;
- O2;
- eircom Group (Meteor and eircom); and
- H3GI.

In Consultation 10/71, ComReg considered what would happen if it allowed each of Vodafone and O2's respective existing GSM 900 MHz licences to expire, as currently provided for in May 2011 without implementing any appropriate interim measure(s), in advance of the finalisation and subsequent implementation of its broader spectrum release proposals, which currently involve a proposed joint release of 800 MHz, 900 MHz and 1800 MHz spectrum. However, ComReg discounted this as a viable regulatory option.<sup>3</sup> On the basis that a final decision had yet to be made and realised regarding ComReg's approach to the granting of new liberalised licences in the 900 MHz band, and in the interests of safeguarding existing competition and eliminating probable serious disruption to consumer services for the time being, ComReg considered that the overall interests of consumers would be better served, on balance, by granting so-called 'interim licences' to O2 and Vodafone on a GSM-only use basis for a limited period until such time as a final decision on ComReg's broader spectrum release proposals could be made and realised. In light of these considerations, ComReg set out its proposals with regard to granting interim licences to each of Vodafone and O2 (including proposals regarding applicable licence conditions and spectrum fees). The key elements of ComReg's Interim Licence Proposal were that:

- interim spectrum rights of use would be granted on a fixed term basis;
- interim licence spectrum fees would be based on licence fees in respect of the current 900 MHz licences held by Vodafone and O2 updated to current price levels;
- licence conditions currently applicable to each of Vodafone and O2 under their existing 900 MHz licences would be attached to their respective interim licences. Specifically:
  - technology-specific criteria limiting licensees to the use of GSM-technology only;

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<sup>1</sup> Consultation 10/71. *800 MHz, 900 MHz & 1800 MHz Spectrum Release*. Published 17 September 2010. Note in particular consultation questions 5, 6 and 7.

<sup>2</sup> ComReg Document 11/11. *Interim Licences for the 900 MHz band*. Published 17 February 2011.

<sup>3</sup> See section 3.2 of Consultation 10/71.

- specifying all or a subset of the same 36 GSM900 channels currently assigned to each operator; and
- licence conditions reflecting the commitments made in the course of the original licensing procedure for Vodafone and O2's respective GSM 900 MHz licences.

In Document 11/11 ComReg reviewed and analysed the responses received to Consultation 10/71 where these related to ComReg's 900 MHz interim licence proposal. There was broad support for the Interim Licence Proposal, albeit noting that some supporting parties disagreed with certain aspects of the proposal. It was also noted that one respondent disagreed with ComReg's proposal, and a further respondent considered that ComReg's currently proposed approach to the release in due course of the 800 MHz and 900 MHz bands, taken together the Interim Licence Proposal, would not adequately encourage efficient spectrum use.

These views were considered and addressed by ComReg in Document 11/11<sup>4</sup>, in which ComReg proposed to put in place interim measures that deal with the issue of the expiry of rights of use of 900 MHz spectrum by Vodafone and O2 for 2G purposes in May 2011 and the regulatory situation presented in that context, as well as generally. That proposal was based, amongst other things, on the fact that their respective 2G licences would expire at that point in time, and:

- no matter how ComReg arranged and decided on its broader spectrum release proposals and the implementation of same, and
- no matter what permutations of spectrum-assignment, spectrum-loss, spectrum-substitution, relocation within frequency bands, retuning, infrastructure roll-out, test-and-trial, migration or 'churn', for example, occurred following the implementation of the process,

there would be a period between May, 2011 and 31 January 2013<sup>5</sup>, in which there would be a clear requirement to preserve the *status quo* in relation to Vodafone and O2 and their respective customers and existing competition in the market while these matters took their course.

ComReg is of the view that its proposed interim measures as specified in Consultation 10/71 and amended in Document 11/11<sup>6</sup>, would provide for the efficient use of the relevant spectrum in the period from 16 May 2011 onwards, and up until 31 January 2013<sup>7</sup>, thereby safeguarding existing competition and eliminating probable serious disruption to consumer services during that period. The implementation of such interim

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<sup>4</sup> Specifically the first three bullet points were addressed in chapter 2 of Document 11/11 and the fourth bullet point was addressed in chapter 3 in the context of the Draft RIA.

<sup>5</sup> Or possibly earlier, depending on developments in the medium term, which might allow for earlier liberalisation of 900 MHz spectrum-use, subject to, *inter alia*, there being no distortion to competition arising from same.

<sup>6</sup> Amendments include; the duration of the interim licence (section 2.9 of Document 11/11) and setting the same interim licence fees for both Vodafone and O2 (section 4.3.2 of Document 11/11)

<sup>7</sup> See footnote 5 above.

measures would also allow ComReg to continue to develop its proposals to finality and give appropriate consideration to all of the materials submitted to it in the context of its wider consultation process on spectrum release in respect of the 800 MHz, 900 MHz and 1800 MHz bands, and to proceed to a final decision on which spectrum bands to release and how these will be assigned for the period currently proposed as 2013 to 2030 (noting that in Document 11/11, ComReg set out a proposal by which there could be earlier release of liberalised 900 MHz spectrum, subject to there being, amongst other things, no distortion to competition arising from same).

ComReg's Interim Licence Proposal 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 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.

ComReg will, in due course, publish its Response to Consultation and Draft Decision in relation to its broader spectrum release proposals. Interested parties should note that the making of a decision in relation to the Interim Licence Proposal now, and separately to ComReg's broader spectrum release proposals, does not imply that ComReg has made any decisions on the latter, or that it will make any particular decisions thereon.

This document is structured as follows:

**Chapter 2:** considers and sets out ComReg's response to submissions received to Document 11/11 in respect of responses related to ComReg's Interim Licence Proposal;

**Chapter 3:** sets out ComReg's Regulatory Impact Assessment ("RIA") and assessment against other statutory objectives on the various alternative proposals put forward by respondents to Consultation 10/71 and Document 11/11;

**Chapter 4:** sets out ComReg's decision on the interim licence conditions and spectrum fees;

**Chapter 5:** sets out relevant next steps in relation to the interim licence process going forward; and

Annexes<sup>8</sup>:

- (1) ComReg's functions and objectives in relation to spectrum;
- (2) Decision on Interim Licence;
- (3) Draft Statutory Instrument; and
- (4) Interim Licence Schedules for Vodafone and O2.

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<sup>8</sup> ComReg notes that there have been no significant developments in other countries with respect to the treatment of expiring GSM licences since it last published an update in Annex 4 of Document 11/11, hence ComReg has not included an Annex regarding International updates in this document.

## 2 Consideration of Responses to Consultation 11/11

### 2.1 Introduction

This chapter considers submissions received in relation to matters set out in Chapter 2 of Document 11/11. These can be broadly categorised as:

- Interim Licence Proposal as a facilitating measure;
- Justification for Interim Licence Proposal, including “consumer disruption”;
- Interim licence duration and potential withdrawal of interim licences during the proposed term;
- Promotion of competition and avoiding distortions to competition;
- Articles 106, 107 and 3(1)(b) TFEU and 4(3) TEU;
- Non-discrimination; and
- Proportionality.

For the reasons set out in Section 2.2 below, ComReg does not propose to address, in this document, submissions received relating to ComReg’s broader spectrum release proposal. For the avoidance of doubt, these submissions are being considered and will be addressed by ComReg in its forthcoming Response to Consultation and Draft Decision on its broader spectrum release proposal.

### 2.2 Interim Licence Proposal as a facilitating measure

In Document 11/11, ComReg made clear its view that:

*“It is necessary to move forward and separately finalise its Interim Licence Proposal prior to any final decisions on its broader spectrum release proposal so as to, amongst other things:*

- *safeguard existing competition in the mobile markets concerned and to protect end users from any potential disruption to services that would otherwise arise;*
- *ensure that all relevant processes relating to the Interim Licence Proposal, including appropriate consultation upon the draft Regulatory Impact Assessment (RIA) and draft decision, are completed in a timely manner; and*
- *provide adequate regulatory predictability for affected parties.” (page 4)*

In addition, ComReg stated:

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

### *Views of Respondents*

ComReg received responses from Vodafone and H3GI on this issue.

Vodafone welcomed ComReg's "decision" to adopt its recommendation to treat the 900 MHz interim licensing arrangements dealing with any transition period separately from the proposals relating to the spectrum award process for the sub-1GHz and 1800 MHz bands.

On the other hand, in its response to Document 11/11, H3GI claims that:

- ComReg itself has linked the issue of interim licences to its broader spectrum release proposal;
- the Interim Licence Proposal and ComReg's Interim Licence Proposal decision, of their nature, involves a concurrent decision by ComReg not to liberalise 900 MHz spectrum and to delay availability of liberalised 900 MHz spectrum until some future date, yet to be determined;
- ComReg wishes to restrict the current consultation process to the Interim Licence Proposal "*for some purpose of its own*"; and
- the way ComReg appears to be going about its consultation on these two issues seems to be part of a deliberate attempt to deprive undertakings from taking issue with ComReg's delay in making available liberalised 900 MHz spectrum.

In addition, H3GI calls on ComReg to amend its Interim Licence Proposal, auction liberalised 900 MHz spectrum by September 2011 and, based on the results of that auction, license liberalised 900 MHz spectrum to the winning bidders immediately after such an auction.<sup>9</sup>

When addressing concerns raised by H3GI in its response to Consultation 10/71 (in section 2.2 of Document 11/11), ComReg noted that this respondent appeared to be conflating concerns with ComReg's broader spectrum release proposal (for instance, "*preventing H3GI from having access to 900 MHz spectrum until 2013*") with those relating to the Interim Licence Proposal.

### *ComReg's response*

First, ComReg rejects the suggestion that it is seeking to deliberately attempt to deprive undertakings from taking issue with ComReg's broader spectrum release proposal which would, amongst other things, make available liberalised 800 MHz, 900 MHz and 1800 MHz spectrum in 2013 (and potentially earlier for 900 MHz spectrum).

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<sup>9</sup> ComReg believes this to be ambitious given the volume of preparatory work that would be required. ComReg notes there would need to be considerable preparatory work prior to any such auction, including: publication, consultation and settling of a draft Information Memorandum, conducting auction workshops etc. It is also noted that the auction itself may extend over a number of weeks.

In that regard, ComReg notes that H3GI and other interested parties have been given sufficient opportunity to make submissions and representations, express their views and identify any concerns they might have with ComReg's current broader spectrum release proposal in the course of Consultation 10/71 and Consultation 10/105. Indeed, ComReg notes that H3GI has expressed and reiterated its concerns in this regard in response to each of these consultations. Furthermore, ComReg continues to have regard to these and other submissions in coming to its view on its broader spectrum release proposal.<sup>10</sup>

ComReg also rejects the suggestion put forward by H3GI that it is wishing to progress and separately finalise its Interim Licence Proposal "*for some purpose of its own*" (which ComReg interprets to mean some improper purpose and one that is not amongst those purposes it has advanced as the basis for the proposal). In that regard, ComReg has been and continues to be fully transparent and open about its approach to this proposal and the facts and circumstances giving rise to it.<sup>11</sup>

In addition, and with a view to receiving and considering representations, views and submissions in relation to it, ComReg has set out in detail the rationale for its Interim Licence Proposal, both generally and against its statutory objectives, together with its assessment and evaluation of that proposal against possible alternatives in the current circumstances, and its consideration of responses received in relation to same (including extensive treatment of this particular respondent's submissions).<sup>12</sup> In these circumstances, in addition to rejecting the suggestion that it has some improper purpose of its own which it has not disclosed, ComReg considers that the purpose of, and objective justification for, the Interim Licence Proposal have been transparently and openly consulted upon with interested parties.

In addition, and contrary to the further assertion by H3GI in its response to Document 11/11, ComReg wishes clearly to point out that its Interim Licence Proposal does not comprise a "*concurrent decision by ComReg not to liberalise 900 MHz spectrum and to delay availability of liberalised 900 MHz spectrum until some future date, yet to be determined*".

This is simply not the correct characterisation of the Interim Licensing Proposal set out in Document 11/11. Furthermore, ComReg made clear and explicit in Document 11/11 that a decision on the Interim Licence Proposal at this stage and separately to ComReg's broader spectrum release proposals does not imply that ComReg has made any decision/s on the latter, or that it will make any particular decisions thereon. To be clear: no decision on the availability of liberalised 900 MHz spectrum has been made and a decision by ComReg to grant interim licences does not, and should not, be construed to mean that it could not adopt a broader spectrum release proposal that could result in the earlier release of the 900 MHz band on a liberalised basis (such as in the manner

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<sup>10</sup> Indeed, ComReg notes the additional material provided by H3GI in its response to Document 11/11 that relates to the broader spectrum release proposal and is taking these into account in coming to its final position on this issue.

<sup>11</sup> See, for example, Section 2.3 of Information Notice 10/59 (issued in July 2010), Section 3.1 of Consultation 10/71 (issued in September 2010) and the above quoted sections of Document 11/11 (issued in February 2011).

<sup>12</sup> See, for example, Chapter 3 of Consultation 10/71 and Sections 2.1 to 2.4 of Document 11/11.



proposed by H3GI or in some other manner). In that regard, ComReg notes the following:

- ComReg has, itself, put forward a potential modification to its current broader spectrum release proposal that could result in the earlier release of the 900 MHz band on a liberalised basis (see Section 3.2 of Document 11/11);
- ComReg continues to have regard to alternative broader spectrum release proposals which could bring about the availability of liberalised 900 MHz spectrum earlier than 2013; and
- Article 3.3 of the Draft Decision (on page 95 of Document 11/11) and Article 3.3 of the Decision (see **Annex 2**) specifically provides that ComReg would be able to shorten or amend the duration of interim licences granted (pursuant to Regulation 15 of the Authorisation Regulations) to facilitate liberalisation of rights of use of 900 MHz spectrum at a date earlier than January, 2013, following a transparent and lawful process.

As such, it remains open to ComReg to decide to, and to grant interim licences (to address the competition and consumer issues identified in the context of its Interim Licence Proposal) *and* to decide in the future to adopt a broader spectrum release proposal which could result in availability of liberalised 900 MHz spectrum earlier than 2013.

Accordingly, whilst ComReg welcomes H3GI's submissions relating to its broader spectrum release proposal (such as those relating to concerns regarding ComReg's currently-proposed joint making available of liberalised-use 800 MHz, 900 MHz and 1800 MHz spectrum in 2013), these will generally be addressed in ComReg's forthcoming Response to Consultation and Draft Decision on its broader spectrum release proposal.

### **2.3 Justification for Interim Licence Proposal, including "consumer disruption"**

ComReg set out its reasoning for the Interim Licence Proposal in Consultation 10/71 and again in Document 11/11 following consideration of the responses received to Consultation 10/71. It is not proposed to repeat this reasoning here and readers are referred to these documents.<sup>13</sup>

#### *Views of Respondents*

ComReg received responses to this issue from Vodafone, O2 and H3GI.

Vodafone stated:

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<sup>13</sup> For the avoidance of doubt, where ComReg refers to previous reasons, analysis, material etc contained in previous consultation papers throughout this document, then ComReg is relying upon such analysis, reasoning, material etc in forming its decision on these matters subject, clearly, to consideration of subsequent responses to consultation and other material received in relation to same.

- that the Interim Licence Draft Decision is overall a reasonable, proportionate, and non-discriminatory measure that is consistent with ComReg's regulatory objectives and functions; and
- the proposed Interim Licences are essential to provide certainty to all of the existing 900 MHz licensees around their ability to maintain continuity of current services to their customers in the short term (from 16 May 2011 to 31 January 2013) while safeguarding the existing strong level of competition.

O2 stated that it:

- *“agrees with ComReg’s rejection of the allegations in the H3GI response to document 10/71 relating to alleged non-compliance of the Interim Licence with ComReg’s statutory functions and obligations”*; and
- *“agrees with ComReg that, contrary to the H3GI allegations, the Interim Licence proposal would not constitute discrimination, dis-proportionality, special rights, state aid or a distortion of competition on the grounds alleged by H3GI”*.

On the other hand, ComReg notes H3GI's submission, in response to Document 11/11, that it *“does not consider ComReg’s interim licence proposal as justified by the consumer disruption issues asserted by Vodafone and O2”* and the views put forward by H3GI in this regard, include:

- ComReg's concerns regarding consumer disruption have not been sufficiently backed up by independent consultants;
- ComReg is well aware that many of Vodafone's and O2's customers have 3G handsets and that all 2G devices are 1800 MHz enabled;
- the reliance on and prioritisation of *“somewhat unsubstantiated concerns regarding consumer disruption”* is difficult to reconcile with ComReg's objective to ensure efficient use of spectrum under section 12 of the 2002 Act and Ministerial Direction No. 3 of 2003 in relation to universal roll-out of broadband;
- the position ComReg finds itself in is directly attributable to:
  - the failures to act by each of Vodafone and O2 to take adequate and timely steps to address the risks of consumer disruption (and the grant of interim licences would constitute a reward for such behaviour and have the effect of protecting the vested interests of Vodafone and O2 at the expense of competition and consumers at large); and
  - the length of ComReg's consultation process, which is claimed to be *“extraordinary, unnecessary and excessive”* and it is *“wholly inappropriate”* to seek to rely upon its own delay so as to justify its Interim Licence Proposal. In this regard, H3GI considers that ComReg has, amongst other things, failed to promptly make a decision in respect of these issues, respect legal certainty and promote investment, contrary to its statutory obligations;
- the manner in which ComReg proposes to draft the interim licences seems to incentivise those undertakings in further *“foot dragging”*; and
- H3GI addressed the other concerns raised by ComReg (in Consultation 10/71) in its response to Consultation 10/71 and, in particular, sections 6 to 13 inclusive.

*ComReg's Response*

First, ComReg notes that concerns relating to consumer disruption in the event that interim licences are not granted have been expressed by other respondents, in addition to Vodafone and O2. For example, eircom and Qualcomm also considered, in their respective responses to Consultation 10/71, that the Interim Licence Proposal would ensure continuity of services to end users and, accordingly, considered that the proposal would mitigate or eliminate the probable serious disruption from loss of existing communications services to end users that would otherwise arise.

Secondly, ComReg does not consider it necessary, as a matter of principle, to have its concerns regarding consumer disruption “*sufficiently backed up by an independent consultant*” for them to be valid in fact or law. For example, with Vodafone and O2 together accounting for circa 75% of retail mobile customers in the State (with the highest levels of coverage in the State and with Meteor and H3GI relying upon Vodafone, via roaming agreements, to obtain wider geographical coverage) and given the importance of existing GSM 900 MHz rights of use to their respective mobile networks, it is clear to ComReg, drawing on its own experience, knowledge and expertise, and should be readily apparent to an objective and reasonable observer without having to carry out significant further analysis, that these operators not having access to GSM 900 MHz spectrum rights of use in the interim period would likely have serious consequences for the quality of GSM services provided to end consumers and for competition in the market, amongst other things.

In any event, ComReg considers there to be sufficient additional material before it to indicate that serious effects to end consumer services would arise if interim licences were not issued. First, ComReg refers to the independent Red-M/Vilicom report<sup>14</sup> on the likely activities required (including the likely scale of costs and time required) for a typical GSM 900 MHz operator in Ireland to address a situation where it would be required to “retune” its network from a holding of 2 x 7.2 MHz to 2 x 5 MHz of GSM 900 MHz spectrum. This report makes clear that significant steps would need to be employed by Vodafone and O2 (along with certain time for these steps to be implemented) to avoid negative consequences to the quality of services provided to end consumers. In addition, ComReg notes that H3GI’s consultant’s report, submitted alongside its response to Document 11/11 (“H3GI’s consultant’s report”)<sup>15</sup> implicitly acknowledges that there would be detrimental consequences for Vodafone’s and O2’s customers if interim licences were not granted. In particular, H3GI’s consultants report states<sup>16</sup>:

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<sup>14</sup> See Section 4 of ComReg Document 10/71c

<sup>15</sup> This report was prepared by Value Partners and Radio Regulatory Associates.

<sup>16</sup> Page 48 of H3GI’s consultant’s report, dated 17 March 2011. ComReg notes that the corollary of the calculations in this report appears to be that such losses will be over €43m for Vodafone and €33m for O2. However, as this report did not provide any details of these calculations (including the methodology and assumptions used), ComReg is not in a position to determine the accuracy of these calculations.

*“Were interim licences not awarded to Vodafone and O2, both operators would face considerable losses in revenue. These revenue losses would arise as a result of churning customers who would be left uncovered by reduced 2G network coverage over 1800 MHz spectrum.”* (emphasis added)

Given that both of the remaining MNOs (being Meteor and H3GI) have roaming arrangements in place with Vodafone to obtain wider geographical coverage for their respective networks, ComReg queries, in these circumstances, whether a substantial portion of Vodafone and O2’s respective customers would, in fact, have any viable alternative service provider to migrate to in the interim period.

Furthermore, in relation to H3GI’s submission that *“ComReg is well aware that many of Vodafone’s and O2’s customers have 3G handsets and that all 2G devices are 1800 MHz enabled”*, ComReg would reiterate its view, as set out in Document 11/11, that requiring Vodafone and O2 to engage in strategies to overcome not having access to GSM 900 MHz rights of use in the interim period (such as additional rollout of 1800 MHz and/or 2.1 GHz sites) would result in inefficient investment in circumstances where each of these operators could potentially gain access to some liberalised 800 MHz and/or 900 MHz spectrum in the near future. Indeed, such a view is not dissimilar from that put forward by H3GI’s consultant’s report in the context of its own position *vis-à-vis* 2.1 GHz spectrum.<sup>17</sup> As such, ComReg remains of its view, as stated in Document 11/11, that (i) H3GI has not advanced any compelling countervailing argument in relation to this issue and (ii) H3GI has failed to demonstrate how investment in mitigation strategies could be made efficiently, at this time.

ComReg also rejects the view that it is prioritising its concerns regarding consumer disruption over its other statutory objective of ensuring the effective and efficient management and use of spectrum and/or having due regard to Ministerial Policy Direction No. 3 in relation to the universal roll-out of broadband.<sup>18</sup> Factors informing this view include that:

- ComReg set out, in Consultation 10/71 and Document 11/11, a number of objective reasons as to why it considers the Interim Licence Proposal to be justified in the circumstances. This includes, but is not limited to, the issue of consumer disruption;
- In Document 11/11, ComReg set out its reasons why it considered that the Interim Licence Proposal is consistent with the objective of the effective and efficient management and use of spectrum, being that it would:
  - contribute to the effective management of radio frequencies by facilitating the joint award of liberalised-use 800 MHz and 900 MHz spectrum which, in ComReg’s view, would be more likely to result in a more efficient spectrum assignment outcome than would otherwise be the case with separate releases of the 800 MHz and 900 MHz bands; and

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<sup>17</sup> See Section 4 of H3GI’s consultant’s report.

<sup>18</sup> It is noted that this statutory objective appears twice in the Communications Regulation Act 2002-2010 (the “2002 Act”): once as a stand-alone objective (section 12(1)(b)) and again, in relation to the provision of ECN/ECS and associated facilities under the broader objective of the promotion of competition (section 12(2)(a)(iv)).

- encourage the continued efficient use of 900 MHz spectrum, pending the outcome, implementation and crystallisation of its broader spectrum release proposals, by having the spectrum currently attached to each of Vodafone and O2's current GSM 900 MHz licences used, during the interim period, to provide GSM-only services for which there is clear, existing, and substantial consumer demand at this point in time;
- in Section 2.4 of Document 11/11, ComReg set out its reasons why it did not agree that any short 'delay' in the award of liberalised 900 MHz spectrum would run contrary to this policy direction.

In addition, whilst ComReg notes that Vodafone and O2 arguably could have done more to migrate their respective GSM customers to 3G services and otherwise reduce their reliance upon their expiring GSM 900 MHz rights of use, this issue is not relevant to the question of the likelihood and extent of consumer disruption (and ComReg's other stated concerns) that would materialise if interim GSM 900 MHz rights of use were not granted in the current circumstances. Additionally, as was made clear in Consultation 10/71 and Document 11/11, the proposed issue of interim licences is not to reward Vodafone and O2, but to, amongst other things, address the real risks to consumer services and the safeguarding of existing competition in the mobile markets concerned until such time that ComReg can release liberalised spectrum in a manner which would not distort competition.

ComReg also rejects the view that its consultation process has been "*extraordinary, unnecessary and excessive*". As ComReg made clear in Document 11/11, the nature and length of ComReg's consultation process reflects both:

- the extensive and complex nature of the issues raised; and
- more recently, the need for ComReg to recalibrate and consult upon its proposals to take into account the major and earlier-than-expected development relating to 800 MHz spectrum availability, as well as the development regarding availability of Long Term Evolution ("LTE") equipment for the 1800 MHz band.

In relation to the first bullet point above, ComReg notes that some respondents have expressly pointed out and agreed that the overall consultation process has involved extensive and complex issues and developments. ComReg would add that, given the critical importance of the spectrum bands under consideration to the mobile industry in the State (a fact not disputed by H3GI or its consultants) and the effects that ComReg's decisions on same will have on competition and consumer outcomes over the next two decades, ComReg considers that its consultation process, including providing interested parties with appropriate opportunities to make submissions and representations, and express their views, is in keeping with ComReg's obligations of consultation and transparency, and is entirely appropriate. Moreover, ComReg notes that it continues to receive disparate views and proposals, which themselves have developed during the course of the consultation process, from interested parties.

In relation to the second bullet point above, ComReg notes H3GI does not give adequate weight to this factor in making its submissions in the present context. ComReg would also make the following points:

- but for the developments in the summer of 2010 which provided greater certainty as to 800 MHz availability in the State,<sup>19</sup> ComReg would have likely pressed on with its 900 MHz spectrum release proposals; and
- given the significance of this development and its bearing upon ComReg's 900 MHz deliberations (see, for example, the advice from independent consultants DotEcon regarding the benefits of a potential joint award<sup>20</sup> and views from several interested parties regarding the benefits of a "holistic approach" to spectrum release etc), ComReg considered it necessary to properly take this development into account and consult appropriately (see ComReg Information Notice 10/59 and Consultation 10/71). Indeed, ComReg notes that its proposal for a joint award of the 800 MHz, 900 MHz and 1800 MHz bands has been well received by most interested parties. For reasons previously set out, ComReg continues, subject to further consideration of materials put forward by interested parties, to see merit in a joint award of liberalised 800 MHz, 900 MHz and 1800 MHz rights of use. In these circumstances, it is appropriate for ComReg to put in place GSM 900 MHz interim measures that, amongst other things, facilitates such an approach, but which are also sufficiently flexible to be adapted to other broader spectrum release proposals (such as those which could result in the release of liberalised 900 MHz spectrum-use rights earlier than 2013).

In light of the above, ComReg rejects the claims by H3GI (including that ComReg has failed to promptly make a decision in respect of these issues, respect legal certainty and promote investment, contrary to its statutory obligations).

ComReg addresses the claim that "*the manner in which ComReg proposes to draft the interim licences seems to incentivise those undertakings in further "foot dragging"*" in the sections below on Licence Duration and Proportionality.

Finally, ComReg notes H3GI's view that it addressed, in its response to Consultation 10/71 (and particularly sections 6 to 13 inclusive), ComReg's other concerns identified in Consultation 10/71 (being those other than in relation to consumer disruption). ComReg notes that it provided extensive consideration and analysis of H3GI's response to Consultation 10/71 (including sections 6 to 13 inclusive) in Document 11/11 and, for the reasons set out in that document (and elaborated upon in this document to the extent that H3GI continues to raise such issues), ComReg considers that H3GI's arguments are wanting in a number of material respects.

Therefore, having considered the additional material put forward by H3GI and on the basis of:

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<sup>19</sup> See, in particular, Information Notice 10/59 and Consultation 10/71 and related documents

<sup>20</sup> See ComReg Documents 10/71a and Consultation 10/105a

- the reasons put forward by ComReg in Consultation 10/71;
- the responses received to Consultation 10/71;
- ComReg's consideration of said responses and its further analysis as contained in Sections 2.1 and 2.2 of Document 11/11; and
- ComReg's consideration of H3GI's submission to Document 11/11 (as set out above);

ComReg's final position is that the analysis and material before it support the implementation of the Interim Licence Proposal and the making of the Decision contained in Annex 2 of this document.

## **2.4 Interim Licence Duration and potential withdrawal of Interim Licences during the proposed term**

### *Views of Respondents*

ComReg received diverging views in relation to the proposed end date of interim licences (being 31 January 2013).

On the one hand, one respondent, Vodafone, submitted that the proposed setting of a specific expiry date, rather than the "conditions-based" approach suggested by it, has not been established by ComReg to be appropriate and necessary. Reasons cited by Vodafone in this regard include that:

- the imposition of a fixed expiry date is not possible in current circumstances, given some current uncertainty about the timing of 800 MHz availability;
- the adoption of a fixed expiry date is bad policy as it risks creating a situation where the conformity with a fixed expiry date is given priority over actual market conditions;
- furthermore, the inflexibility of a specific end date for interim licences is far greater than an end date contingent on fulfilment of necessary and objectively justified minimum requirements;
- appropriate safeguards can be put in place to remove the scope for perverse incentives, for example by delaying or frustrating transitional activities<sup>21</sup>; and
- in any event it is unclear whether, under most circumstances, there would actually be an incentive for existing licensees to seek to prolong the duration of interim licences.<sup>22</sup>

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<sup>21</sup> Vodafone cited the example that any condition associated with the completion of spectrum relocation/re-tuning by licensees could be abrogated where there were objective grounds to believe that one or more of the existing licensees were not making all reasonable efforts to expedite the process. Review by an expert independent third party of the efficiency of the spectrum re-location re-tuning measures undertaken by an interim licensee could for example be initiated in the event of potential undue delay in the completion of transition.

<sup>22</sup> In this regard, Vodafone stated that, given ComReg's current proposals to assign interim licences on a GSM-only usage basis, existing 900 MHz licensees would have strong incentives to take all measures within their control to expedite spectrum relocation and retuning activities to gain access as early as possible to liberalised new licences that would be allocated in the sub-1GHz and 1800 MHz bands. Vodafone considers that these incentives would far outweigh any potential benefit from prolonging the duration of unliberalised interim licences.



In addition, another respondent, O2, submitted that:

- the term is the minimum possible term ComReg could grant to avoid significant immediate disruption to consumers and competition;
- ComReg may be required to extend the interim licence post 31 January 2013 for a number of reasons, including lack of readiness of operators or a delay in Analogue TV Switch Off;
- For this reason O2 considers that it would be better if ComReg built in to the proposed Interim Licence Regulations the ability to extend the interim licences on specific, objectively justifiable grounds; and
- it noted, however, ComReg's statements to the effect that it will deal with the issue of extension if it arises (*"In the event that any difficulties or delays arise then ComReg can address the impact of such difficulties/delays and corresponding remedial measures at the relevant time and having regard to the best information available at the time"*) (Section 2.9.2).<sup>23</sup>

Finally, H3GI submitted that:

- the retention of the entire 900 MHz band for use by the incumbent operators for at least a further 20 month period is not in H3GI's view the shortest duration possible and practical and, as such, it is not appropriate as it lacks proper objective justification;
- the necessary transitional activities of Vodafone and O2 could be completed well in advance of 2013;
- such a duration fails to ensure the efficient management and use of spectrum, contrary to ComReg's statutory obligation pursuant to section 12(1)(b) of the 2002 Act;
- a licence duration of at least 20 months is excessive and that it is both possible and practical to carry out any necessary transitional activities well within this timeframe. It appears to H3GI that ComReg's Interim Licence Proposal including in particular, the mechanism for granting the relevant licences to Vodafone and O2, and their duration, unduly and disproportionately favours the interests of Vodafone and O2.
- it is also difficult to understand how ComReg's justification for the duration of the interim licences complies with paragraph 4 of Article 5(2) of the Authorisation Directive:  
*"Where Member States grant rights of use for a limited period of time, the duration shall be appropriate for the service concerned in view of the objective pursued taking due account of the need to allow an appropriate period for investment amortisation."*
- Vodafone and O2 have already recovered their investment costs during the 15 year duration of their current GSM licences.

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<sup>23</sup> In addition, O2 stated that it *"hereby puts ComReg on notice that it will rely on ComReg doing so appropriately, in a timely and reasonable manner."*



### *ComReg's Response*

ComReg has carefully considered these submissions and remains of the view that its position on the proposed duration of interim licences is objectively justified, proportionate, reasonable and appropriate. In this regard, ComReg notes:

- the Interim Licence Proposal is a measure designed, amongst other things, to safeguard existing competition in the mobile markets concerned and to eliminate probable serious disruption to consumer services that would otherwise arise until such time that ComReg can appropriately complete its decision-making on the broader spectrum release proposals;
- ComReg has proposed the current end-date of 31 January 2013 to reflect its understanding that Analogue Switch-Off (“ASO”) will occur in Quarter 4 of 2012<sup>24</sup> and that the 800 MHz spectrum band would, therefore, become available for use in early 2013. Whilst there are clearly a number of steps required to achieve ASO, on the basis of information currently before it, ComReg has no reason to believe that ASO would not occur in this timeframe. Moreover, to the extent that there could be a delay to 800 MHz availability, then ComReg considers that its stated position, as set out in Section 2.9.2 of Document 11/11<sup>25</sup>, would provide sufficient flexibility for ComReg to properly address such issues. Finally, ComReg notes that one respondent, O2, found ComReg’s stated position to be acceptable.
- Whilst the currently proposed end-date of 31 January 2013 would clearly facilitate the adoption of ComReg’s current broader spectrum release proposal (i.e. joint availability of liberalised 800 MHz, 900 MHz and 1800 MHz spectrum in 2013), it is critical to note that the Interim Licence Proposal does not prevent ComReg from adopting a broader spectrum release proposal that could result in availability of liberalised 900 MHz spectrum earlier than 2013, for instance, under the potential modification put forward by ComReg in Document 11/11. In that regard, ComReg refers to Article 3.3 of the Draft Decision (on page 95 of Document 11/11) and Article 3.3 of the Decision (see Annex 2) which specifically provides that ComReg would be able to shorten or amend the duration of interim licences granted (pursuant to Regulation 15 of the Authorisation Regulations) to facilitate liberalisation of rights of use of 900 MHz spectrum at a date earlier than January 2013, following a transparent and lawful process. For this reason, ComReg does not accept that the Interim Licence Proposal would definitely involve a duration of at least 20 months as submitted by H3GI.

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<sup>24</sup> See statement by the Minister for Communications, Energy and Natural Resources (“the Minister”) of 29 July 2010.

<sup>25</sup> “In the event that any difficulties or delays arise then ComReg can address the impact of such difficulties/delays and corresponding remedial measures at the relevant time” Section 2.9.2 at p38.

In light of the above, ComReg considers that its approach to licence duration provides reasonable balance between clarity and certainty (by setting a specific date) while also ensuring sufficient flexibility. Further ComReg is of the view that its flexible approach to the duration of interim licences (by having the ability to amend or shorten on objectively justified grounds) is consistent with Article 5(2) of the Authorisation Directive. In this regard, ComReg considers that the ability to shorten or amend the licence duration is appropriate in the context of ComReg's objective of facilitating its decision making on its broader spectrum release proposal and the potential release of liberalised 900 MHz spectrum earlier than 2013.

## **2.5 Promotion of Competition and Avoiding Distortions of Competition**

In this section ComReg sets out the views expressed by respondents on the area of competition generally. ComReg also sets out its response to those issues raised.

In Document 11/11, and in particular, Chapter 3 of that document, ComReg set out its reasoning as to why it considered its Interim Licence Proposal (i.e. Option 1 as presented in the Draft RIA in Document 11/11) to be the approach which best meets its statutory obligations in relation to the promotion of competition in the Irish mobile market. It is not intended to repeat those arguments in any great detail here. However, in summary, ComReg considered that its Interim Licence Proposal would:

- effectively eliminate the adverse effects on consumer services and competition that would otherwise likely occur in the event that Vodafone and/or O2 were not to obtain GSM 900 MHz rights of use in the period between licence expiry and proposed commencement of liberalised 800 MHz, 900 MHz and 1800 MHz licences in 2013;
- enable the full liberalisation of the 900 MHz bands to occur by early 2013 (and potentially earlier than 2013), while minimising any potential for competition to be distorted;
- in conjunction with ComReg's proposed preparatory licences and test licences, give all winners of liberalised rights of use between 12 - 18 months during which to roll out new networks and prepare for the launch of new services for consumers;
- facilitate ComReg's broader spectrum release proposals on fair, open and non-discriminatory terms; and
- best meet ComReg's objective of the promotion of competition and its regulatory obligations in relation to the awarding of spectrum rights of use, by minimising potential market distortions (such as by creating a first mover advantage for incumbent operators in the 900 MHz band).

In summary, ComReg considered that its Interim Licence Proposal represents the option which should deliver the greatest benefits to all stakeholders and safeguard existing competition in the market.

Two respondents, H3GI and Vodafone, provided comments on this matter in their responses to Document 11/11 and these are discussed below.

### 2.5.1 H3GI submission

In Part 2 of its response to Document 11/11, under the general heading ‘Distortion of Competition’, H3GI submits that the Interim Licence Proposal distorts competition contrary to:

- Article 4 of Directive 2002/77/EC (the “Competition Directive”);
- Recitals 6, 7 and 8 of Directive 2009/114/EC (the “GSM Amendment Directive”);
- Article 1(2) of Directive 87/372/EEC (the “GSM Directive”) as amended by the GSM Amendment Directive;
- Recital 14 of Commission Decision of 16 October 2009 on the harmonisation of 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications in the Community (the “2009 Decision”);
- Article 8 of Directive 2002/21/EC (the “Framework Directive”) as amended by Directive 2009/140/EC; and
- Section 12(1)(a)(i) of the 2002 Act.

Before ComReg considers in detail H3GI’s arguments made in support of the above assertion, it is worth first considering the context and relevance of each of these legal provisions. As will be seen below, ComReg is of the view that a number of these provisions are not necessarily applicable to the Interim Licence Proposal.

**Article 4 of the Competition Directive** provides that Member States should not grant exclusive or special rights of use of radio frequencies and that the rights of use of those frequencies should be assigned according to objective, transparent, non-discriminatory and proportionate criteria. ComReg does not consider that the Interim Licence Proposal involves the granting of a special right within the meaning of the Competition Directive (see discussion below in section 2.6) or the assignment of radio frequencies otherwise than in accordance with objective, transparent, non-discriminatory criteria (as discussed throughout this chapter and in Document 11/11 and Consultation 10/71) and so does not breach Article 4 of that directive.

**Recital 6 of the GSM Amendment Directive** clearly concerns competitive distortions that might result from “*the liberalisation of the use of the 900 MHz band*”. However, the Interim Licence Proposal does not concern the liberalisation of the use of the 900 MHz band and does not propose to liberalise interim licences. Instead, it concerns the award of “unliberalised” interim licences for the purposes, amongst other things, of eliminating the probable serious consumer disruption and safeguarding existing competition. As such, the proposal is not capable of raising the competition concerns identified in Recital 6 of the GSM Amendment Directive, and cited by H3GI in its submission.

**Recital 7 of the GSM Amendment Directive** suggests that Member States, when implementing the GSM Amendment Directive, should examine whether the implementation of the Directive could distort competition in the mobile markets concerned. However, ComReg notes that the Interim Licence Proposal is not concerned with the “implementation” of the GSM Amendment Directive as it does not propose authorising the use of UMTS technology in the 900 MHz spectrum band. ComReg notes that this interpretation is consistent with that of the UK Competition Appeal Tribunal (the “CAT”) in *Telefónica O2 UK Limited v Office of Communications*<sup>26</sup>. Indeed, ComReg also notes that Hutchison 3G UK Limited (an intervener in that Appeal) actively supported this interpretation. As such, the Interim Licence Proposal is, similarly, not capable of raising the competition concerns identified in Recital 7 of the GSM Amendment Directive, cited by H3GI in its submission.

**Recital 8 of the GSM Amendment Directive** suggests that any spectrum made available under the Directive should be allocated in a transparent manner and in such a way as to ensure no distortion of competition in the relevant markets. ComReg interprets this Recital as making a distinction between transposing the Directive (or making available spectrum under the Directive) on the one hand and licensing (or assigning) liberalised 900 MHz spectrum on the other. Again, ComReg notes that this interpretation is consistent with that taken by the CAT in *Telefónica*.<sup>27</sup> As the Interim Licence Proposal is not concerned with the assignment of liberalised 900 MHz spectrum, ComReg does not consider that it is capable of distorting competition within the meaning of Recital 8 of the GSM Directive.

ComReg would anyway reiterate its proposal to assess, after the conclusion of its proposed broader spectrum release, whether or not it is possible to implement earlier liberalisation of the 900 MHz band in light of the factual position at that time.

**Article 1(2) of the GSM Directive**, as amended by the GSM Amendment Directive, provides that:

*“Member States shall, when implementing this Directive, examine whether the existing assignment of the 900 MHz band to the competing mobile operators in their territory is likely to distort competition in the mobile markets concerned and, where justified and proportionate, they shall address such distortions...”*

For the reasons set out above, ComReg considers that the Interim Licence Proposal does not concern the implementation of the GSM Directive and so Article 1(2) is not applicable to the current proposal. Notwithstanding this, ComReg has at all times remained cognisant of the need to minimise and avoid unnecessary distortions to competition and considers that the Interim Licence Proposal is a necessary facilitating measure in order to ensure that ComReg’s later broader spectrum release process delivers the greatest benefits to all stakeholders and competition in the market, while minimising the risks of distortions to competition.

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<sup>26</sup> 7 October 2010, Case Number: 1154/3/3/10.

<sup>27</sup> See, for example, paragraph 88(iii).

**Recital 14 of the 2009 Decision** observes that “[D]ifferences in the existing national situations could result in distortion of competition” and that Member States have the tools to deal with these problems. ComReg assumes here that, in referencing this Recital, H3GI is linking this Recital to its argument that the existing assignment of “unliberalised” 900 MHz spectrum distorts competition, and is suggesting that Recital 14 somehow requires ComReg to license liberalised 900 MHz spectrum immediately after the proposed auction set out under its current broader spectrum release proposal. Although it is not even clear whether the term “differences in the existing national situations” is actually referring to transnational differences (normally the focus of a harmonisation directive) rather than to intra-national differences (as suggested by H3GI), ComReg notes that the 2009 Decision is clearly concerned with technical harmonisation rather than authorisation or licensing (see Recital 13).<sup>28</sup> It clearly distinguishes radio spectrum technical management from assignment and licensing procedures. As such, ComReg considers that the 2009 Decision is not concerned with the licensing procedures used by Member States, or the timing of those procedures, and it is not therefore appropriate to refer to this Recital in the context of the Interim Licence Proposal

**Section 12 of the 2002 Act**, which effectively transposes **Article 8 of the Framework Directive**, sets out ComReg’s objectives and includes the objective of promoting competition. In so far as the promotion of competition is concerned, Section 12 requires ComReg to take all reasonable measures which are aimed at ensuring that there is no distortion or restriction of competition in the electronic communications sector. Unlike the aforementioned legislative provisions which ComReg believes H3GI has incorrectly cited in the context of the Interim Licence Proposal, the provisions of Section 12 are clearly relevant to its proposal and ComReg has therefore always remained fully cognisant of the requirements of that provision. ComReg set out in detail in Chapter 3 of Document 11/11 why it considered the Interim Licence Proposal best meets its obligations in this regard and does not intend to reiterate those points in detail here. However, it has considered its reasoning once again below to the extent that this reasoning has been questioned by H3GI.

**Specific comments made by H3GI on competition generally**

In its submission, H3GI has raised the following issues under the general heading ‘Distortion of Competition’ to support its contention that, with its Interim Licence Proposal, ComReg has not met the above obligations in relation to competition. Although many of these arguments are overlapping in nature, ComReg considers each of them in turn.

As it did in its response to Consultation 10/71, H3GI argues that:

- The Interim Licence Proposal (or at least the part of the proposal dealing with the proposed duration of interim licences) confers a competitive advantage on

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<sup>28</sup> ComReg also notes that this interpretation accords with the views expressed by the CAT in *Telefónica*.

Vodafone and O2 “by preventing H3GI from having the benefit of entering the 900 MHz band for at least a further 20 months and consequently, stifling H3GI’s ability to compete effectively with Vodafone and O2”.

First, ComReg made clear in Document 11/11 and as noted in Section 2.1 above, no decision on the availability of liberalised 900 MHz spectrum has been made and a decision by ComReg to grant interim licences does not and should not be construed to mean that it could not adopt a broader spectrum release proposal that could result in the earlier release of liberalised spectrum in the 900 MHz band (such as in the manner proposed by H3GI or in some other manner).

In any event, ComReg notes that it addressed this issue in Document 11/11 and remains of the view that the above assertion overstates the effect of the Interim Licence Proposal on H3GI and on competition in the Irish mobile market. As noted in Document 11/11, ComReg believes that H3GI would not be in a position to reduce its reliance upon its existing roaming agreement with Vodafone to any great extent until it had planned, designed and implemented a 900 MHz network of sufficient scale. Whilst H3GI has recently submitted that it could roll out a UMTS 900 MHz (sic) in rural areas in 6 months, ComReg notes that it has previously indicated (for example, in its submission to Consultation 10/71) that it would take considerable time for it to plan, design and implement a 3G 900 MHz network.<sup>29</sup>

In addition, ComReg notes that H3GI is clearly of the view that no new entry will occur in the Irish market as a result of the proposed auction under ComReg’s broader spectrum release proposal and so it is the only competitor that should be considered by ComReg when considering its obligations under Section 12 of the 2002 Act. On this basis it essentially demands that ComReg amend the State’s entire policy towards liberalisation of 900 MHz spectrum for the perceived benefit of a single operator.<sup>30</sup> Clearly such an approach would run contrary to a number of ComReg’s statutory duties including that of the promotion of competition. Further, as noted previously, H3GI’s argument is based on the assumption that it would actually win 900 MHz spectrum in the proposed auction. This is of course not a foregone conclusion.

Finally, ComReg is of the view that the Interim Licence Proposal would meet its statutory obligations in relation to the promotion of competition by facilitating a proposal that would afford all existing operators and potential new entrants to the Irish mobile market an equal opportunity to obtain sub-1 GHz and 1800 MHz spectrum in a

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<sup>29</sup> In its response to Document 11/11 H3GI itself recognises that it would need to carry out considerable work in order to carry out this task, namely: site acquisition; site build; commissioning of base stations etc in the 900 MHz spectrum band that will require extensive radio planning and design work to accommodate 900 MHz; and rigging new antennas to deploy services. Given H3GI’s previous statements in its response to Consultation 10/71 and the possibility that some of these activities are likely to require planning permission and thus incur associated time delays, ComReg is of the view that H3GI’s assertion of rolling out a 900 MHz network in 6 months is optimistic, particularly if it intends to roll-out an UMTS 900 MHz network in a substantial proportion of the rural areas of Ireland.

<sup>30</sup> H3GI further argue that this would enhance competition in the market. However, no company can be the arbiter of whether a market is insufficiently competitive without action by the regulator to improve that company’s position. Competition issues are discussed further in chapter three.

competitive award process and begin offering advanced mobile services over that spectrum on a commercial basis from 2013 onwards (or earlier if possible under ComReg's earlier liberalisation proposal). The period between the proposed award process and commencement of commercial services could also be used by all winners of liberalised spectrum to prepare and ensure they are in a position to compete effectively from the commencement date. As noted previously, the GSM Amendment Directive affords ComReg discretion with regards to the exact timing of liberalisation of 900 MHz spectrum.

H3GI in its response to Document 11/11 asserts that the Interim Licence Proposal is:

- Discriminatory;
- Distorts competition by impairing its ability to compete and entrenching the market position of Vodafone and O2 to the detriment of competition; and
- Will have particular adverse affect on the provision of new and innovative services to customers, including mobile broadband.

ComReg notes that compliance with its non-discrimination obligation is considered in Section 2.6 below.

In relation to the second bullet, this issue was already raised by H3GI in its submission to Consultation 10/71. ComReg notes that the Interim Licence Proposal simply maintains the status quo in spectrum assignments for a limited period. As noted in Document 11/11, H3GI, on entering the market and subsequently, were offered "unliberalised" 900 MHz spectrum but chose not to avail of this spectrum, notwithstanding the fact that the GSM 900 MHz and 1800 MHz bands were, at the time, also considered by industry to be a natural future resource for 3G applications. For example, in June 1999 the UMTS Forum noted that the 900 MHz and 1800 MHz bands in Europe could be "*refarmed progressively in the long term when GSM use decreases*".<sup>31</sup> Instead, unlike all three other MNOs, H3GI chose to compete in the Irish market as a 3G-only MNO (a position which could also potentially put H3GI in a more advantageous position to utilise liberalised sub-1GHz spectrum compared to the existing GSM MNOs in the short-term, as it does not have any legacy GSM customers to service using 900 MHz spectrum). H3GI also decided to enter into a roaming agreement to use roaming on 2G services in areas where it has not built out sufficiently to provide services over 3G.

H3GI appears to be asserting that ComReg is somehow responsible for H3GI's failure to avail of 900 MHz spectrum when originally offered. However, it is arguable that, had H3GI chosen to avail of 900 MHz when it was originally offered, it would now be in a similar position to Vodafone, O2 and Meteor and would not have to rely on a national roaming agreement to any great extent if at all. ComReg, therefore, rejects the assertion that the Interim Licence Proposal distorts competition by impairing H3GI's ability to compete. It is, instead, arguable that H3GI's decision to forego 900 MHz

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<sup>31</sup> Page 47 of Report No.6 from UMTS Forum entitled "UMTS/IMT-2000 Spectrum", dated June 1999, available here: [http://www.three-g.net/3g\\_umts\\_spectrum.pdf](http://www.three-g.net/3g_umts_spectrum.pdf)



spectrum when originally offered may have impaired its ability to compete, if its ability to compete is indeed impaired. H3GI was offered the opportunity to avail of 900 MHz spectrum when its 3G licence was issued in 2002, at a time when it was clearly signalled that 900 MHz would likely be liberalised in the medium term for UMTS use.

H3GI is effectively demanding that ComReg should significantly amend its spectrum liberalisation policy to address H3GI's position alone. Instead, the Interim Licence Proposal is aimed at safeguarding existing competition as a whole rather than promoting the interests of a single competitor. In this regard, ComReg again refers to its duty to refrain from promoting the interests of individual competitors and instead focus on competition in the mobile market as a whole.

ComReg also believes that H3GI's assertion that the Interim Licence Proposal entrenches the market position of Vodafone and O2 ignores some important facts surrounding the proposal. The proposed interim licences are to be issued on an "unliberalised" basis and H3GI, despite its alleged disadvantage, currently has the largest number of mobile broadband subscribers.<sup>32</sup> In addition, H3GI, in its analysis, focuses exclusively on the effect of the proposal on its own immediate position and its analysis ignores the positive benefits of the proposal for competition in mobile markets generally from 2013 onwards, or, indeed, potentially earlier than January 2013. Also, ComReg notes that H3GI's argument ignores the fact that, as a 3G-only operator, it is arguably in a better position than the three GSM MNOs to take full advantage of the liberalisation of sub-1 GHz spectrum in the short-term, were it to win such spectrum in the proposed award process, as H3GI would not have to set aside 900 MHz spectrum to serve GSM customers. These are points which should not be ignored when considering the actual impact of the Interim Licence Proposal on existing and future competition in the Irish mobile market.

In relation to the third bullet, ComReg notes that it has addressed this issue in detail in Document 11/11 and in previous consultation papers, and does not consider it necessary or appropriate to address this once again.

H3GI is of the view that:

- The Irish mobile market is not competitive, basing its analysis on the asymmetries between the market shares of Vodafone and O2, when compared with Meteor, H3GI and the MVNOs. H3GI also asserts that ComReg has ignored the fact that competition is dynamic, so that the preservation of the *status quo* by definition harms competition; and
- This is compounded by [**Confidential Material Removed**] and H3GI's concerns in respect of delay.

In response to the above comments, ComReg would, first, note that it has no evidence before it to conclude that the retail mobile market in Ireland is not effectively competitive. Indeed, ComReg notes that H3GI, in its response to Consultation 09/17

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<sup>32</sup> See ComReg's latest Quarterly Report for Q4 2010 (ComReg Document 11/21, figure 3.3.9, page 41).



indicated that *“there is sufficient competition in the Irish mobile market to provide services to the customers of Vodafone, O2 or Meteor in the event that either of these operators was to lose or effectively lose its licence”*.<sup>33</sup> In addition ComReg notes that any assessment of competition based on market shares alone would clearly be insufficient for the purposes of Irish and EU competition law and indeed the Common Regulatory Framework.

Secondly, ComReg notes that H3GI’s analysis, again, ignores the strong position enjoyed by H3GI in the rapidly growing mobile broadband sector.<sup>34</sup> H3GI itself clearly alludes to the important role played by mobile broadband.

Thirdly, ComReg acknowledges that competition is dynamic, particularly in innovative sectors like electronic communications, and points out that it has never ignored and has always had cognisance of this fact when considering the appropriateness of the Interim Licence Proposal. However, ComReg rejects H3GI’s assertion that its proposal by definition harms competition. As noted in the discussion on State aid below, the present system of competition is retained pending the broader spectrum release. H3GI remains fully capable of competing for customers in Ireland and its current rights to use spectrum for 3G are unaffected by the proposed grant of GSM-only interim licences to Vodafone and O2. Moreover, the position of Meteor also remains unaffected.

Furthermore, H3GI’s analysis focuses on its own immediate position rather than on the effect of the proposal on competition in the mobile market as a whole. As noted previously, the Interim Licence Proposal is, amongst other things, aimed at safeguarding existing competition by preventing an immediate significant distortion of competition, as well as supporting the promotion of competition in Irish mobile markets as it would facilitate ComReg’s broader spectrum release proposal, which would encompass the awarding and subsequent making available of a large block of sub-1 GHz spectrum, thus facilitating the fair and competitive participation of all interested parties on an equal basis. In this regard, ComReg reiterates its position that H3GI’s proposal in response to Consultation 10/71 that ComReg administratively assign a single block of 900 MHz spectrum to H3GI does not achieve this objective, including ComReg’s other statutory objectives such as encouraging efficient use and ensuring effective management of radio frequencies.

H3GI submits that:

1. ComReg has sought to justify the Interim Licence Proposal on the basis that GSM only rights of use are being granted to Vodafone and O2 and as H3GI has never required GSM rights, competition cannot be regarded as being distorted;
2. ComReg fails to recognise that in implementing the Interim Licence Proposal and as a consequence of this decision, delaying the liberalisation of 900 MHz spectrum, ComReg is in fact hindering competition in the market; and

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<sup>33</sup> As published in ComReg Document 09/51s, page 11.

<sup>34</sup> In one year, between Q4 2009 and Q4 2010, there was a 27.1% increase in mobile broadband subscriptions. ComReg Document 11/21, figure 3.3.1, page 34.

3. H3GI is a 3G only operator and accordingly requires access to liberalised 900 MHz spectrum immediately in order to compete effectively. H3GI seeks to demonstrate this requirement as follows:
  - a. the Irish mobile market is saturated and therefore the main way in which H3GI can grow market share and compete is to take customers from operators with larger market shares;
  - b. to do this H3GI needs to be able to offer advanced mobile services;
  - c. in order to do this H3GI needs to have access to liberalised 900 MHz spectrum.

ComReg acknowledges that H3GI is a 3G-only operator. ComReg also acknowledges that, by virtue of choosing to be a 3G only operator and refusing previous offers of unliberalised 900 MHz spectrum, it now relies on a national roaming agreement with Vodafone in order to provide nationwide GSM coverage to its customers. However, H3GI now alleges that this situation requires ComReg to tailor its 900 MHz spectrum policy to suit H3GI. ComReg fails to see how seeking to promote and enhance the competitive position of a single operator would not be in breach of its statutory obligations. ComReg's Interim Licence Proposal is aimed at safeguarding existing competition as a whole rather than promoting the position of any one operator.

ComReg would note, once again, that it does not have any evidence to conclude that the mobile market is not effectively competitive. In addition, ComReg notes that symmetrical market shares are not a prerequisite for effective competition. Indeed, H3GI has itself noted that competition is dynamic. ComReg believes that interference by an *ex ante* regulator to artificially bring about greater market share symmetry could itself result in harmful interference with the competitive process. ComReg is also of the view that competition issues can inform the design of the proposed broader spectrum release process, for instance in the setting of appropriate spectrum caps.

H3GI then submits that:

- the market is characterised by incumbent operator historic advantages and a significant imbalance in spectrum allocation; and
- the Interim Licence Proposal confers an advantage on Vodafone and O2 as follows:
  - the proposed interim licence spectrum fee is approximately €2.5 million p.a.;
  - Vodafone and O2 will achieve revenue of in excess of €43 million p.a. and €33 million p.a. respectively as a result of the Interim Licence Proposal.

H3GI appears to be suggesting here that the fee for interim licences be set at a far higher level purely for the purposes of aligning them with the revenue streams of Vodafone and O2. It is noted that H3GI and their consultants have not set out in their submissions how they have calculated the annual revenue figures for Vodafone and O2, and ComReg is therefore not in a position to comment on the valuations. ComReg is of the view, however, that an approach to align the spectrum fees to the revenue streams of

Vodafone and O2 would not accord with any of its objectives under the Common Regulatory Framework.<sup>35</sup> Instead, ComReg believes that the fees should be set in accordance with the criteria as discussed in Chapter 4 of this document.<sup>36</sup> ComReg fails to see how what would amount to a punitive methodology for licence fee setting, would achieve the former objective and it is therefore not clear to ComReg the relevance of these estimated revenue figures. ComReg's views on the appropriate licence fees for interim licences are set out in Chapter 4 of this document.

In relation to compatibility with State aid law, please refer to the discussion under the Article 107 TFEU section below.

H3GI asserts that:

- The Interim Licence Proposal places it at a significant disadvantage and will cost H3GI in excess of **[Confidential Material Removed]** and unnecessary national roaming costs.
- As noted at section 4.2.1 of H3GI's consultant's report, ComReg's failure to immediately liberalise 900 MHz spectrum and refusal to assign the 900 MHz spectrum which is currently unassigned and available in Ireland, leaves H3GI as the only operator without 900 MHz spectrum and in need of a national roaming agreement in order to maximise coverage for its customers.
- The burden of the cost of H3GI's roaming agreement with Vodafone is large **[Confidential Material Removed]** and will continue to increase, as traffic continues to move away from voice to data.
- ComReg's decision to delay the availability of liberalised 900 MHz spectrum will result in an increase in H3GI's cost base, so as to distort competition in the Irish mobile market. H3GI cites its consultant's report in support of this position. H3GI's consultants assert that this additional cost prevents H3GI from passing the equivalent value to consumers in the form of additional value-added services, increased innovation and lower prices. Such pricing and services would increase H3GI's competitiveness and maximise benefits to all users of mobile services in Ireland through increased price and service competition, whether an H3GI customer or not.
- **[Confidential Material Removed]** Again H3GI rely on their consultant's report in this regard.

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<sup>35</sup> In this regard, ComReg notes that the European Commission recently referred France and Spain to the European Court of Justice and instigated the first step in legal proceedings against Hungary, because of its view that these countries' taxes on the turnover of telecoms operators may not be compatible with European Union law. See, for example, Cullen International Update – March 2011:

[http://www.cullen-international.com/report/5511/c68965#\\_Commission\\_refers\\_Spain](http://www.cullen-international.com/report/5511/c68965#_Commission_refers_Spain)

<sup>36</sup> Being to:

- ensure the optimal use of the radio frequency spectrum;
- ensure that any such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives of ComReg as set out in section 12 of the 2002 Act; and
- in a manner which is not incompatible with relevant provisions under the EU Treaties.

- H3GI's consultant's report asserts that the delay in the liberalisation of, and access to, currently unallocated 900MHz spectrum until 2013 impacts consumers directly and distorts competition in the Irish mobile market. Moreover, it prevents H3GI competing on an equal basis with other Irish MNOs and therefore decreases the benefits of competition to Irish consumers with regard to lower prices and greater innovation [Confidential Material Removed]. The total impact of ComReg's decision to unnecessarily delay access to 900MHz, in financial terms alone, to H3GI is [Confidential Material Removed], of which [Confidential Material Removed] is in direct transfer payments to Vodafone in terms of unnecessary roaming costs and [Confidential Material Removed].
- ComReg's decision to delay access to 900MHz spectrum (in particular that which is not already allocated) thus directly harms the interests of both H3GI and all consumers of voice and data mobile services in Ireland by reducing H3GI's ability to offer competitive pricing and new and innovative services, entrenches the unfair competitive advantage granted to Ireland's other mobile network operators, and runs contrary to both the EU Directive 2009/114/EC and ComReg's stated aim of ensuring that there is no distortion or restriction of competition in the electronic communications sector.
- In granting the interim licences ComReg will place H3GI at a significant competitive disadvantage by hindering its ability to compete effectively with the incumbent operators. In so doing, ComReg is acting in direct contravention of its obligation to act in a neutral manner.

It is noted that H3GI and their consultants have not set out in their submissions how they have calculated the unnecessary roaming costs and [Confidential Material Removed] estimates and ComReg is therefore not in a position to substantiate these figures.

Each of the points listed above have already been raised by H3GI in response to Consultation 10/71 and addressed by ComReg in Document 11/11 so ComReg does not consider it appropriate or necessary to address them in any great detail as they do not raise any new concerns. However, ComReg would make the following observations.

ComReg notes that H3GI's arguments in relation to future cost are based on the assumption that it would obtain 900 MHz spectrum in any future award. This is of course not a foregone conclusion.

Although H3GI and its consultants have given no transparency as to how they have arrived at the above figures, ComReg believes (based on H3GI's previous submission to Consultation 10/71, referred to above) that H3GI would not be in a position to mitigate its roaming costs in their entirety very quickly following any proposed award process, but would instead require an extended period of time to build out the required 900 MHz network. ComReg does not believe that H3GI and its consultants have taken this factor into account and are likely therefore to have overstated the costs to H3GI of the proposal. Instead, H3GI and its consultants appear to be suggesting that H3GI's roaming costs would be mitigated in their entirety were (1) ComReg to liberalise 900

MHz spectrum immediately following its proposed auction in 2011 and (2) were H3GI to win 900 MHz spectrum in that proposed auction.

ComReg also notes that the rates agreed with Vodafone under the national roaming agreement and the decision to focus primarily on 3G services were clearly commercial decisions taken by H3GI and not a direct result of ComReg measures. ComReg rejects any suggestion that it is somehow responsible for H3GI's past commercial decisions. Again, H3GI is, perhaps understandably, focusing on its own situation rather than on the benefits to competition in the mobile market as a whole. As noted previously, ComReg is obliged to promote competition as a whole rather than the interests of a single operator.

Finally, ComReg is concerned by the level of subjectivity expressed by H3GI's consultants in the following sentence:

*“ComReg's decision to delay access to 900MHz spectrum (in particular that which is not already allocated) thus directly harms the interests of both H3GI and all consumers of voice and data mobile services in Ireland by reducing H3GI's ability to offer competitive pricing and new & innovative services, **entrenches the unfair competitive advantage granted to Ireland's other mobile network operators**, and runs contrary to both the EU Directive 2009/1114/EC and ComReg's stated aim of `ensuring that there is no distortion or restriction of competition in the electronic communications sector.”*

As noted above, H3GI finds itself in the position it is currently in by virtue of its own commercial decision making and ComReg strongly rejects any suggestion that it is somehow responsible for this, or that its licensing policy in the past has given an “unfair competitive advantage” to any mobile operator. ComReg would also remind H3GI that it has no convincing evidence to demonstrate that the Irish mobile market is not currently effectively competitive.

H3GI then asserts that:

- In justifying the Interim Licence Proposal as the preferred option in relation to minimising the distortion of competition it is not appropriate for ComReg to rely on the theoretical possibility of new entry to justify delay in liberalising 900 MHz spectrum;
- Entrant concerns can only properly be relied upon by ComReg where it has sufficient evidence that new entry will occur;
- Accordingly, ComReg's proposed approach places a premium on potential market entry at the expense of real market competition;
- ComReg ignores the important role played by H3GI in encouraging competition;
- While H3GI has built its market share to 6.2% in the overall mobile market (including mobile broadband subscriptions), this is in no way comparable to the significant market shares currently held by the incumbents. In the current economic climate, the likelihood of further market entry is low;

- In justifying the Interim Licence Proposal on the basis of encouraging new entry, ComReg has failed to recognise that, rather than distorting competition, early liberalisation of 900 MHz would allow the existing smaller market players (who are already struggling to build market share) to compete more effectively with the entrenched positions of the incumbents and thereby encourage competition in the market;
- The Interim Licence Proposal will only serve to safeguard the existing lack of competition in the Irish mobile market; and
- ComReg should take into account the positive impact of H3GI on competition in the Irish mobile market and the adverse impact of the Interim Licence Proposal and the related decision to delay availability of liberalised 900 MHz spectrum which will further distort the ability of H3GI to effectively compete with the incumbent 2G operators to the detriment of competition and consumers.

ComReg notes that the above arguments have been raised by H3GI and considered by ComReg previously (either in this paper or in Document 11/11) and does not consider it appropriate or necessary to consider them in any detail once again. However, ComReg would make the following observations.

ComReg, of course, recognises and welcomes the role played by H3GI in the Irish mobile market, in encouraging competition between the MNOs and the level of investment made by it to-date.

At the same time, ComReg notes that H3GI demands that ComReg afford it some sort of special status as being the key manifestation of competition in the Irish mobile market. H3GI also demands that ComReg simply refuse to take into account or facilitate the possibility of new entry into the Irish mobile market. Such an approach would clearly run contrary to ComReg's statutory obligations and the competitive reality in the Irish mobile market. ComReg is required to promote competition as a whole rather than any individual competitor which requires it to take account of both actual and potential competition in its decision making in order to adhere to its statutory objectives. For the above reason, ComReg rejects H3GI's assertion that the Interim Licence Proposal places a premium on potential market entry at the expense of real market competition and also notes that this assertion ignores the benefits of the Interim Licence Proposal to safeguarding existing competition as a whole and the possibility under ComReg's broader spectrum release proposal for earlier 900 MHz liberalisation.

H3GI's assessment of market power in the Irish market on the basis of market shares alone is clearly insufficient for the purposes of Irish and EU competition law and the Common Regulatory Framework, and ComReg has no evidence before it to allow it to conclude that the Irish mobile market is not effectively competitive. Indeed ComReg notes that the relative market shares referred to by H3GI mask its strong position in the mobile broadband sector.<sup>37</sup>

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<sup>37</sup> See ComReg's latest Quarterly Report for Q4 2010 (ComReg Document 11/21, figure 3.3.9, page 41).

ComReg notes that H3GI incorrectly asserts that ComReg at page 46 of Document 11/11 states that the retail mobile communications market in Ireland is characterised by high barriers to entry and expansion. ComReg has not made such a statement anywhere in Document 11/11.

ComReg is of the view that the proposed broader spectrum release award is likely to have a major impact on competition whereas the Interim Licence Proposal is a facilitating measure that will safeguard existing competition.

Finally, ComReg notes and rejects H3GI's assertion that ComReg does not acknowledge and take cognisance of the positive impact of H3GI on competition in the Irish mobile market. However, ComReg cannot and should not place the interests of any one operator over the interests of the market as a whole and believes that the Interim Licence Proposal is the most objective, proportionate and non-discriminatory means of achieving its objectives in this regard (see discussion below).

Finally, H3GI submits that:

- ComReg's continued reference to the fact that H3GI declined to accept its offer of 2G 900 MHz spectrum is disingenuous. H3GI declined the offer of 2G 900 MHz spectrum because at the relevant time, there was no indication that 2G 900 MHz spectrum would be liberalised for 3G use. Had H3GI accepted 2G 900 MHz spectrum, H3GI would not have been in a position to use this spectrum. It is puzzling to H3GI that ComReg should propose a course of action that would not result in the efficient use of spectrum, contrary to ComReg's statutory obligation under section 12(1)(b) of the 2002 Act.

ComReg has commented on this matter in a number of places in this and other documents and believes that H3GI's comment above ignores the fact that H3GI made a conscious commercial decision to enter the Irish market on a 3G-only basis and it "*would not have been in a position to use this spectrum*" as a result of that decision rather than as a result of any measure taken by ComReg.

#### 2.5.2 Vodafone submission

While being generally in agreement that the Interim Licence Proposal is essential to safeguarding competition in the Irish mobile market, Vodafone maintains its view that ComReg has not effectively established that Option 3 (i.e. Vodafone's proposal as was assessed in the Draft RIA whereby interim licences would be issued on a liberalised basis to the three existing GSM operators) would materially distort competition in the market, or that any such distortion of competition would outweigh the benefits of this potential approach. In this regard, see Chapter 3 for ComReg's regulatory impact assessment of each option.

ComReg notes that Vodafone has not provided any evidence to suggest that its earlier conclusions on this matter were incorrect. ComReg maintains its position that the

situation in the UK<sup>38</sup> is quite different to that in Ireland and there are obvious and significant risks of competitive distortion were ComReg to liberalise the proposed interim licences.<sup>39</sup> Vodafone has made no attempt to adduce evidence to support its suggestion that competition in the Irish market would not be distorted, but merely asserts that ComReg must prove otherwise.

ComReg again notes that the award of liberalised interim licences would go beyond what is necessary to address the stated objectives of the Interim Licence Proposal, and would therefore breach the principle of proportionality.

Finally, Vodafone suggests that the award of liberalised interim licences would be more closely aligned to the intent of the GSM Amendment Directive. However, ComReg would point out again that it has discretion under the Directive with regards to the exact timing of liberalisation of 900 MHz spectrum and the Interim Licence Proposal is not intended to implement the GSM Amendment Directive. In addition, ComReg notes that Vodafone's assertion ignores the clear intent of, and safeguards built into, the Directive to avoid distortions of competition caused by existing 900 MHz spectrum asymmetries following liberalisation.

On this basis, ComReg does not consider it appropriate to amend the Interim Licence Proposal in this regard.

## **2.6 Article 106 / 107 and 3(1)(b) TFEU and 4(3) TEU**

In Document 11/11 ComReg expressed the view that the Interim Licence Proposal does not infringe the State's obligations under Article 106 of the Treaty on the Functioning of the European Union ("TFEU"), breach the EU State aid rules in Article 107 TFEU or breach the obligations conferred on it under Article 3(1)(b) TFEU and Article 4(3) of the Treaty on European Union ("TEU").

H3GI has submitted that that the Interim Licence Proposal distorts competition contrary to *inter alia*:

- Article 106(1) TFEU;
- Article 107(1) TFEU (State aid);
- Article 3(1)(b) TFEU; and
- Article 4(3) TEU.

### *2.6.1 Article 106 TFEU*

In its response to Document 11/11, H3GI repeats its claim that the interim licences violate Article 106 (1) TFEU and Article 4 of Directive 2002/77/EC. Such a claim alleges that the interim licences would confer special rights on Vodafone and O2

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<sup>38</sup> In its response to Document 11/11 Vodafone suggested that ComReg follow the advice given by Ofcom to the UK government to liberalise 900 MHz spectrum in the hands of current licensees.

<sup>39</sup> See Chapter 3 for further discussion of this matter.



because they are the only operators to benefit from a spectrum award under the interim licence scheme.

ComReg will first respond to the alleged claim of a violation of Article 106 (1) TFEU. Pursuant to the literal wording of Article 106 (1) TFEU, as confirmed consistently by the applicable case law of the European Court of Justice (“ECJ”), there is no doubt that Article 106 (1) cannot apply in isolation and must necessarily apply in conjunction with the violation of another provision of the Treaty. However, H3GI does not indicate which other provision of the Treaty would be violated as a result of the existence of such alleged special rights. Therefore, H3GI does not demonstrate how, from a legal perspective, the interim licences would infringe Article 106 (1) TFEU.

ComReg notes that even if the Interim Licence Proposal was to constitute the granting of a special right within the meaning of Article 106 TFEU (a finding which ComReg would dispute), it does not consider that the proposal is contrary to the rules contained in the Treaties and, in particular, those rules provided for in Article 18 and Articles 101 to 109 TFEU. Although H3GI has separately asserted that the proposal breaches Articles 107 and 3(1)(b) TFEU and Article 4(3) TEU, ComReg, for the reasons set out in the following sections, does not believe that these provisions of the Treaties would be breached by the proposal.

ComReg will now consider the claim that the interim licences violate Article 4 of Directive 2002/77/EC. Article 4 of Directive 2002/77/EC provides, inter alia, that Member States shall not grant exclusive or special rights of use of radio frequencies for the provision of electronic communications services. Under Article 1(6) of that directive ‘special rights’ are defined as:

*“rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area:*

*(a) designates or limits to two or more the number of such undertakings authorised to provide an electronic communications service or undertake an electronic communications activity, **otherwise than according to objective, proportional and non-discriminatory criteria, or***

*(b) confers on undertakings, **otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same electronic communications service or to undertake the same electronic communications activity in the same geographical area under substantially equivalent conditions”***

According to H3GI, the grant of interim licences amounts to the grant of special rights because they are not granted in accordance with objective, proportionate and non-discriminatory criteria. As explained in section 2.7.1 of Document 11/11, ComReg does not believe that the grant of interim licences involves the granting of special rights as defined in Article 1(6) because the proposed interim licences are to be granted in accordance with objective, proportionate and non-discriminatory criteria which operators other than Vodafone and O2 clearly do not satisfy (Meteor might satisfy this

criteria but for its GSM licence expiry date not arising until 2015). The fact that H3GI does not meet the criteria for the interim licences does not mean that such criteria are not objective, proportionate and non-discriminatory. H3GI's response to Document 11/11 does not raise any new issues. Compliance with the principle of objectivity, proportionality and non-discrimination was already discussed at length in the Consultation 10/71 (sections 3.2.4 to 3.2.6) and in Document 11/11 (sections 2.5 and 2.6), and again is discussed and set out in this Chapter.

Finally, on page 13 of its response to Document 11/11, H3GI rejects the suggestion by ComReg in section 2.7.1.2 of Document 11/11 that the Interim Licence Proposal is a "*necessary and temporary step*" to allow effective competition between all interested parties for the long term award of a large quantity of spectrum. H3GI also disagrees with ComReg's view that any assessment as to the existence or absence of special rights must also "*take into account the broader context within which the Interim Licence Proposal has arisen*". ComReg is of the view that H3GI has misinterpreted ComReg's position in this regard. The Interim Licence Proposal is, in the first place, a necessary and temporary step, amongst other things, to eliminate probable serious consumer disruption and to safeguard existing competition in the mobile market. In addition, however, ComReg should not ignore its broader radio spectrum responsibilities under the Common Regulatory Framework and is proposing to issue those interim licences - which are capable of being amended in the event of earlier liberalisation of the 900 MHz band proving to be possible - in a manner that is designed to facilitate and not to unduly constrain its deliberations on, and implementation of, its broader spectrum release proposals. In this context, the broader spectrum release proposal is relevant to any assessment of whether the Interim Licence Proposal involves the granting of rights of use otherwise than in accordance with objective, proportional and non-discriminatory criteria, i.e. the grant of special rights.

For the above reasons, ComReg does not consider that the interim licenses violate Article 106 TFEU or Article 4 of Directive 2002/77/EC.

#### 2.6.2 Article 107 TFEU (State aid)

H3GI remains of the view that:

- The Interim Licence Proposal and associated delay in making 900 MHz spectrum available, if implemented without the prior approval of the European Commission, will amount to illegal State aid to each of Vodafone and O2 in breach of Article 107 TFEU.
- As regards the criterion of State resources, H3GI argues (i) that ComReg has incorrectly equated intervention by the State or through State resources solely with waiver of fees, (ii) that the failure of ComReg to obtain a licence fee which reflects the true market value of the rights awarded constitutes State aid and (iii) that ComReg's proposal will result in a significant financial burden being placed on the State, including costs associated with the delay in making available more valuable liberalised 900 MHz spectrum, associated higher licence fees which could be obtained in respect of liberalised 900 MHz spectrum, higher revenue

from licence fees imposed on Vodafone and O2 to reflect market value, and foregone revenue/GDP growth due to delay in liberalisation.

- As regards the criterion of selectivity, H3GI argues (i) that ComReg is wrong to limit consideration of the comparable legal and factual situation solely by reference to the provision of 2G services in Ireland on the ground that this is artificial and leads to undue exclusion of H3GI which competes with Vodafone and O2 for customers, (ii) that the interim licence proposal favours Vodafone and O2 by preserving their competitive advantage over other operators so as to distort competition in the market, and (iii) that it is insufficient for ComReg to seek to justify the interim licence proposal by reference to a “catch-all” general system of licensing.
- As regards the criterion of distortion of competition, H3GI argues (i) that the effect of the Interim Licence Proposal will be to discriminate unduly against H3GI, (ii) that Vodafone and O2 will be given guaranteed access to 900 MHz spectrum while H3GI must compete using more expensive 3G spectrum and technologies, making it more difficult for it to do business in comparison with its rivals and (iii) that Vodafone and O2 will be able to avail of the 900 MHz spectrum at a price well below the open market rate that is likely to be realised in an open competition and thus benefit from lower operating and investment costs.

ComReg is of the view that:

H3GI has confused the three criteria and has mixed up notions of State resources, selectivity and distortion of competition.

As regards the criterion of State resources, in Document 11/11, ComReg made the point that the State must forego some income from the grant of licences that it would otherwise receive in order for this to be considered as an intervention through State resources. As such, the mere grant of a licence does not engage Article 107 TFEU. Even if the licence may be regarded as the grant of a State resource, the decision to adopt an interim regime as opposed to an immediate open competition for liberalised 900 MHz spectrum is itself not a matter that falls within Article 107 TFEU.

Rather, there must be a waiver of fees or income which is properly due. H3GI’s argument rests on the premise that the amount properly due must be the “market value” of the licences. This contention is wrong. First, there is no “market value” applicable in the grant of a licence to relevant licensees, since no market mechanism applies to determine the value of the licences. Secondly, the special circumstances of the interim licences must be taken into account. While the General Court and the Court of Justice of the European Union acknowledged in the *Bouygues* case that a mobile telecommunications licence has an economic value, the determination of that value must be made in the context of the general European Community mobile telecoms legislative scheme which requires *inter alia* objective, non-discriminatory and transparent treatment in the award of rights to radio spectrum, taking into account the need to maximise benefits to users, ensure optimum utilisation of scarce resources and facilitate the development of competition. In particular, therefore, the fees payable for the interim licence should approximate to fees already payable by direct competitors.

The general fee system for 2G operators has been in place since 1996 and remains applicable to Meteor (whose GSM licence does not expire until 2015). It is therefore appropriate to use that same fee system for the interim licences which ComReg proposes to grant to Vodafone and O2. i.e. based upon the existing fees for the GSM 900 MHz licences, updated to current day values, as discussed in Chapter 4 of this document.

H3GI's contention that State aid is granted by reference to foregone fees from bringing forward the liberalisation of 900 MHz spectrum and increased GDP following liberalisation are wrong. Even if the State could attract more revenue by following a different course of action that does not amount to the State using those foregone resources to aid Vodafone and O2.

As regards the criterion of selectivity, H3GI conflates the issues of selectivity and distortion of competition, which must be separately considered for State aid purposes. Selectivity requires that an advantage is granted to one person that is not granted to another person who is in a comparable legal and factual situation. Distortion of competition must be caused by that selective grant.

H3GI may be in competition with Vodafone and O2 for customers, but it is not in a comparable legal and factual situation. ComReg is proposing to issue interim licences in the 900 MHz band for 2G services only pending the finalisation of the broader spectrum release proposals. The only persons who are in a comparable legal and factual situation in the light of that policy decision are the current providers of 2G services who are in a position to continue providing such services, which is limited to Vodafone, O2 and Meteor and does not include H3GI. Therefore, the issue of selectivity is restricted to ensuring that no selective advantage is granted to Vodafone and O2 as compared to the treatment of Meteor.<sup>40</sup> It is only if there is a selective grant for Vodafone and O2 that one would then examine whether that would cause a distortion of competition affecting other mobile network operators, including H3GI. However, since no selective advantage is to be granted to Vodafone and O2, the issue of distortion of competition does not arise for consideration.

As regards the criterion of distortion of competition, H3GI's arguments are principally aimed at the adoption of the system of interim licences for Vodafone and O2 rather than any advantage granted to them out of State resources. In any event, ComReg does not consider that the issue of the interim licences will distort competition with H3GI. On the contrary, the present system of competition is retained pending the finalisation of the broader spectrum release proposals. H3GI remains fully capable of competing for customers in Ireland and its current rights to 2.1GHz spectrum to provide 3G services are unaffected by the grant of the interim licences to Vodafone and O2. Moreover, the position of Meteor also remains unaffected.

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<sup>40</sup> Section 2.5, of Document 11/11 noted that, "*the Interim Licence Proposal is open to Vodafone and O2, and would have been extended to Meteor also, had its 900 MHz licence also been about to expire with similar imminence*".

### 2.6.3 Article 3(1)(b) TFEU and 4(3) TEU

Based on the preceding discussion in this chapter, ComReg is of the view that no new evidence is before it to suggest that ComReg's conclusions on these provisions set out in Document 11/11 were incorrect. Absent any clearly identified breach of the EU State aid provisions, the GSM Amendment Directive, the other legislation under the Common Regulatory Framework, or the 2002 Act, ComReg maintains the view that it is not appropriate to refer to a breach of Article 3(1)(b) TFEU and/or Article 4(3) TEU. ComReg is of the view that H3GI has identified no breach by ComReg capable of engaging Article 3(1)(b) TFEU and/or Article 4(3) and it is therefore circular to rely on these provisions in isolation.

## 2.7 Non-discrimination

In this section ComReg sets out some of the views expressed and issues raised by respondents in relation to non-discrimination and its response to these.

In Section 2.5 of Document 11/11, and in Section 3.2.5 of Consultation 10/71, ComReg set out its reasoning as to why it considered its Interim Licence Proposal is non-discriminatory. Save to the extent that it is necessary or appropriate to clarify or elaborate on those views in response to the issues raised by respondents, ComReg does not repeat those views here.

### 2.7.1 H3GI submission

In Part 4 of its response to Document 11/11, H3GI submits that the Interim Licence Proposal is discriminatory, and contrary to:

- Article 4 of Directive 2002/77/EC (the "Competition Directive");
- Recital 14 of Commission Decision of 16 October 2009 on the harmonisation of 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications in the Community (the "2009 Decision");
- Articles 5 and 7 of the Authorisation Directive as amended by Directive 2009/140/EC;
- Article 8 and 9 of the Framework Directive as amended by Directive 2009/140/EC; and
- Regulations 9(4) and 11(3) of the Authorisation Regulations; and
- Regulation 23 of the Framework Regulations.

ComReg notes that H3GI seeks to rely on the Authorisation Directive and the Framework Directive as amended by Directive 2009/140/EC and sets out its own consolidation of extracts thereof in an annex to its submission. As ComReg has noted previously, Directive 2009/140 has not yet been transposed in Ireland and the date for its transposition has not yet passed. Accordingly, while ComReg will consider materials submitted to it and make its decisions consistent with, and being cognisant of, these

directives, it also does so bearing in mind that Directive 2009/140/EC is not yet binding law in Ireland.

Before ComReg considers H3GI's supporting arguments in detail, it believes it is worth first considering the context of each of the statutory provisions referred to by H3GI. As will be seen below, ComReg is of the view that a number of these provisions are not necessarily applicable to the Interim Licence Proposal.

**Article 4 of the Competition Directive** is considered above in Section 2.5.

**Recital 14 of the 2009 Decision** is, as H3GI is aware, a recital of the circumstances and considerations giving rise to the making of the Decision. While recitals are often relied on to aid in the construction of legislative instruments, ComReg observes that this recital does not in itself purport to apply any obligation capable of being breached.

**Article 5 of the Authorisation Directive** is a multifaceted provision and H3GI has not particularised how in its view the Interim Licence Proposal breaches this article *vis à vis* discrimination. ComReg assumes that H3GI is referring to the requirement to adopt open, transparent, non-discriminatory and proportionate procedures in the granting of rights of use of radio frequencies in accordance with Article 9 of the Framework Directive. Accordingly, ComReg addresses this issue in that context below.

**Article 7 of the Authorisation Directive** sets out the procedure where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies or whether to extend the duration of existing rights of use. ComReg believes that it has and is adhering to the procedure set out in Article 7.1.

The issues arising in relation to this article are considered in the section relating to specific comments made by H3GI relating to non-discrimination below.

**Article 8 of the Framework Directive** is addressed to the Member States and is in large measure transposed by Section 12 of the Act of 2002.

**Article 9 of the Framework Directive.** ComReg notes that the only significant reference to non-discrimination, that appears to be relevant in the context of the instant matter, occurs in Article 9.1 and is to the effect that Member States shall ensure that the assignment of spectrum will be based on *inter alia* non-discriminatory criteria. As this appears to be transposed by the national implementing legislation it is considered in that context.

**Regulation 9(4) of the Authorisation Regulations**

**Regulation 11(3) of the Authorisation Regulations**

**Regulation 23 of the Framework Regulations**

The three provisions above require ComReg to act *inter alia* on the basis of non-discriminatory criteria in granting licences and ensuring the efficient use of spectrum. ComReg is of the view that the criteria it has applied in relation to the Interim Licence Proposal are non-discriminatory as set out in Document 11/11 and in this document.

**Specific comments on discrimination**

In its submission in response to Document 11/11 H3GI asserts the following:

- ComReg has failed to recognise that H3GI is different to Vodafone and O2 in that H3GI is a 3G only operator and accordingly requires access to liberalised 900 MHz immediately in order to effectively compete.
- ComReg is incorrect in suggesting that the proposed delay of liberalisation affects all operators equally. Rather, the delay places H3GI at a significant competitive disadvantage by hindering its ability to compete effectively with the incumbent operators in the 900 MHz band. ComReg is in direct contravention of its obligation to *act in a neutral manner*.
- ComReg's statement that H3GI is not being denied anything it could lawfully have used until 2013 is entirely self-serving and assumes that its policy decision to wait until that time to provide access to liberalised spectrum is correct and justified in accordance with ComReg's statutory functions.
- For the reasons set out above and below, H3GI does not believe that delaying liberalisation of the 900 MHz band until 2013 promotes competition, is objective, proportionate or ensures the efficient management and use of spectrum. In relation to ComReg's statement that "*as the Interim Licence Proposal would be limited to GSM-only, it cannot be said to be discriminatory vis-à-vis H3GI (or any other party)*", ComReg fails to take account of the competitive harm its interim licence proposal has on H3GI.
- Competitive harm will be caused to H3GI both by:
  - ComReg's decision to grant an interim licence to Vodafone and O2 on a GSM only basis; and
  - ComReg's decision to delay the availability of liberalised 900 MHz.
- H3GI is not interested in GSM-only 900 MHz spectrum between May 2011 and January 2013. It is interested in the early availability of liberalised 900 MHz spectrum.

To the extent that the above points relate to non-discrimination they are addressed below, however, to the extent that they relate to other matters, such as competition, they are dealt with elsewhere in this document.

ComReg notes that H3GI seems to have moved from its former position of suggesting that it be given an immediate administrative grant of rights of use in respect of liberalised spectrum - which, in ComReg's view, would have been clearly discriminatory against new entrants - to a position that it is now proposing that ComReg issue liberalised licences which will come into effect immediately on completion of ComReg's broader spectrum release process.

Implicit in this alteration of position on behalf of H3GI appears to be an acceptance that interim licences constitute acceptable measures at least in the period from the expiry of

Vodafone's and O2's current 900 MHz licences until the assignment of longer term rights of use on completion of ComReg's current broader spectrum release process.<sup>41</sup>

ComReg reiterates that it has not made a decision to delay the availability of liberalised spectrum to January 2013. Rather, it is proposing to issue interim licences - which are capable of being amended in the event of earlier liberalisation proving to be possible - in a manner that is designed to facilitate and not to unduly constrain its deliberations on, and implementation of, its broader spectrum release proposals.

ComReg has however, contrary to H3GI's assertions, fully recognised that H3GI is differently situated to Vodafone and O2 in the current market.

ComReg is not, at this time, in a position to know which operators will win spectrum, much less what blocks of spectrum any operator will hold. To take an example, it is theoretically possible, although very unlikely, that either Vodafone or O2, or both, will not win any 900 MHz spectrum rights. If this were to occur it is unlikely to be proportionate to require Vodafone and/or O2 to turn off their 900 MHz GSM network on the day the result of the broader spectrum release process becomes known, as to do so would have the potential to cause serious consumer disruption with no countervailing benefits to the winners of such rights of use of spectrum, in circumstances where such winners would not automatically have equipment deployed.

Accordingly, while ComReg remains open, as previously indicated, to evaluating the potential for earlier liberalisation once the result of the currently-proposed broader spectrum release process is known, it is of the view that it is not possible or appropriate, at this stage of its deliberations and at this time, to predict matters or to predetermine the approach that it will take in this regard, noting also the possible severe impacts on consumers and operators, matters which ComReg is entitled to consider.

Article 7.3 of the Authorisation Directive requires that where the granting of rights of use needs to be limited, selection shall be based on objective, transparent, non-discriminatory and proportionate criteria. In drafting the Interim Licence Proposal, ComReg worked on the assumption that GSM only rights of use would not be of interest to H3GI. ComReg notes that H3GI has confirmed that this is the case on page 26 of its response to Document 11/11.

As the rights of use that ComReg is proposing to make available pursuant to the interim licences are clearly of no interest to H3GI, ComReg has some difficulty understanding how it can be alleged to be acting in a discriminatory manner towards H3GI.

ComReg notes that acceding to H3GI's new proposal made in its response to Document 11/11, whereby all liberalised rights of use would come into effect immediately on assignment in the proposed broader spectrum release process, could be argued to be

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<sup>41</sup> ComReg notes that the position advanced in H3GI's recommendation on page 4 of its response to Document 11/11 which accepts a delay until the completion of the broader spectrum release process is somewhat inconsistent with its statement in the first bulleted paragraph referred to above at page 24, where it states that it *"requires access to liberalised 900 MHz spectrum immediately"*.



discriminatory against new entrants (who would not have mast sites and a back haul infrastructure in place), and potentially discriminatory against the current 900 MHz licensees (who would have transitional issues to address before they could make use of liberalised spectrum).

Equally, without making any commitment as to the date on which its currently proposed broader spectrum release process might be completed, ComReg considers H3GI's postulated date of September 2011 for the completion of the broader spectrum release to be ambitious given the volume of preparatory work required.<sup>42</sup> As discussed in the Consultation 10/71, transitional arrangements are likely to be required by the incumbent MNOs in order to re-tune and/or relocate their existing spectrum assignments to the outcome of the broader spectrum release process. The RedM/Vilicom report<sup>43</sup> has presented a number of scenarios for the 900 MHz band, and as discussed in that report, the use of unassigned blocks of spectrum are likely to be required to deal with transitional issues after the licensing process is complete. The use of such transitional arrangements allows the incumbent 900 MHz operators to plan and make the necessary arrangements so as to ensure that their customers face minimal disruption.

ComReg notes that H3GI does not seek to rebut the findings of the RedM/Vilicom report in relation to this matter. Failing to provide for an appropriate period in the interim licences in this regard could be seen as discriminatory against incumbent 900 MHz operators on the basis that they could be required to bid excessive amounts to retain their current spectrum assignments to avoid disruption to their businesses and to consumers. ComReg notes that given the current spectrum assignments and position of the incumbent 900 MHz operators, and the 2 x 5 MHz block size proposed for the broader spectrum release proposal, it is not technically possible to avoid some form of relocation and/or retuning activities, assuming each incumbent 900 MHz operator obtains spectrum rights of use as a results of the broader spectrum release process.

In the section of its response on discrimination H3GI also raised certain issues relating to:

- ComReg's reliance on the possibility of new entrants;
- state aid issues; and
- its assertion that the grant of interim licences confers an advantage on Vodafone and O2.

These are dealt with in the appropriate sections of this document.

At page 8 of its submission H3GI asserted that the Interim Licence Proposal is unwarranted, discriminatory and disproportionate as both Vodafone and O2 have had more than a sufficient period of time to make arrangements in preparation for the expiry of their licences.

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<sup>42</sup> ComReg notes there would need to be considerable preparatory work prior to any such auction, including: publication, consultation and settling of a draft Information Memorandum, conducting auction workshops etc. It is also noted that the auction itself may extend over a number of weeks.

<sup>43</sup> ComReg Document 10/71C

ComReg is of the view that it is incumbent on it to regulate on the basis of the facts and circumstances as they currently stand, and not on the basis of H3GI's view as to what other market participants should have done in the past. ComReg is firmly of the view that no discrimination arises from regulating on the basis proposed in Document 11/11.

#### *2.7.2 Vodafone submission*

At page 7 of its submission in response to Document 11/11 Vodafone asserts that certain amendments to the draft licence set out in Document 11/11 are discriminatory against Vodafone and O2.

This submission is addressed in Chapter 4 of this document.

#### *2.7.3 O2 and Eircom Group submission*

Neither of these respondents raised discrimination explicitly in their submissions. O2 did raise a similar issue to that raised by Vodafone in relation to licence conditions and this issue is addressed in Chapter 4 of this document.

## **2.8 Proportionality**

In this section ComReg sets out some of the views expressed and issues raised by respondents in relation to proportionality and its response to these.

In Section 3.2.5 of Consultation 10/71, ComReg set out reasons why it was of the view that the Interim Licence Proposal was proportionate. In Section 2.6 of Document 11/11 ComReg set out the views of the respondents to Consultation 10/71 with respect to proportionality and its analysis of those views. Save to the extent that it is necessary or appropriate to clarify or elaborate on those views in response to the issues raised by respondents to Document 11/11, ComReg does not repeat those views here.

#### *2.8.1 H3GI submission*

In Part 5 of its response to Document 11/11, H3GI submits that the Interim Licence Proposal is not proportionate, contrary to a similar array of legislation to that cited in respect of non-discrimination:

1. Article 4 of Directive 2002/77/EC (the "Competition Directive");
2. Recital 7 of the Amending GSM Directive;
3. Article 1(2) of the GSM Directive (as amended);
4. Recital 14 of the "2009 Decision";
5. Articles 5 and 7 of the Authorisation Directive as amended by Directive 2009/140;

6. Article 8 and 9 of the Framework Directive as amended by Directive 2009/140/EC;
7. Regulation 11(3) of the Authorisation Regulations;
8. Regulation 23 (1) of the Framework Regulations; and
9. Section 12(3) of the Act of 2002.

In relation to points 4, 5 and 6 of the above list, ComReg's views set out in section 2.7 above (Non-discrimination) appear equally applicable here. Accordingly, these will not be repeated here.

**Recital 7 of the GSM Amending Directive** and Article 4 of the Competition Directive have been considered in Section 2.5 above.

**Article 1(2) of the GSM Directive (as amended)** has also been considered in detail in Section 2.5, and it appears to be unnecessary to revisit it here.

**Regulations 11(3) of the Authorisation Regulations**

**Regulation 23(1) of the Framework Regulations**

The two provisions above require ComReg to act *inter alia* on the basis of proportionate criteria in granting licences, ensuring the efficient and effective management of radio frequencies and allocating and assigning radio frequencies for electronic communications services. ComReg is of the view that it is acting on the basis of appropriate and proportionate criteria, as set out in Document 11/11 and in this document.

**Section 12(3) of the Act of 2002 (as amended)** this subsection requires ComReg, in carrying out its functions, to ensure that the measures taken by it are proportionate having regard to the objectives set out in Section 12 of the Act.

**Specific comments on proportionality**

To the extent that the points raised in section 5 of H3GI's response to Document 11/11 relate to proportionality, they are addressed below; however, to the extent that they relate to other matters, such as competition, they are dealt with elsewhere in this document.

In its submission H3GI questions the value of the submissions of Vodafone and O2 in light of what H3GI asserts is a "*significant and unwarranted competitive advantage*", which the Interim Licence Proposal will confer on them.

ComReg reiterates that:

- as was made clear in Consultation 10/71 and Document 11/11, the proposed issue of Interim Licences is not to reward Vodafone and O2, but to, amongst other things, address the real risks to consumer services and existing competition in the

mobile markets concerned until such time that ComReg can release liberalised spectrum in a manner which would not distort competition;

- of the eleven responses to Consultation 10/71 only H3GI's submission contended that the Interim Licence Proposal was not a proportionate measure; and
- ComReg expects respondents to represent their own best interests in submissions, and evaluates all responses carefully in light of this expectation.

In seeking a release of the two currently fallow blocks of 900 MHz spectrum immediately H3GI postulates that ComReg is imposing a 20 month delay in the use of such spectrum and refers to its consultant's report prepared in support of its submission in this regard and its contention that ComReg is not likely to need both of these blocks to facilitate relocation and retuning activities.

ComReg notes that:

- Prior to releasing any spectrum it would be obliged to engage in an open and transparent process. Accordingly, even if it were minded to release these blocks of spectrum today - which for the avoidance of doubt it is not - it would take a number of months to complete such a process.
- As noted previously and elsewhere in this document ComReg will need some spectrum to facilitate relocation and retuning activities. The quantum of spectrum and the duration for which it will be required for this purpose will only become clear once the broader spectrum release process (whatever may be its final shape) is completed. Even the H3GI submission goes no further than asserting that H3GI "*does not consider it likely*" that ComReg will require all of this spectrum.
- ComReg further intends to make available preparatory - and to the extent possible - test licences. Access to spectrum will be required to enable all of the eventual winners of rights of use of spectrum in the broader spectrum release process to deploy and test their networks prior to going live.
- ComReg notes that in the case of the Finnish operator, referred to at page 49 of H3GI's consultant's report prepared in support of H3GI's submission, where that operator had 2 x 14.4 MHz of 900 MHz spectrum when it started its transition to UMTS, it is noted that it took the operator one year to put a UMTS 900 MHz network in place. Taking this data at face value, noting that H3GI's consultant's report does not postulate that H3GI could achieve a shorter timeframe and assuming the data to be applicable to Ireland, it could be expected to take one of the current 900 MHz licensees one year after the completion of the broader spectrum release process to fully deploy a UMTS 900 MHz network, assuming it had sufficient 900 MHz spectrum to deploy such a network in tandem with GSM.
- As discussed earlier in this chapter, H3GI's estimate of 6 months to put such a network in place in rural areas appears optimistic.

- To the extent that it can be accomplished without distorting competition, ComReg intends to consider early liberalisation in the context of the situation obtaining after the broader spectrum release process is completed. In this regard, ComReg notes the approach recommended by H3GI in its response to Document 11/11 (auction liberalised 900 MHz spectrum by September 2011, followed by immediate licensing of liberalised-use of spectrum by winning bidders based on the results of that auction). Indeed, in its response to Document 11/11 in this connection, while not explicitly stating it, H3GI seems to contemplate a preservation of the *status quo* up until September, 2011. This is essentially in line with ComReg's interim-licence-amendment and early-liberalisation option (depending on feasibility in light of the outcome and facts and circumstances obtaining following the proposed spectrum release process) - save that ComReg does not consider it possible or appropriate, at this stage of its deliberations and at this time, to predict matters or to predetermine the approach that it will take in this regard.

In Document 11/11 at page 20 ComReg noted that "*It could also be argued that H3GI is in a better position to take advantage of liberalised 900 MHz spectrum as the incumbent 3G only carrier, and might thus be put in a more advantageous position than the other MNOs were it awarded liberalised 900 MHz spectrum prior to 2013*".

H3GI in quoting this sentence in its submission omitted the phrase "*It could also be argued that*" and proceed to seek to rebut the statement as amended.

ComReg notes that:

- For the duration of the interim licences, the incumbent 900 MHz operators would be required to maintain the same standard of service in respect of GSM 900 MHz service as is presently set out in their current GSM licences. This is discussed further in chapter 4 of this document.
- H3GI's proposal in its response to Consultation 10/71 stated that it did not "*have any issue with the use by the existing 2G licence holders of their existing 900 MHz spectrum for 3G purposes following the expiry of Vodafone and O2's licences in May 2011 up to the award of licences secured at auction in 2013.*" In such a scenario, the incumbent 900 MHz operators would have 2 x 7.2 MHz of spectrum. None of the studies made available to ComReg have indicated that it would be possible to deploy a GSM and an UMTS 900 MHz network with this amount of spectrum.
- Provision of UMTS services will effectively require one 2x5 MHz block of 900 MHz spectrum.
- Accordingly, for the current 900 MHz incumbent MNOs to operate both UMTS and GSM services they would need to be granted rights of use in respect of additional spectrum, so that each of them held rights of use in respect of 2 x 10 MHz of 900 MHz spectrum. If this were not done the incumbents could not

launch a UMTS 900 MHz network while effectively continue to provide service to the GSM customer base. As discussed earlier, given the current spectrum assignments and position of the incumbent 900 MHz operators, and the 2 x 5 MHz block size proposed, it is not technically possible to avoid some form of relocation activity in the band, and consequent time delay arising from such relocation activity.

- In particular ComReg notes that in the case of the Finnish operator, referred to at page 49 of H3GI's consultant's report, the operator had 2 x 14.4 MHz of 900 MHz spectrum when it started its transition to UMTS. This contrasts with Ireland where each of the incumbents holds 2 x 7.2 MHz of 900 MHz spectrum.

Finally H3GI puts forward confidential data as to the financial impact of the Interim Licence Proposal on H3GI arising from the continued operation of its roaming agreement.

In this respect ComReg notes that even if the proposal put forward by H3GI, at page 4 of its submission, that spectrum be released immediately on the completion of the broader spectrum release process, were implemented, H3GI would incur a significant portion of the roaming expenditure [**Confidential Material Removed**] indicated as:

- H3GI would be unlikely to achieve a significant reduction in its roaming costs between now and September 2011;
- it is unlikely that H3GI would order a significant amount of equipment to deploy a 900 MHz UMTS network prior to the result of the proposed auction;
- to modify its sites, H3GI may be required to make planning applications, with its attendant delays, in respect of a significant number of sites;<sup>44</sup>
- even if it built out its network on a piecemeal basis it could only gradually transfer traffic away from Vodafone as its network was constructed.

Accordingly ComReg is of the view that the costs in this regard are likely to be overstated and any roaming costs that could be saved by H3GI by early liberalisation are weighted towards the end of the period of the Interim Licences. Therefore, if ComReg were in a position to advance liberalisation of the 900 MHz band following the completion of the broader spectrum release process (in a manner that did not distort competition), much of this cost weighted at the end of the period of interim licences might be saved.

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<sup>44</sup> In its response to Consultation 10/71, H3GI acknowledged this possibility. It stated that

*"In contrast, H3GI will be required to either rig new antennas to support 900 MHz or replace its existing antennas with multi band antennas to deploy 900 MHz. This will require interaction with landlords and may require planning permission."*

### *2.8.2 O2 submission*

The only comment made by O2 in its submission relating to proportionality is that it would be disproportionate of ComReg to attach new conditions to the interim licences. This issue is addressed in Chapter 4 of this document.

### *2.8.3 Vodafone submission*

Vodafone expresses the view that the Interim Licence Proposal is a proportionate measure.

### *2.8.4 Eircom Group submission*

Eircom/Meteor do not address the issue of proportionality in their submission.

## **2.9 Conclusion**

In light of the contents of Consultation 10/71 and Document 11/11 and the foregoing, and in light of the issues that the Interim Licence Proposal is designed to address, ComReg remains of the view that the Interim Licence Proposal - which it emphasises holds out the prospect of early liberalisation of the 900 MHz band if that can be achieved without significant distortion of competition - is calibrated in the most proportionate way, and represents a proportionate measure by ComReg in the performance of its functions, having regard to its objectives.



### 3 Regulatory Impact Assessment

#### 3.1 Introduction

Document 11/11 set out ComReg's draft Regulatory Impact Assessment (RIA) on its Interim Licence Proposal ("the Draft RIA") which was prepared in accordance with ComReg's RIA Guidelines ("ComReg's RIA Guidelines")<sup>45</sup> and having regard to:

- the RIA Guidelines issued by the Department of An Taoiseach in June 2009 ("the Department's RIA Guidelines"), and
- relevant Policy Directions issued to ComReg by the then Minister for Communications, Marine and Natural Resources under Section 13 of the 2002 Act on 21 February 2003 (the "Policy Directions").

ComReg invited interested parties to review the Draft RIA and to submit any comments or information in relation to it that they believed ComReg should consider in finalising its Interim Licensing Proposal. Two respondents set out specific comments in relation to the Draft RIA and other matters relevant to those considered in the Draft RIA. Their views are set out below, followed by ComReg's response and final position on this RIA.

#### 3.2 Summary of Draft RIA

Before addressing the respondents' views, a summary of ComReg's draft RIA as per Document 11/11 is set out below. The Draft RIA followed five steps in line with ComReg's RIA Guidelines:

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

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

As set out in the Draft RIA, ComReg noted that it would not be in a position to issue new (liberalised) licences based on the proposals set out in Consultation 10/105 (and other relevant consultations) by the date of expiry of Vodafone and O2's respective GSM 900 MHz licences in mid May 2011.

The policy issue of relevance for the RIA is how to deal with the imminent expiry of Vodafone's and O2's GSM900 MHz rights of use in a way that:

- does not materially distort competition in the relevant mobile markets; and
- facilitates and does not materially impact on the final decisions on its broader spectrum release proposals which ComReg has yet to make and implement.

<sup>45</sup> ComReg Document 07/56a. *Guidelines on ComReg's approach to Regulatory Impact Assessment*. August 2007.

ComReg is faced with the policy issue of how to address these expiry-related concerns and at the same time allow it to bring forward, finalised and implement, its final proposals for the award of the relevant spectrum bands in a timely fashion with, amongst other things, an expected date of early 2013 for 800 MHz availability in mind.

ComReg's statutory functions, objectives and relevant duties in relation to Ireland's radio frequency spectrum were set out in Annex 1 of Document 11/11.<sup>46</sup>

The focus of the RIA is to identify the impact of the Interim Licence Proposal on stakeholders (i.e. existing operators (including MVNOs), potential new entrants and consumers) and competition and, in so doing, highlight the option that best achieves ComReg's functions and objectives in the most proportionate manner.

### 3.2.2 Regulatory Options

The four options evaluated in the Draft RIA were considered in the context of facilitating the finalisation and subsequent implementation of ComReg's broader spectrum release proposals.

ComReg did not consider a 'do nothing' scenario as a practical option and so it was not reviewed in the Draft RIA (see Section 3.2 of Document 11/11) for reasons of "*imminent and unavoidable consumer disruption*" mentioned in Section 3.1.1 of Document 11/11. The four options include the Interim Licence Proposal put forward by ComReg in Consultation 10/71 and those put forward by interested parties in their responses to that consultation, or refinements thereof.

In summary, the options considered in the Draft RIA were as follows:

**Option 1:** ComReg's Interim Licence Proposal. This would involve the issue of GSM-only interim licences ( $2 \times 7.2$  MHz of 900 MHz spectrum) to Vodafone and O2 for the period 16 May 2011 - 31 Jan 2013 (noting the potential to amend the duration as set out in Document 11/11). Such interim licences would not be liberalised on the basis of ComReg's belief that to do so could give rise to distortions to competition.

**Option 2:** This was proposed by O2 and is a variant of Option 1. Interim licences would be issued on a GSM-only basis to Vodafone and O2 that would operate from 16 May 2011 until the expiry of Meteor's 2G licence in 2015 (i.e. co-termination of existing GSM 900 MHz licences).

**Option 3:** This was proposed by Vodafone and is a further variant of Option 1. Interim licences ( $2 \times 7.2$  MHz of 900 MHz spectrum) would be issued on a liberalised basis to Vodafone and O2, and the liberalisation of Meteor's existing GSM 900 MHz licence on

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<sup>46</sup> These have been updated and included in this document, see Annex 1.

the basis of ensuring that there would not be a distortion to competition or discrimination.<sup>47</sup>

**Option 4:** This option was based on a proposal by H3GI, the latter of which involved the issuing of liberalised 900 MHz licences to all four mobile network operators for the period up to 2030. It was ComReg's view that such a proposal would be disproportionate as a facilitating measure as it would, in effect, prejudice the outcome of ComReg's broader spectrum release proposal. For that reason, ComReg examined a variation of H3GI's proposal so as to enable a fair and reasonable comparison with the remaining options. Option 4, as assessed by ComReg, was a variant of Option 3 but additionally involved the granting of an interim licence to H3GI for one  $2 \times 5$  MHz block on a liberalised basis, where H3GI's assignment would be for either of the currently unassigned blocks.

### 3.2.3 Impact on Stakeholders and Competition

Having identified and described each of the options, ComReg then considered the impact of these options on stakeholders and upon competition. In relation to the former, there are three principal stakeholder groups which ComReg is required to take into account: existing operators (including MVNOs); potential entrants; and consumers. Each option was also assessed in a tabular form (see Annex 5 of Document 11/11).

#### 3.1.3.1 Impact on existing operators

Based on ComReg's analysis, the views of existing operators on the various options appeared to be highly divergent. ComReg was of the view that Vodafone had a preference for Option 3, O2 for Option 2, Meteor's preference was not clear, and that H3GI would have a preference for Option 4.

While no MVNOs submitted a response in relation to Consultation 10/71, in light of their responses to Consultation 09/99 it is apparent that any disruption to the capacity available to Vodafone or O2 at 900 MHz would impact negatively on their operations.

#### 3.1.3.2 Impact on Potential New Entrants

ComReg was of the view that of the four options, potential new entrants would be highly likely to see Option 1 as the best option in light of the likely impacts on competition of each of the remaining options.

#### 3.1.3.3 Impact on Competition

Of the four options, ComReg was of the view that:

- Option 3 could well have the most distortive effect on competition out of the four options, by affording Vodafone, O2 and Meteor a first mover advantage over H3GI and potential new entrants in the provision of advanced services over 900

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<sup>47</sup> ComReg's interpretation of Vodafone's proposal was confirmed by Vodafone in its response to Document 11/11.

MHz spectrum, thereby creating a strong dissuasive effect on potential new entrants from within Ireland and from other Member States;

- Option 2 would postpone the benefits of liberalisation for over two additional years without any improvement in competition over Option 1; and
- Option 4 would involve administrative assignment of spectrum to operators and would also lead to a potential distortion to competition.

ComReg therefore considered that Option 1 would have a less distortive effect on competition than the other three options, both in any competitive process to award spectrum rights of use for the 2013 to 2030 period and in the downstream retail market from now until 2030. Option 1 was seen as the best option in terms of maintaining the level of competition in any competitive process for the assignment of spectrum rights of use for the 2013 to 2030 period (if this were to be chosen as the preferred broader spectrum release proposal). Option 1 would leave all operators, including potential new entrants, in the same position as they are now for any competitive or comparative process to award long term spectrum usage rights.

#### *3.1.3.4 Impact on Consumers*

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

The Draft RIA noted that all four options would ensure that no significant disruption to existing services would occur and that Option 3 would likely be the least preferable option from a consumer's perspective. Option 3 would immediately reduce competition both in the market and in any competitive process to award spectrum rights of use. This apparent discrimination in favour of particular operators would all but guarantee that operators contemplating new entry would revise their decision while also placing H3GI at a competitive disadvantage.

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

- the timescales likely involved in deploying UMTS services at 900 MHz (noting the counterfactual of preparatory licences under ComReg's broader spectrum award proposals);
- the amount of spectrum stated to be required by existing operators to provide GSM and UMTS services simultaneously in contrast to the amount of spectrum that would be available to these operators under Option 4;
- the likely need for operators to know the outcome of any process to award spectrum for the 2013 to 2030 period in advance of making sunk investments; and
- the possibility of earlier liberalisation of the 900 MHz band under Option 1 (noting assumptions previously identified in section 3.2 of Document 11/11 (and as subsequently discussed in Chapter 2 of this document)).

### 3.2.4 Option Assessment and Selection

In comparing the options, ComReg was of the view that any apparent benefits of earlier liberalisation provided by Option 4 over Option 1 could be almost entirely negated by the costs of both reducing competition between existing players (for example, if all players are not equally ready to realise the benefits of liberalisation) and the dynamic inefficiency induced by dissuading more efficient new entry.

### 3.2.5 The Preferred Option

As noted in the Draft RIA, ComReg was of the view that Option 1 represented the option which would deliver the greatest benefits to all stakeholders including, in particular consumers, and competition in the market, while minimising the risks of distortions to competition. On balance, ComReg believed that Option 1 was the most proportionate of the options considered in the Draft RIA and, accordingly was the preferred option for the reasons already given, including that it would:

- effectively eliminate the adverse effects on consumer services and competition that would otherwise likely occur in the event that Vodafone and/or O2 were not to obtain GSM 900 MHz rights of use in the interim period;
- facilitate the full liberalisation of the 900 MHz bands to occur by early 2013 (and potentially earlier than that), while minimising the potential for distortions to competition;
- when viewed in the context of ComReg's broader spectrum release proposals (and particularly proposed preparatory licences and test licences), give all winners of liberalised rights of use between 12 - 18 months during which, for example, to roll out new networks and prepare for the launch of new services for consumers;
- facilitate the finalisation and implementation of ComReg's broader spectrum release proposals on fair, open and non-discriminatory terms; and
- best meet ComReg's objective of the promotion of competition and its regulatory obligations in relation to the awarding of spectrum rights of use, by minimising potential market distortions (such as by creating a first mover advantage for incumbent operators).

## 3.3 Views of Respondents

Of the four respondents to Document 11/11, two respondents, Vodafone and H3GI, provided specific comments on the Draft RIA.

Vodafone stated that it is *"in broad agreement with the general approach to the draft RIA adopted by ComReg"* and that *"the four options set out in the RIA are reasonable to consider"*.

Vodafone added that it *"is in strong agreement"* with ComReg's conclusion that the potential 'do nothing' scenario of declining to undertake an interim licensing measure is

not a feasible regulatory option in light of the severe disruption this would cause to the provision of services to consumers.

Vodafone remains of the view that *“Option 3 is the optimal regulatory option”* as, similarly to Option 1, it ensures continuity of service on the part of all the existing 900 MHz licensees (to their customers, those of MVNOs, and to customers of those operators availing of service on the basis of national roaming agreements) for the period until 800 MHz availability but with the advantage of being more closely aligned to the intent of the GSM Amendment Directive of introducing earliest licensing of the 900 MHz band on a technology neutral basis. Vodafone also maintains its view that *“ComReg has not effectively established that Option 3 would materially distort competition in the market, or that any such distortion of competition would outweigh the benefits of this potential approach”*.

Vodafone considered that Option 1, with its provision for a potential earlier liberalisation of the 900 MHz band than previously proposed, to be *“a reasonable approach”*. Vodafone suggests, however, that Option 1 should provide for licence expiry when a defined set of minimum conditions are achieved rather than a specific end date of 31 Jan 2013 as proposed.

According to H3GI, the Draft RIA was fundamentally flawed. H3GI was of the view that ComReg’s Interim Licence Proposal is not necessary for the purposes of awarding the spectrum bands on a liberalised basis (although ComReg notes that H3GI’s proposal put forward in response to Document 11/11 envisages a spectrum award by September 2011, over three months after existing licences expire and does implicitly therefore appear to contemplate interim licences or some preservation of the *status quo*).

In terms of the options considered in Document 11/11, H3GI welcomes ComReg’s acknowledgement that Option 3 (as proposed by Vodafone) would place H3GI at a competitive disadvantage.

H3GI claims that at no point did it propose or state a preference for Option 4 as set out in Document 11/11.

H3GI disagrees with ComReg’s proposed approach (Option 1) on a number of grounds:

- It would confer *“special rights”* and *“significant competitive advantages”* *“in excess of €43m p.a. on Vodafone and in excess of €33m p.a. on O2”*. In doing so the proposal *“will distort competition by impairing H3GI’s ability to compete and entrenching the market position of Vodafone and O2”*;
- In H3GI’s view, the interim licence proposal *“will only serve to safeguard existing lack of competition in the Irish mobile market”*;
- H3GI rejects ComReg’s statement that Option 1 would preserve the *status quo* and as such would not damage competition. According to H3GI, *“preservation of*

*the status quo by definition involves harming competition” because “competition is dynamic”;*

- It would have a “*disproportionate effect*” on H3GI. As H3GI is relying on national roaming from Vodafone, handing over a 3G connection to Vodafone's GSM network often results in a substantial deterioration in the service being provided to H3GI's customers, thus causing significant reputational harm and **[Confidential Material Removed]**; and
- ComReg's proposal places a premium on potential new market entry at the expense of real market competition. It is not appropriate for ComReg to rely on the theoretical possibility of new entry to justify its delay.

H3GI recommended a new proposal – auction liberalised 900 MHz spectrum by September 2011 and, based on the results of that auction, award new liberalised-use licences immediately thereafter.

### **3.4 ComReg's Position**

The following section considers the views of these respondents as follows:

- The necessity for an interim measure;
- The competition issues associated with Option 3;
- Consideration of H3GI's new proposal; and
- Addressing H3GI's criticisms of Option 1.

#### *3.4.1 Necessity of an Interim measure*

ComReg addresses the issue of interim licences as a facilitating measure and the justification for interim licences in Section 2.1 and Section 2.2 of this document.

ComReg also notes that H3GI's new proposal implicitly acknowledges the need for interim licences to be granted or measures to be put in place (albeit until its postulated date for the completion of the broader spectrum release process of September 2011).

#### *3.4.2 Competition issues associated with Option 3*

In its response to Document 11/11, Vodafone submits that ComReg has failed to effectively establish that Option 3 would materially distort competition in the market or that any such distortion of competition would outweigh the benefits associated with Option 3.

By way of background, ComReg set out in Document 11/11 its view that:

*“Option 3, by affording Vodafone, O2 and Meteor a first mover advantage over H3GI and potential new entrants in the provision of advanced services over 900 MHz spectrum, would likely seriously distort competition in advanced services (with knock*

*on effects on competition in the downstream mobile market as a whole) and would likely have a strong dissuasive effect on potential new entrants from within Ireland and from other Member States. It was claimed by one operator that Option 3 would not create any competitive distortion. ComReg does not believe this to be the case and, on the contrary, Option 3 could well have the most distortive effect on competition out of the four options.”*

In addressing Vodafone's submission, the first issue is to consider how implementing Option 3 could materially distort competition.

### **Would Option 3 likely distort competition?**

Currently in the Irish mobile market there is approximately a 60/40 split between 2G and 3G SIMs in mobile devices, with a clear movement away from 2G towards 3G, which is similar to current developments in other European markets.

The relevant time period for consideration under Option 3 is circa 20 months, from May 2011 to end of January 2013. In ComReg's opinion, the grant of liberalised licences to each of Vodafone, O2 and Meteor for the period between May 2011 and January 2013 would likely distort competition for 3G services by giving each of these three operators an advantage in the provision of these services for a short but potentially significant period of time.<sup>48</sup>

First, each of Vodafone, O2 and Meteor would be in a position to provide 3G services at significantly lower costs and provide better quality 3G services (e.g. improved in-building penetration) to consumers (once they have rolled out new networks) compared to operators using other spectrum (i.e. H3GI using 2.1GHz spectrum). In particular, H3GI would be placed at a competitive disadvantage as it would not be capable of replicating the same cost structure. During the time period in question, it would have to continue using 2100 MHz which would leave H3GI at a cost disadvantage in the provision of 3G services. In its response to Document 11/11, H3GI welcomes ComReg's acknowledgement that Option 3 (as proposed by Vodafone) would place H3GI at a competitive disadvantage.<sup>49</sup>

Moreover, it is noted that the advantages that would be provided to Vodafone, O2 and Meteor would be artificial in nature. That is, it would not be earned on the basis of these

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<sup>48</sup> ComReg would highlight the distinction here between the likely competitive advantage / distortion of competition that would be caused by Option 3 on the one hand and its arguments made in Chapter 2 on the absence of a selective advantage / distortion of competition (within the meaning of Article 107 TFEU) in relation to Option 1, on the other. The points made in Chapter 2 are specifically made in the context of the State aid analytical framework and Option 1 and would not necessarily apply in their entirety, if at all, in the context of Option 3, particularly in relation to any analysis of a distortion of competition.

<sup>49</sup> H3GI, in their response to Consultation 08/57, referred to the unjustified competitive advantage that would be conferred on existing GSM operators were their existing 900 MHz spectrum assignments to be liberalised prior to their expiry. This argument was also made in the submission made by the 3 Group to the European Commission (dated 5 March 2007) regarding the Draft Commission Decision on the harmonisation of the 900 MHz and 1800 MHz bands in the Community, which was submitted by H3GI in response to Consultation 08/57, and is included in ComReg Document 09/14s, page 32-36.



operators being better competitors than other operators, or recognising an untapped business opportunity. It would be based purely on incumbency and an administrative decision by ComReg.

Furthermore, ComReg notes that Option 3 would also potentially impact on the likelihood of new entry. In particular, granting incumbent GSM operators a cost and timing advantage in the provision of 3G services (when these operators already have incumbency advantages in terms of, amongst other things, existing network infrastructure) may deter entry by having a dissuasive effect on operators considering entering the Irish mobile market.

For these reasons, ComReg is strongly of the view that Option 3 would have a distortionary impact on long-term competition in the provision of 3G services.

***Would the potential benefits of Option 3 outweigh the likely distortions to competition?***

The second issue is to consider whether the potential benefits associated with Option 3 would outweigh the likely distortions to competition. When considering this, it is necessary to discuss what these benefits would likely be.

Consumers may be offered cheaper ‘smart’ mobile devices, lower cost advanced mobile services and better in-building 3G coverage by the three operators who would be granted the cost advantage, and roll out new networks, over the time period in question.

It is possible that these benefits would materialise for consumers earlier than would be the case under Option 1. There is, however, no guarantee that this would be the case. How much earlier consumers may benefit under Option 3 compared to Option 1 would depend on the three operators in question and how soon they choose to pass the cost advantage they gain on to customers. This, in turn, is likely to be linked to the speed with which each of these operators could roll out new networks at 900 MHz<sup>50</sup>, and to the competitive intensity then prevailing.

The comparison will also be influenced by how soon the broader spectrum release process can be concluded and the outcome of this process particularly, as it affects the timing of availability of liberalised 900 MHz spectrum. Under certain scenarios, the timing difference as between Option 1 and Option 3 in the availability of liberalised 900 MHz spectrum for ‘live network use’ could be very slight. Hence it is difficult to quantify the benefits with any precision.

Is there any evidence that these benefits, such as they are, would outweigh the distortive effects on competition? According to Vodafone, it is keen to access liberalised 900 MHz spectrum as soon as possible. It appears that O2 in contrast would prefer if this

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<sup>50</sup> Some of the steps involved in the rollout of a new network using 900 MHz spectrum would include: site acquisition, site build, commissioning of base stations, radio planning and design work, rigging new antennas to deploy 900 MHz services.

was delayed until 2015 and as such do not appear to be overly anxious to access liberalised 900 MHz spectrum in the immediate short term. Meteor's views are unclear. Therefore it is not possible to say with any degree of certainty that under Option 3 the benefits to consumers would materialise significantly in advance of when they would materialise under Option 1. In any event, as discussed above the relevant time period is approximately 20 months. However given the time required to build out new networks, the benefits may not materialise significantly in advance of January 2013.

When comparing the potential benefits of earlier liberalisation against the potential costs associated with distortion of competition, it is necessary to consider the impact on H3GI and potential new entrants.

The liberalisation of the 800 MHz, 900 MHz and 1800 MHz bands creates an opportunity to attract *de novo* entry into the Irish market. This could potentially change the current market structure and lead to even greater competition in the market. Opportunities of this scale do not arise very often. Noting that some of ComReg's statutory objectives are to promote competition and to promote the internal market, the pursuit of an option which could deter new entry into the market is not, in ComReg's view, appropriate.

In ComReg's view, the benefits to consumers that may arise under Option 3 (prior to January 2013) do not outweigh the distortions to competition that would arise under this option by placing H3GI at a cost disadvantage and sending a signal to potential new entrants that ComReg adopts incumbent-centric policies.

Option 1 on the other hand does not create the same distortions to competition, as the interim licences would be granted on a GSM-only basis and therefore the same cost advantages referred to above would not arise for recipients of interim licences.

Although its preference is for Option 3, Vodafone considers that Option 1 is "*a reasonable option that is broadly consistent with the achievement of ComReg's regulatory objectives*".

#### 3.4.3 Consideration of H3GI's new proposal

As noted in Chapter 2, H3GI's new proposal would involve a gap of several months between the expiry of Vodafone and O2's GSM 900 MHz licences in May 2011 and its proposed award of liberalised rights of use by September 2011.

First, as noted in Chapter 2, while not explicitly stating it, H3GI seems to contemplate a preservation of the *status quo* up until September, 2011. Preservation of the status quo for a limited period of time is in line with ComReg's Interim Licence Proposal, albeit the latter envisages that this could continue up until January 2013.

Secondly, there is a considerable amount of preparatory work involved in conducting an auction, such as that set out under ComReg's current broader spectrum release proposal, and for this reason ComReg considers the award of liberalised rights of use by

September 2011 to be somewhat ambitious given the volume of preparatory work that would be required.<sup>51</sup> ComReg nevertheless would be hopeful that the award of liberalised rights of use would take place within a relatively short time period after H3GI's proposed date.

Finally, H3GI's proposal involves the issue of liberalised licences in the 900 MHz band immediately after the proposed auction (albeit – importantly, and as ComReg has noted, the issue of 900 MHz rights of use on a liberalised basis at such a juncture would have to be “...based on the results of that auction...”). This is a matter which is of relevance to ComReg's broader spectrum release proposal and is therefore not relevant for discussion in the RIA regarding the Interim Licence Proposal. However, ComReg would note that as set out in Document 11/11, ComReg is considering an early liberalisation option whereby the 900 MHz band could be released on a liberalised use basis earlier than January 2013, provided the facts and circumstances transpired after the broader spectrum release process to be favourable and appropriate in that regard, and provided, in particular, that it would not create a distortion to competition.

For these reasons, and other reasons set out in this document, ComReg is of the view that it is not necessary to include this proposal as a new option for consideration in this Final RIA.

#### 3.4.4 H3GI's criticisms of Option 1

As noted above, H3GI raised a number of concerns in connection with Option 1, focussing on its negative implications for competition and the distortionary impact it would have on H3GI *vis-à-vis* the other mobile operators. According to H3GI, Option 1 would:

- Preserve the *status quo* and will result in ComReg negatively affecting competition in the market;
- Distort competition in the mobile market favouring Vodafone and O2 at the expense of H3GI;
- Have a disproportionate effect on H3GI given its roaming agreement with Vodafone which costs in the region of [**Confidential Material Removed**]; and
- Involve ComReg putting a premium on new entrants over existing operators.

Many of these concerns have been fully addressed in Chapter 2, and so the following section refers to those relevant sections of Chapter 2.

**In relation to the first and second bullet points**, these issues have been addressed in Chapter 2.

As was made clear in Consultation 10/71 and Document 11/11, the proposed issue of interim licences under Option 1 is, amongst other things, to protect end users from the

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<sup>51</sup> ComReg notes there would need to be considerable preparatory work prior to any such auction, including: publication, consultation and settling of a draft Information Memorandum, conducting auction workshops etc. It is also noted that the auction itself may extend over a number of weeks.

probable serious disruption to consumer services and safeguard existing competition in the mobile markets concerned until such time that ComReg can complete its broader spectrum release proposals in a manner which would not distort competition. Neither the intention nor the effect of Option 1 would be to reward Vodafone and O2.

H3GI fails to consider the fact that under Option 1 the interim licences would be limited to GSM-only use precisely in view of maintaining the *status quo* in spectrum assignments and preventing any competitive distortion to the benefit of O2 and Vodafone.

ComReg does not therefore agree that preserving the *status quo* in spectrum assignments for what will in reality be a very limited period of time, to enable its broader spectrum proposals to be considered to finality and be realised, is likely to have a negative impact on competition. The Interim Licence Proposal is a facilitating measure for the finalisation and subsequent implementation of broader spectrum-release proposals which would have the potential to have a very positive impact on competition by creating the opportunity for, amongst other things, *de novo* entry into the market. Indeed eircom Group in their submission to Document 11/11 state “*We consider it important to maintain the status quo for the interim period so that all possible options for the future can be fully evaluated*”.

**In relation to the third bullet point**, this has been addressed in Chapter 2.

As noted in Document 11/11, H3GI, on entering the market and subsequently, were offered unliberalised 900 MHz spectrum but chose not to avail of this spectrum and instead, unlike all three other MNOs, chose to compete in the Irish market as a 3G-only MNO (a position which ComReg notes could potentially put H3GI in a more advantageous position than the existing MNOs in the short-term, to utilise liberalised sub-1GHz spectrum as it does not have any GSM customers to serve on 900 MHz spectrum). H3GI chose to enter into a national roaming agreement to use roaming on 2G services in areas where it had not built out sufficiently to provide services over 3G.

H3GI appears to be asserting that ComReg is somehow responsible for H3GI’s decision not to avail of 900 MHz spectrum when originally offered, and subsequent reliance on a roaming agreement with Vodafone, in order to offer nationwide coverage. However, it is arguable that, had H3GI chosen to avail of 900 MHz when it was originally offered, it would now be in a similar position to Vodafone, O2 and Meteor and would not have to rely on a national roaming agreement to such any extent (if at all). ComReg rejects the assertion that Option 1 distorts competition by impairing H3GI’s ability to compete. It is, instead, arguable that H3GI’s decision to forego 900 MHz spectrum when originally offered might have impaired its ability to compete, if its ability to compete is indeed impaired. H3GI was offered the opportunity to avail of 900 MHz spectrum when it was offered its 3G licence in 2002, at a time where it was clearly signalled that 900 MHz spectrum would be liberalised in the medium to long term for UMTS use.

The fact that H3GI has a commercial roaming agreement with Vodafone which costs it in the order of [**Confidential Material Removed**] is not relevant in the context of

considering interim measures. This was a commercial decision between H3GI and Vodafone and it is entirely the responsibility and choice of H3GI how it wishes to run its network.

**In relation to the fourth bullet point**, this has been addressed in section 2.5 above.

ComReg is required to promote competition as a whole rather than any individual competitor which requires it to take account of *both* actual and potential competition in its decision making in order to adhere to its statutory objectives.

Contrary to H3GI's views, ComReg is not placing a premium on new entrants. Rather it is ensuring that new entrants are not placed at a disadvantage *vis-à-vis* incumbent operators. To achieve this, ComReg does not intend to take any measures which will discriminate against or exclude new entrants from the award process. Ultimately the competitive nature of the award process will determine who are best users of spectrum whether that be incumbent operators or new entrants.

Any option for the interim period that involves the administrative assignment of liberalised rights of use to existing market players would discriminate against potential new entrants, amongst others, and reduce, potentially substantially, their willingness to pursue entry into the Irish market.

As noted in Document 11/11, ensuring that potentially efficient new entrants are not dissuaded from entering the process is also critical for ensuring that competition in the downstream retail market is maximised over the medium and longer term. New entrants that are more efficient than incumbent operators will increase market share by offering more innovative services at lower prices. This will, in turn, increase the competitive pressure felt by the other firms in the market, who will in turn react by striving to offer better services at keener prices. The potential benefits over the period to 2030 (being the termination date currently proposed) are substantial.

Incumbents have a natural advantage over new entrants for the reasons set out by ComReg in previous consultations. ComReg is seeking to ensure that barriers are not put in place which would act to dissuade new entrants from participating in the award of long term licences for liberalised spectrum.

### **3.5 Summary of ComReg's Position**

ComReg has carried out a Draft RIA as detailed in Document 11/11, provided respondents with ample opportunity to put forward alternative interim proposals, and considered and responded to the views of respondents. ComReg has considered a number of alternative interim measures including those put forward by interested parties, and based on its RIA of these alternatives (as discussed in this chapter and chapter 3 of Document 11/11), none of the alternatives proposed achieve ComReg's objectives as satisfactory as Option 1. ComReg is of the view that Option 1 clearly strikes the best balance between competing and disparate considerations, needs and

wants, on the one hand, and the lawful optimisation by ComReg of the attainment of its statutory objectives, on the other.

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

As set out in Chapter 2, ComReg has also considered each of the options in the Final RIA with regard to all statutory objectives, criteria and Policy Directions that appear to ComReg to be relevant to the Interim Licence Proposal, where respondents have referred to these factors in their responses to Document 11/11. Where respondents have not commented on these factors in their response to Document 11/11, ComReg refers back to its analysis as set out in Document 11/11, Chapter 3.5.

## 4 Licence Conditions and Spectrum Fees

### 4.1 Introduction

This chapter considers the licence conditions and spectrum fees that would be attached to the interim licences. It considers the responses received to Document 11/11 on these issues and sets out ComReg's final position on same.

### 4.2 Licence conditions

In Consultation 10/71 and in Section 4.2 of Document 11/11, ComReg proposed that licence conditions for interim licences be set by reference to the current licence conditions in the existing GSM 900 MHz licences of the respective licensee. In that regard, ComReg prepared a draft licence schedule for consideration by interested parties, and this draft licence schedule was set out in Annex 3 of Document 11/11 (as Schedule 4 to the draft Statutory Instrument).

In addition, ComReg noted that, over the lifetime of the proposed interim licences, variations to conditions may be required.

#### 4.2.1 Summary of Responses

Two respondents, O2 and Vodafone, provided comments on proposed licence conditions and both generally agreed with ComReg's proposal.

Both respondents considered, however, that the details of the Draft Licence Schedule contained material differences to the conditions currently in place in their respective existing GSM 900 MHz licences. These respondents submitted that these new conditions were material and the introduction of such conditions in this manner was contrary to the obligation for proper consultation. In this regard, Vodafone contended that ComReg failed to identify and set out the objective justification for these changes and ComReg must do so in order to propose such a decision. The other respondent, O2, contended that it was inappropriate to introduce such changes in a short consultation process where it is ComReg's intention to proceed to an immediate decision.

Regarding the specific conditions referred to by these respondents:

- both Vodafone and O2 believed that the proposed text of the *billing medium* licence condition (as set out in Part 4 of the Schedule on page 125 of Document 11/11) was materially different to their existing GSM licence conditions; and
- O2 believed that the proposed text of the *additional services* licence condition (as set out in Part 2 of the Schedule on page 119 of Document 11/11) and the *per second billing* licence condition (as set out in Part 4 of the Schedule on page 125 of Document 11/11) were materially different to its existing GSM licence conditions. O2 noted that it understood that the draft licence in ComReg 11/11 was illustrative and that it expected that actual conditions of its interim licence to be identical to those of its current GSM licence.

In relation to the proposed *billing medium* licence condition, both Vodafone and O2 disagreed with the introduction of new text specifying the “prior” agreement of the customer before the alternative delivery of bills on computer media or on-line could be implemented. These respondents believed that this:

- would be discriminatory, as it would impose a licence restriction on two operators (namely Vodafone and O2) in the market, but not on Meteor, H3GI, Mobile Virtual Network Operators (“MVNOs”) or other providers of Electronic Communications Services (“ECS”); and
- would be inconsistent with ComReg’s stated position of basing the licence conditions on those currently in place in the existing GSM 900 MHz licences of the respective licensees.

In addition, Vodafone raised the question about the extent of the proposed licence conditions and whether they only apply to end-user services using the licensed bands or whether they would apply to all similar end-user services offered by the licensee irrespective of the spectrum over which the service actually is provided. If it is the latter, then Vodafone stated that it is not clear whether there is a basis for ComReg to impose such a condition. If it is the former, then Vodafone noted that clearly there would be a differentiation in obligations based solely on the frequency band in which the end user service would be carried from time to time and it believed that ComReg had not provided any objective justification for such a potential differentiation.

#### 4.2.2 *ComReg’s Final View*

ComReg notes that there was general agreement from Vodafone and O2 to its licence conditions proposal.

The areas of disagreement raised by Vodafone and O2 related to the detail of the licence conditions text as presented in Schedule 4 to the Draft Statutory Instrument (Annex 3 of Document 11/11), and, in particular, to three conditions: billing medium; additional services; and per second billing.

ComReg acknowledges that the draft licence conditions set out in Document 11/11 are different to those set out in their respective existing GSM licences and agrees that the text of the interim licence conditions should, save for the removal of obsolete conditions, be aligned with the text of the existing GSM licences of Vodafone and O2 respectively.

Accordingly, ComReg’s final view on the licence conditions to be attached to the interim licences of Vodafone and O2 are set out in the following:

- Annex 4.1 which identifies the interim licence conditions for O2; and
- Annex 4.2 which identifies the interim licence conditions for Vodafone.

In addition, and as set out in Document 11/11, ComReg recognises that, over the lifetime of the interim licences, variations to licence conditions of Vodafone and O2



may be required to be effected (in accordance with the requirements set out in Regulation 15 of the Authorisation Regulations), for example,

- to ensure the fulfilment of ComReg’s statutory functions, objectives and duties, e.g. to amend the duration of a licence to facilitate the earlier liberalisation of the 900 MHz band;<sup>52</sup> and/or
- as appropriate, to facilitate any transitional arrangements that may be required in advance of the new liberalised licences that ComReg proposes to issue covering *inter alia* the 900 MHz band.

### 4.3 Spectrum Fees

Section 4.3 of Document 11/11 set out ComReg’s revised proposal for spectrum fees for interim licences. In summary, ComReg proposed that:

- interim licence spectrum fees would be determined by reference to the spectrum fees paid by Vodafone and O2 for their respective 15 year licences (not including fees that were administrative in nature). Therefore, the relevant historic spectrum fees for both operators would be:
  - the up-front payment of IR£10m (€12,697,381); and
  - the annual spectrum fee of €25,395 for a 200 kHz duplex channel, or €914,220 for 36 channels (i.e. for 2 x 7.2MHz of spectrum); and
- these fees would be updated on a once-off basis to present day terms to take account of the change in the average level of prices paid for consumer goods and services since 1996 using the overall Consumer Price Index (“CPI”). The change in the overall CPI between May 1996 and January 2011 was 43.33%.

In light of these considerations, ComReg proposed an annual spectrum fee of €70,101 for a 200 kHz duplex channel, which equates to an annual spectrum fee of €2,523,629 for 2 x 7.2 MHz of 900 MHz spectrum.

ComReg noted that the actual CPI figure used would reflect the CPI data available at the time of proposed issue of interim licences.

#### 4.3.1 Summary of Responses

The four mobile network operators (H3GI, eircom Group, O2 and Vodafone) provided comments on ComReg’s proposal and, in the main, the four respondents maintained their views, as expressed in their varied responses to Consultation 10/71.

H3GI fundamentally disagreed with ComReg’s Interim Licence Proposal and suggested that the interim licence spectrum fees were too low, by stating that:

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<sup>52</sup> In this regard, it should be noted that ComReg issued a provisional consultation on electronic, and other, itemised bill formats (ComReg Document 10/96) and the outcome of this consultation process may necessitate an amendment to the conditions of the interim licences of Vodafone and O2 and to the conditions of the other existing GSM and 3G licences.

*“In a market characterised by incumbent operator historic advantages and a significant imbalance in spectrum allocation amongst mobile operators, ComReg's interim licence proposal confers a significant advantage on Vodafone and O2. In contrast with the proposed interim licence spectrum fee of approximately €2.5m p.a., ComReg's interim licence proposal confers in excess of €43m p.a. on Vodafone and in excess of €33m p.a. on O2.”*

*Indexation of the current fees & the use of the overall CPI as the indexation measure*

eircom Group agreed that it was appropriate for ComReg to apply an indexation to the current fees in order to take account of the time value of money, but believed that the appropriate measure was the Weighted Average Cost of Capital (“WACC”). In this regard it noted that:

- *“Vodafone and O2 will have incurred additional finance costs in providing the up-front payment at commencement of the licence. The true cost of the up-front payment to an operator is governed by their cost of capital<sup>53</sup> and higher than that suggested by CPI escalation.”; and*
- *“We would agree that estimates of the cost of capital are generally forward looking but this is not a valid reason for using CPI.”<sup>54</sup>*

Vodafone and O2 did not agree with ComReg’s proposal to apply indexation to current licence fees or with the proposed use of overall CPI as the indexation measure.

Vodafone believed that the current annual spectrum usage fees are sufficient to ensure efficient spectrum use and that there is no objective justification for ComReg’s interim licence fees proposal. It argued that ComReg should apply the current fees to the interim licences and in this regard it noted that:

- *these are the fees being paid by Meteor for the remaining period of its licence<sup>55</sup>, and “ComReg cannot credibly claim that much higher SUFs are required to be applied to Vodafone and O2, over the same time period, in order to ensure that this same objective is met in their case.”; and*
- *“ComReg has itself acknowledged, in consultation document 10/71, that the evidence indicates that existing licensees in the 900 MHz band are currently making efficient use of the spectrum on the basis of the fee levels established under the terms of their current licences.”*

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<sup>53</sup> *“The 10.2% proposed equates to eircom’s Weighted Average Cost of Capital and is proposed in this context as a proxy for the telecommunications industry operator cost of capital.”*

<sup>54</sup> In addition, eircom Group stated that:

*“At various times the Regulator has reviewed and specified eircom’s cost of capital over the time in which the spectrum licences have been in existence. As such there is a historical record of the cost of capital that can be applied for the majority of the licence duration. Indeed given that Eircell was part of the eircom group of companies when its licence was acquired there can be little debate as to the merits of the industry cost of capital proxy proposed.”*

<sup>55</sup> In addition, Vodafone stated that *“Vodafone agrees with ComReg’s view that it would not be appropriate to index these fees paid by Meteor under its existing licence term”*

In relation to an indexation measure, Vodafone was firmly of the view that if such a measure was to be applied, then the most appropriate index to use is the communications sub-component of the CPI, not the overall CPI. It disagreed with ComReg’s proposal to use the overall CPI and stated that:

- *“It is the changes in the prices of communications services specifically, with their relatively closer linkage to the revenues and profits of mobile operators and consequently the valuation placed by the latter on spectrum, that are most relevant for indexation purposes.”;*
- *“As SUFs are not, to Vodafone’s knowledge, included in any published price index compiled in Ireland, ComReg’s overall proposed approach of indexation in general, and use of the change in the overall CPI specifically, is not objectively justified on ComReg’s own reasoning.”<sup>56</sup>; and*
- *“the fact that ComReg has in the past used the overall CPI in updating spectrum usage fees does not, in itself, validate ComReg’s current proposed approach.”*

O2 stated that *“given the urgency with which ComReg must proceed to a decision, no further comment is made on this matter.”* However it added that this did not imply that it accepted that it is appropriate to apply CPI to licence fees and in this regard it stated that it is not correct to:

*“suggest that the use of CPI in the 26GHz auction in some way constitutes implied acceptance of use of CPI in the very different situation that arises on the Interim Licence fee calculation.”*

*Detailed aspects of the interim licence fee proposal*

O2 additionally provided comments on two detailed aspects of the interim licence fee proposal.

- 1) *Fee for part of a month:* O2 believed that ComReg’s proposal under Regulation 9(2) of the Draft Statutory Instrument (Annex 3 of Document 11/11) was not fair or reasonable, as it would result in a licensee paying the full fee for a month where it has the licence for any part of the month. It noted that this situation would affect O2 in the period from 16 May to 31 January and would result in an overcharging of €100,000 in May alone. It believed that it should only be charged for the part of the month that it is actually licensed for, and therefore on a *pro rata* basis;

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<sup>56</sup> In addition, Vodafone stated in its response to Document 11/11 that:

*“if the communications sub-index of the overall consumer price index is inappropriate to use for indexation on the basis that it does not include spectrum usage fees within the basket, then the overall consumer price index is similarly unsuitable on the same grounds as it also omits spectrum usage fees from the basket being measured.”; and*

*“spectrum usage fees could not be included even in principle within the basket of goods and services by the CPI as spectrum usage fees are paid by producers (communications operators holding spectrum usage rights), not consumers. Indexation to the wholesale/producer price index (PPI), rather than the CPI would therefore be the appropriate index to use in theory.”*

- 2) *No repayment of fees in the event of withdrawal or return of licence*: O2 noted that Regulation 9(4) of the Draft Statutory Instrument (Annex 3 of Document 11/11) provides that in the event of withdrawal of a licence (e.g. to facilitate early liberalisation), O2 would not be entitled to any repayment of fees. O2 believed this to be unfair and cited the following two examples where it believed a *pro rata* repayment of licence fees would be appropriate:
- a) If the licence is withdrawn by the Regulator to facilitate early liberalisation, then the licensee should be entitled to a repayment on a *pro rata* basis for the unused part of the licensed term. O2 noted that, for example, this principle has previously been acknowledged by ComReg in relation to the early surrender of Meteor's licence; and
  - b) If the licensee returns parts of their licence during the term (e.g. they manage to reduce their spectrum requirements), then in the interests of efficient spectrum use and allocation, it should be possible to secure a repayment of the fee for the unused part of the term.

#### 4.3.2 ComReg's Final Position

ComReg notes that the four respondents which submitted a response on this issue maintained their views as per their response to Consultation 10/71. In summary, two of these respondents, H3GI and eircom Group, believed that ComReg's proposed interim licence spectrum fees were too low and the other two respondents, to which the fees would apply, Vodafone and O2, believed that ComReg's proposal was too high.

In the main, the respondents provided arguments along similar lines to their responses to Consultation 10/71 and ComReg's analysis of such arguments (as set out in Document 11/11) remains, save as otherwise set out in this chapter.

#### Relevant Criteria

ComReg notes that Vodafone considered that the current spectrum fees are sufficient to ensure efficient spectrum use and therefore the interim licence fees should be set at this level.

ComReg is aware that encouraging efficient use and ensuring the effective management of radio frequencies is one of the means by which it must seek to promote competition in the provision of electronic communications services and associated facilities and services, and that ensuring the efficient management and use of the radio frequency spectrum is one of its core objectives set out in Section 12 of the 2002 Act. However, this is not the only criterion relevant to the setting of spectrum licence fees.

In that regard, under Regulation 20(1) of the Authorisation Regulations (as amended) ComReg may impose fees for a licence which reflect the need to ensure the optimal use of the radio frequency spectrum. Under Regulation 20(2), ComReg must ensure that

any such fees are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account ComReg's objectives set out in Section 12 of the Act of 2002 (see Annex 1 in this regard).

In determining the appropriate method for calculating interim licence fees ComReg has remained cognisant of the above statutory obligations. ComReg has also remained cognisant of those overarching obligations under the EU Treaties which are relevant to the calculation and imposition of spectrum fees, and in particular, those obligations concerning State aid.

ComReg has also remained cognisant of the case law of the Court of Justice of the European Union which has, over time, provided additional guidance on the appropriate interpretation and application of the provisions of the Common Regulatory Framework and those provisions of the EU Treaties relevant to the calculation of spectrum licence fees. This has been discussed earlier in section 2.6.

ComReg further notes that, under Regulation 16 of the Department of Communications, Energy and Natural Resource's proposed new draft Framework Regulations, which will in due course give effect to the Framework Directive (as amended by Directive 2009/140/EC), it currently appears that ComReg will be obliged to take into account additional objectives in setting licence fees. ComReg considers that some of these new objectives, which reflect many of the amendments to Article 8 of the Framework Directive, are relevant to the setting of licence fees. For the avoidance of doubt, ComReg has had regard to these additional objectives (which may or may not become law prior to the enactment of the attached proposed licence regulations giving effect to the Interim Licence Proposal) in the calculation of interim licence fees, and, while ComReg is not bound by the draft Regulations, ComReg is nevertheless of the view that its proposed approach would not be inconsistent with these objectives.

Given the above, ComReg believes that it is clearly inappropriate to consider the setting of spectrum fees solely by reference to the one criterion, namely efficient spectrum use, as suggested by Vodafone.

*Existing GSM fees to be used as the basis for setting the interim licence fees*

Leaving aside consideration of the relevant criteria outlined in the immediately preceding section, ComReg believes that it is appropriate to take a pragmatic and practical approach to the actual setting of the interim licence fees. In this regard, in Document 11/11 ComReg proposed that the interim licence fees be based upon the current GSM fees paid by each of Vodafone and O2 for their respective GSM 900 MHz licences. This was considered appropriate in light of ComReg's proposal to allow for GSM-use only and to otherwise maintain existing licence conditions. This approach will also ensure that there is a consistency between the fees that Vodafone and O2 will pay for their interim licences and the fees that Meteor will continue to pay for its GSM 900 Licence.

In reviewing the responses received to this proposal, ComReg notes that aside from H3GI (which objected to the Interim Licence Proposal as a whole) none of the respondents objected to this proposal. Indeed the two respondents who submitted alternative proposals for setting the interim licence fees, namely Vodafone and eircom Group, both used the current GSM fees as their starting point, but differed in their suggested indexation adjustment measures.

Given the above, ComReg is of the view that it is appropriate that the interim licence fees be based upon the current GSM fees.

*Adjusting current GSM fees to account for the 15 year time difference between the grant of original GSM 900 MHz licences and proposed interim licences*

ComReg notes that Vodafone, O2 and Meteor put forward varying views how this timing difference should be accounted, with Vodafone suggesting that ComReg should maintain the current licence fees, and ignore the elapse of time and the impact of inflation on the real fees altogether.

The current GSM licence fees which apply to Vodafone and O2, in terms of both the access fee and ongoing annual spectrum usage fee, were determined in circa 1995 and these licence fees relate to the 15 year GSM licence covering the period May 1996 to May 2011.

As set out in Consultation 10/71, any interim licence issued would not be a renewal or an extension of a previously issued GSM licence. Instead, it would be a new licence with a licence commencement date of 16 May 2011, and it would commence on the expiry of the 15-year licence period, for which the GSM licences were originally granted.

As ComReg is proposing to issue interim licences in the present day, it would seem perfectly rational, objectively justified and proportionate that licence fees for same also reflect present day value of money.<sup>57</sup>

*The appropriate indexation measure to account for the 15 year time difference*

In Document 11/11 ComReg proposed the overall CPI as the appropriate indexation measure to account for the 15 year time period between the licence commencement date of the interim licence and the original GSM 900 MHz licence. ComReg notes that Vodafone and eircom Group suggested alternative indexation measures, namely the Communications sub-component of the CPI and the WACC. The application of these different indexation measures would reduce and increase the level of spectrum fees, respectively, as compared to the overall CPI as proposed by ComReg.

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<sup>57</sup> As discussed in Document 11/11 ComReg is of the view that it would not be appropriate to index the current GSM fees being paid by Meteor under its existing GSM licence, because Meteor is still within its original 15 year licence term and no such adjustment was made to the original fees during the 15 year lifetime of both Vodafone and O2's existing GSM licence. ComReg notes that Vodafone agreed with this view in its response to Document 11/11.

ComReg considered these alternative indexation measures in Document 11/11, and came to the preliminary view that it was not appropriate to index the fees with either of these alternative measures. In the main, the arguments submitted by Vodafone and eircom Group in support of these alternative indexation measures mirrored the arguments submitted in their responses to Consultation 10/71.

As discussed above, ComReg is proposing to update the current GSM fees to reflect the present day value of money. ComReg remains of the view that the communications sub-component of the CPI is inappropriate as it refers only to price trends in a very limited part of the economy<sup>58</sup> and does not reflect overall price changes in the wider economy. ComReg believes that the WACC is not appropriate as this is a forward looking measure and is the rate that a particular company is expected to pay on average to all its security holders in order to finance its assets and future projects. The indexation period in question for the interim licences is historic, namely from May 1996 to May 2011, and the application of the WACC for this historic period would not be applicable for updating the fees to reflect the present day value of money. Consequently ComReg remains of the view that it would not be appropriate to apply either of these indexation measures in setting interim licence fees.

In relation to the use of the overall CPI as a means of bringing historic licence fees into present day terms, ComReg notes that this is a generally accepted measure for updating historical pricing information into today's price.

In addition, ComReg notes that the CPI and equivalent metrics are used by other regulatory authorities to update spectrum fees:

- In Australia, the Australian Communications and Media Authority ("ACMA") adjusts the annual apparatus tax by CPI to ensure that the desired outcomes of the tax, efficient use of spectrum and indirect cost recovery, are not dissipated by the effects of inflation. The apparatus taxes are calculated based on spectrum location, geographical location, amount of spectrum occupied and coverage area<sup>59</sup>;
- In the United States, the Federal Communications Commission ("FCC") is obliged to review the application fees every two years, making adjustments to reflect changes in the Consumer Price Index<sup>60</sup>; and
- In Sweden, the Post and Telecom Agency ("PTS") adjusts the 800 MHz coverage commitment of Net4Mobility each year for inflation using the CPI,<sup>61</sup>
- In the UK, Ofcom has issued proposals for revising the annual licence fees for 900 MHz and 1800 MHz spectrum. Ofcom proposes to set the fees in constant

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<sup>58</sup> According to the CSO, the communications sub-component comprises price trends for postage, telephone equipment, private telephones, mobile telephones and internet services.

<sup>59</sup> Apparatus Licence Fee Schedule - Appendix A,  
[http://www.acma.gov.au/webwr/\\_assets/main/lib3111409/licence\\_fee\\_schedule\\_appendix-a\\_july2010.doc](http://www.acma.gov.au/webwr/_assets/main/lib3111409/licence_fee_schedule_appendix-a_july2010.doc)

<sup>60</sup> Order FCC 11-27 "Amendment of the Schedule of Application Fees."  
[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-11-27A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-27A1.doc)

<sup>61</sup> "Appendix A: licence conditions etc. for PTS decision to assign licenses (file ref. 10-10534)"  
<http://www.pts.se/upload/Beslut/Radio/2011/10-10534-appendix-a-to-decision-800mhz.pdf>



real terms, which would mean that the annual licence fee would increase in line with inflation. Ofcom note that the Retail Price Index (“RPI”) is an example of an inflation measure and is the measure that Ofcom use in setting charge controls.<sup>62</sup>

Furthermore, the overall CPI has previously been used by ComReg for updating fees<sup>63</sup> and the current proposal to use the overall CPI would be consistent with this previous practice.

Given the above, ComReg considers that the overall CPI is the most appropriate indexation measure to use to account for inflation during this 15 year time period.

### The interim licence fee

Given the above, it is ComReg’s final position that the interim licence fee be set as follows:

- The interim licence fee for Vodafone and O2 are to be determined by reference to the spectrum fees paid by Vodafone and O2 for their respective 15 year GSM licences (not including fees that were administrative in nature). Therefore, the relevant historic spectrum fees for both operators are:
  - the up-front payment of IR£10m (€12,697,381); and
  - the annual spectrum fee of €25,395 for a 200 kHz duplex channel, or €914,220 for 36 channels (for 2x7.2MHz of spectrum); and
- These fees are to be updated on a once-off basis to present day terms to take account of the 15 year time difference between the licence commencement date of interim licence (16 May 2011) and the licence commencement date of Vodafone and O2’s original GSM licence (16 May 1996); and
- The overall CPI is the appropriate proxy indexation measure to use to update prices to today’s value and thereby account for the change in the prices of goods and services over the period. The overall CPI increased between May 1996 and March 2011 by 45.86%.<sup>64</sup>

Given the short duration associated with the interim licence, ComReg is of the view that it is more appropriate to apply a single annual spectrum fee that incorporates both the access fee and usage fee elements associated with the interim licence, rather than having a separate once-off access and ongoing annual spectrum usage fees.

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<sup>62</sup> Consultation on assessment of future mobile competition and proposals for the award of 800 MHz and 2.6 GHz spectrum and related issues – Annex 11  
<http://stakeholders.ofcom.org.uk/binaries/consultations/combined-award/summary/combined-award.pdf>

<sup>63</sup> 26 GHz National Block Licences - [http://www.comreg.ie/\\_fileupload/publications/ComReg0793R.pdf](http://www.comreg.ie/_fileupload/publications/ComReg0793R.pdf) ,  
TETRA licence [http://www.comreg.ie/\\_fileupload/publications/ComReg0867.pdf](http://www.comreg.ie/_fileupload/publications/ComReg0867.pdf) ;

<sup>64</sup> Document 11/11 stated that “the CPI figure would be updated in due course to reflect the most recent CPI data available at the time the interim licences are finalised.” At the time of publishing Document 11/11 the most recent CPI data available was for January 2011 and this resulted in an overall CPI adjustment of 43.33% for the period May 1996 to January 2011, using November 1996 as the selected base year. The most recent CPI data available now is for March 2011 and this results in an overall CPI adjustment of 45.86% for the period May 1996 to March 2011, using November 1996 as the selected base year.



Based on the above, it is ComReg's view that the interim licence spectrum fee be set at €71,338 for a duplex channel of 200 kHz for 1 year. This would equate to €2,568,168 where 36 such duplex channels (or 2 x 7.2 MHz of spectrum) are made available in an interim licence. The calculations supporting the setting of this interim licence spectrum fee are set out in Table 1 below.

	Historical Fees set for 15 year GSM Licence (1996-2011)	Fees updated to current prices levels (CPI 45.86%)
<b>Access Fee</b>		
Access Fee for 15 year licence (based on 2 x 7.2 MHz)	12,697,381	
Access Fee for 1 year licence (pro rata) (based on 2 x 7.2 MHz)	846,492	
Access Fee for 1 year licence (pro rata) (1 duplex channel of 200 kHz)	23,514	34,297
<b>Usage Fee</b>		
Usage Fee for 1 year (1 duplex channel of 200 KHz)	25,395	37,041
<b><u>Interim Licence Spectrum Fees</u></b> (based on 1 year usage fee + 1 year access fee)		
<b>Fee for 1 duplex channel (200 kHz) for 1 year</b>		<b>71,338</b>
<b>Fee for 2 x 7.2 MHz (36 duplex channels of 200 kHz) for 1 year</b>		<b>2,568,168</b>

**Table 1: The Spectrum Fees for the Interim Licence (€)**

In the interests of regulatory predictability and simplicity, it is not proposed that the above proposed fees be altered to reflect any change in CPI between the date of publication of this document and the date of commencement of the interim licences.

*Detailed aspects of the interim licence fee*

ComReg notes that O2 provided two comments on the detailed aspects of the interim licence fee proposal as set out in Regulation 9 of the Draft Statutory Instrument provided in Document 11/11. These relate to a licensee's ability to:

1. pay the *fee for part of a month*; and
2. obtain *repayment of fees in the event of withdrawal or return of a licence*.

ComReg believes there is merit in both of these suggestions and has amended the Statutory Instrument (as set out in Annex 3 to this document) to provide for these changes. Specifically:

- Draft Regulation 9(2) now provides for ComReg to calculate the fee on a *pro rata* daily basis until its expiry.

- Draft Regulation 7(2) allows ComReg to amend the Licence from time to time where objectively justifiable and in a proportionate manner. Any amendment, including any amendment to the duration of the Licence, shall be made subject to and in accordance with the Authorisation Regulations and any other requirements under applicable national or European Community law.
- Without prejudice to Regulation 7(1), at the request of the Licensee, Draft Regulation 7(4) provides for ComReg, if it considers it appropriate to do so, to amend the Licence by adding to, deleting from or altering the radio frequency spectrum specified in the Licence, on which the Apparatus may be used.
- Draft Regulation 9(6) provides that if a Licence is amended under Regulation 7(2) or Regulation 7(4), then the appropriate fee specified in Regulation 9(1) in relation to such channel(s) shall be paid by the Licensee, or refunded to the Licensee, on a *pro rata* basis, based on the proportion of the unexpired period of the Licence on the date of the amendment.

## 5 Next Steps

Upon the publication of this Response to Consultation and Decision Document, ComReg will immediately seek the formal consent of the Minister for Communications, Energy and Natural Resources under section 37 of the Communications Regulation Act 2002, to the making by ComReg of regulations under the Wireless Telegraphy Act, 1926 (as amended) in the terms of the draft Statutory Instrument set out in Annex 3 of this Document (“the Statutory Instrument”).

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>65</sup>

### **The Application Procedure**

On the assumption that ComReg obtains the required ministerial consent to the making of the Statutory Instrument, ComReg will then create and make available to both O2 and Vodafone an application form for a Wireless Telegraphy Interim GSM Mobile Telephony Licence, which ComReg would intend to do no later than 21 April 2011. The application form will be for the issue of a Wireless Telegraphy Interim GSM Mobile Telephony Licence for the period 16 May 2011 to 15 May 2012. Under the terms of the Statutory Instrument, such a licence is renewable, but must, in any event, terminate on 31 Jan 2013.

ComReg intends at this stage to set 3 May 2011 as the closing date for the receipt of completed application forms and receipt of the full spectrum fees for the relevant licence period. This date will be finalised after ministerial consent to the making of the Statutory Instrument has been obtained and it will be published on ComReg’s website with the publication of the Wireless Telegraphy Interim GSM Mobile Telephony Licence application form.

It is currently envisaged that the Wireless Telegraphy Interim GSM Mobile Telephony Licences will be issued on the 13 May 2011 in respect of the first licensing period.

In summary, and subject to the required ministerial consent being obtained, the proposed milestone dates associated with the application procedure are as follows;

- 21 April 2011: ComReg intends to issue Wireless Telegraphy Interim GSM Mobile Telephony Licence application form to the applicants, namely O2 and Vodafone;
- 3 May 2011: Closing date for receipt by ComReg of the completed Wireless Telegraphy Interim GSM Mobile Telephony Licence application forms, along with the full spectrum fees for the relevant licence period;
- 13 May 2011: ComReg to issue Wireless Telegraphy Interim GSM Mobile Telephony Licence(s) to successful applicant(s).

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<sup>65</sup> ComReg 05/24 Response to Consultation - Guidelines on the treatment of confidential information - March 2005.

**The broader spectrum release proposal**

In relation to the broader spectrum release proposal, ComReg will continue to advance its proposals, and will issue a Response to Consultation and Draft Decision in relation to this matter in due course.

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

The Communications Regulation Acts 2002-2010<sup>66</sup>, the Common Regulatory Framework<sup>67</sup> (including for the purposes of this paper the Framework and Authorisation Directives as transposed into Irish law by the corresponding Framework and Authorisation Regulations), and the Wireless Telegraphy Acts<sup>68</sup> set out, amongst other things, powers, functions, duties and objectives of ComReg that are relevant to this response to consultation and draft decision.

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

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

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

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<sup>66</sup> The Communications Regulation Act 2002 (No. 20 of 2002), The Communications Regulation (Amendment) Act 2007 and the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010.

<sup>67</sup> It is noted that there have been substantive amendments to those European Directives comprising the Common Regulatory Framework and these have yet to be incorporated into the statutory instruments which transpose these Directives. Nevertheless, ComReg is, in accordance with best practice of a forward looking ex ante regulator, interpreting its regulatory objectives and obligations in accordance with impending substantive amendments to those statutory instruments which transpose the Common Regulatory Framework. In ComReg's opinion, this approach will provide certainty for market participants. ComReg also notes that Directive 2009/140 provides for its transposition into national law by 25 May 2011. Accordingly, while this may or may not be transposed before any grant of interim licences (the Department of Communications, Energy and Natural Resources ("DCENR") is currently consulting on draft regulations intended to give effect to this Directive), the State is obliged to transpose it, at the latest, in the same month in which the first of the current 900 MHz GSM licences expire. In addition, ComReg is, prior to the transposition deadline, obliged under EU law to refrain from taking any measures likely to seriously compromise the attainment of the result prescribed by that directive.

<sup>68</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.

## **A1.1 Primary objectives and regulatory principles under the 2002 Act and Common Regulatory Framework**

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

- promote competition<sup>69</sup>;
- contribute to the development of the internal market<sup>70</sup>;
- promote the interests of users within the Community<sup>71</sup>; and
- ensure the efficient management and use of the radio frequency spectrum in Ireland in accordance with a direction under section 13 of the 2002 Act<sup>72</sup>.

### *A1.1.1 Promotion of Competition*

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

- (i) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;
- (ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
- (iii) encouraging efficient investment in infrastructure and promoting innovation<sup>73</sup>, and
- (iv) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

### *A1.1.2 Contributing to the development of the internal market*

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

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

<sup>70</sup>Section 12 (1)(a)(ii) of the 2002 Act (No. 20 of 2002).

<sup>71</sup>Section 12(1)(a)(iii) of the 2002 Act (No. 20 of 2002).

<sup>72</sup>Section 12(1)(b) of the 2002 Act (No. 20 of 2002). Whilst this objective would appear to be a separate and distinct objective in the 2002 Act, it is noted that, for the purposes of ComReg's activities in relation to ECS and ECN, Article 8 of the Framework Directive identifies "encouraging efficient use and ensuring the effective management of radio frequencies (and numbering resources)" as a sub-objective of the broader objective of the promotion of competition. In light of this, the assessment of different regulatory options against this objective is set out in the context of the RIA (chapter 3).

<sup>73</sup>As a result of recent amendments to the Framework Directive, this sub-objective has been removed and now appears, albeit modified, as a "regulatory principle" to be applied in the pursuit of the main policy objectives (in Article 8(5)).

- (i) removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level;
- (ii) encouraging the establishment and development of trans-European networks and the interoperability of transnational services and end-to-end connectivity;
- (iii) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services and associated facilities<sup>74</sup>; and
- (iv) co-operating with electronic communications national regulatory authorities in other Member States of the Community and with the Commission of the Community in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of Community law in this field.

#### *A1.1.3 Promotion of Interests of Users*

Section 12(2)(c) of the 2002 Act requires ComReg, when exercising its functions in relation to the provision of electronic communications networks and services, to take all reasonable measures which are aimed at the promotion of the interests of users within the Community, including:<sup>75</sup>

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

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<sup>74</sup> As a result of recent amendments to the Framework Directive, this sub-objective has been removed and now appears, albeit modified, as a “regulatory principle” to be applied in the pursuit of the main policy objectives (in Article 8(5)).

<sup>75</sup> As a result of recent amendments to the Framework Directive, the following sub-objective was added: promoting the ability of end-users to access and distribute information or run applications and services of their choice. In addition, the following wording has been added to the end of sub-objective (vi) above by amendment to its equivalent provision in Article 8(4) of the Framework Directive: “elderly users and users with special social needs”.

- (v) encouraging access to the internet at reasonable cost to users;
- (vi) addressing the needs of specific social groups, in particular disabled users; and
- (vii) ensuring that the integrity and security of public communications networks are maintained.

#### *A1.1.4 Regulatory Principles*

In addition, amendments to the Framework Directive<sup>76</sup> will, with effect from the date of transposition of the amending directive into Irish law, require ComReg, in pursuit of the above 3 policy objectives, to apply objective, transparent, non-discriminatory and proportionate regulatory principles by, inter alia:

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

### **A1.2 Other obligations under the 2002 Act**

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

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<sup>76</sup> Directive 2009/140 EC, the transposition deadline for this directive is 25 May 2011, DCNER has indicated that this directive will be transposed by Statutory Instrument, which will come into force in May 2011: <http://www.dcenr.gov.ie/Communications/Communications+Policy/Telecommunications+Regulatory+Reform+Package.htm>



- (i) seek to ensure that any measures taken by it are proportionate having regard to the objectives set out in Section 12 of the 2002 Act;<sup>77</sup>
- (ii) have regard to international developments with regard to electronic communications networks and electronic communications services, associated facilities, postal services, the radio frequency spectrum and numbering (this is taken into account in the context of Policy Direction 7 below)<sup>78</sup>; and
- (iii) take the utmost account of the desirability that the exercise of its functions aimed at achieving its radio frequency management objectives does not result in discrimination in favour of or against particular types of technology for the provision of ECS.<sup>79</sup>

Separately, pursuant to the Framework Regulations, ComReg is obliged to promote the harmonisation of use of radio frequencies across the European Community and this will be considered within the discussion of the objective to contribute to the development of the internal market.<sup>80</sup>

### **A1.3 Policy Directions<sup>81</sup>**

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

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

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

The Commission shall in the exercise of its functions, take into account the national objective regarding broadband rollout, viz, the Government wishes to ensure the widespread availability of open-access, affordable, always-on broadband infrastructure

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<sup>77</sup>Section 12(3) of the 2002 Act (No. 20 of 2002).

<sup>78</sup>Section 12(5) of the 2002 Act (No. 20 of 2002).

<sup>79</sup>Section 12(6) of the 2002 Act (No. 20 of 2002).

<sup>80</sup>Regulation 23(2) of the Electronic Communities (Electronic Communications Networks (Framework) Regulations 2003.

<sup>81</sup>ComReg also notes the Spectrum Policy Statement issued by the DCENR in September 2010

and services for businesses and citizens on a balanced regional basis within three years, on the basis of utilisation of a range of existing and emerging technologies and broadband speeds appropriate to specific categories of service and customers. ComReg is conscious that the three year objective described in this policy direction has now expired making this direction less relevant currently.

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

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

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

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

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

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

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

The Commission shall ensure that, in its management of the radio frequency spectrum, it takes account of the interests of all users of the radio frequency spectrum.

### **A1.4 Other relevant obligations under the Framework and Authorisation Regulations**

#### *Framework Regulations*

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

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

### *Authorisation Regulations*

#### Publication of procedures

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

For the avoidance of doubt, the relevant procedures for the grant of any interim licences are set out in Chapter 5 of this document and Section 3 of the Decision (Annex 2).

#### Licence conditions

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

#### Grant of limited number of licences<sup>82</sup>

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

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

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<sup>82</sup> In the present case, ComReg:

- notes that the fact that there are a limited number of GSM licences available for the 900 MHz band reflects the of nature the current licensing regime (in place since the first issue of GSM 900 MHz licences in circa 1996);
- refers to the relevant sections of Consultation 10/71, Document 11/11 and this document relating to, amongst other things: the reasons for ComReg's interim licence proposal; promotion of competition; non-discrimination; and proportionality; and
- refers to footnote 77 of Consultation 09/99 (on page 146 of same) in relation to why the numbers of licences ought to be limited for liberalised 900 MHz spectrum.

### Fees for spectrum rights of use/licences

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

ComReg is required to ensure that any such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives of ComReg as set out in section 12 of the 2002 Act.

### Amendment of rights and obligations

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).

## **A1.5 Other Relevant Provisions**

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

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

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

*“The Commission for Communications Regulation shall examine whether the existing assignment of spectrum in the 900 MHz band to competing mobile operators is likely to distort competition in the mobile markets in the State and, where justified and proportionate, it shall address such distortions in accordance with Regulation 15 of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003 (S.I. No. 306 of 2003).”*

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

#### *Rights of use of frequencies*

*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:*

*1. Member States shall not grant exclusive or special rights of use of radio frequencies for the provision of electronic communications services.*

*2. The assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria.”*

## Annex 2 – Decision

This annex sets out ComReg’s decision on its interim licence proposal.

### 1. DEFINITIONS AND INTERPRETATION

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

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

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

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

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

“**Fees**” means annual spectrum fees of €71,338 per duplex 200 KHz channel which shall be pro-rated for any period of less than a year within the Interim Licence Term;

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

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

“**GSM Amendment Regulations**” means the European Communities (Public Pan-European Cellular Digital Land-Based Mobile Communications) Regulations 2010 (S.I. 295/2010), made under section 3 of the European Communities Act 1972 (No. 27 of 1972) for the purpose of giving effect to Directive 87/372/EEC, as amended by Directive 2009/114/EC;

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

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

**“Interim Licence Regulations”** means the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations as set out in draft form in Annex 3 to ComReg Document 11/29;

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

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

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

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

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

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

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

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

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

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

- (i) the contents of, and the materials referred to in, as well as the materials provided by respondents in response to, and in connection with, ComReg documents which shall, where appropriate, be construed with this Decision:
  - a. 08/57;
  - b. 09/14;
  - c. 09/99;

- d. 10/59;
- e. 10/71;
- f. 10/105;
- g. 11/11,
- h. 11/29;

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

- the imminent expiry (on 15 May, 2011) of licences held by Vodafone and O2 under section 5 of the Wireless Telegraphy Act 1926, pursuant to the Wireless Telegraphy (GSM and TACS Mobile Telephony Licence) Regulations, 1999 (S.I. 442 of 1999) as amended by the Wireless Telegraphy (GSM Mobile Telephony Licence)(Amendment) Regulations 2003 (S.I. 339 of 2003), permitting Vodafone and O2 to keep, and have possession of, install, maintain, work and use in a specified place in the State apparatus for wireless telegraphy for the provision of GSM services in the 900 MHz band (“Current Licences”);
- the fact that ComReg will not be in a position to finalise its decision-making in relation to its broader spectrum release proposals and related on-going consultation process in respect of the Joint Spectrum Release and implement the outcome of this decision-making before the Current Licences expire on 15 May, 2011;
- the consequent need to facilitate the finalisation by ComReg of its decision-making in respect of the Joint Spectrum Release, with the stated benefits envisaged by ComReg that would flow from the spectrum-release contemplated, once finalised (and, in particular, the maximisation of benefits for users and the facilitation of the development of competition);
- the avoidance of undue effects on the sustainability of the businesses of industry operators during the time between May, 2011 and the commercial commencement date of new, liberalised-use licences in the relevant frequency bands;
- the desirability of providing for interim measures that can be put in place in that period, preserving the *status quo* in spectrum assignments, pending the outcome of the proposed spectrum-assignment process and the crystallisation thereof, thereafter;
- the likely disruption to consumers and competition if interim measures are not put in place to provide for the continuation of the provision of existing 900 MHz GSM services by Vodafone and O2 between the expiry of their Current Licences and the completion of the foregoing consultation process relating to the Joint Spectrum Release;



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

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

- (i) Regulation 19 of the Framework Regulations; and
- (ii) ComReg's RIA Guidelines (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, upon obtaining the consent of the Minister to the making by it of the Interim Licence Regulations, it will make the Interim Licence Regulations under section 6(1) of the Wireless Telegraphy Act 1926, prescribing relevant matters in regard to Interim Licences (the regulations so hereafter being referred to as "the Finalised Interim Licence Regulations").

ComReg hereby decides that it will, upon application properly being made to it by Vodafone and/or O2 within the terms of the finalised Interim Licence Regulations, and on payment of the Fees prescribed thereby, grant to them, or either of them, as the case may be, under section 5 of the Wireless Telegraphy Act 1926, a licence to keep, have possession of, install, maintain, work and use in a specified place in the State, apparatus for wireless telegraphy for the purpose of providing a GSM Mobile Telephony Service in the form, for the period, and subject to the conditions and restrictions (including conditions as to revocation, and so on), prescribed in the Interim Licence Regulations: including as appropriate, the Interim Licence schedules as set out in Annex 4 to ComReg Document 11/29.

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

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

- 4.1. Nothing in this Decision shall operate to limit ComReg in the exercise and performance of statutory powers, functions, 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 13 DAY OF APRIL 2011**

Annex 3 – Draft Statutory Instrument

**STATUTORY INSTRUMENTS**

**S. I. No.            of 2011**

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

(Prn.            )

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

### **Citation**

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

## **Interpretation**

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

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

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

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

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

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

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

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

“Commission” means the Commission for Communications Regulation;

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

“ETSI” means the European Telecommunications Standards Institute;

“Euribor” means the Euro Interbank Offered Rate;

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

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

“GSM Regulations of 2003” means Wireless Telegraphy (GSM Mobile Telephony Licence) (Amendment) Regulations, 2003, (S.I. No. 339 of 2003);

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

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

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

“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;

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

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

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

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

(2) In these Regulations;

(a) a reference to an enactment or regulation shall be construed as a reference to the enactment or regulation as amended or extended by or under any subsequent enactment or regulation;

(b) a reference to a Regulation or a Schedule is to a Regulation of or Schedule to these Regulations, unless it is indicated that a reference to some other enactment is intended;

(c) a reference to a paragraph or subparagraph is to the paragraph or subparagraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended; and

(d) a reference to a Directive of the European Parliament and Council shall be construed as a reference to the Directive as amended or extended by any subsequent Directive.

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



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

3. (1) These Regulations prescribe matters in relation to Licences of the type detailed in the form of Licence contained in the Schedule hereto, application for the grant or, as the case may be, renewal, of which may be or, as the case may be, has been, made hereunder by any person who, at the time of making their first application for a Licence pursuant to these Regulations, holds, or, as the case may be, held an Original Licence which is, or as the case may be, was due to expire on the 15<sup>th</sup> day of May, 2011, and who was previously the holder of a licence under the GSM and TACS Regulations.
  
- (2) The provisions of the GSM Regulations of 2003, and, in particular, Regulation 4(5) thereof, do not apply to Licences to which these Regulations apply, and, for the avoidance of doubt, any person whose Original Licence is, or, as the case may be, was, pursuant to that Regulation, incapable of grant or renewal so as to expire later than the 15<sup>th</sup> day of May 2011, may apply hereunder for the grant, or as the case may be, renewal, of a licence to which these Regulations apply.

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

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

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

5. (1) A Licence to which these Regulations apply that has not been renewed, shall unless it has been withdrawn or had its duration amended under Regulation 7(2), be in force for a period of up to one year and, unless renewed, shall then expire.
- (2) Subject to paragraph (4) of this Regulation, a Licence to which these Regulations apply may be renewed from time to time by the Commission under paragraph (3) of this Regulation, on payment by the applicant of the fees prescribed in Regulation 9.
- (3) On application by or on behalf of a Licensee to the Commission before the expiration of their Licence, the Commission may, by notice in writing given to the Licensee or sent to the Licensee at the address of the Licensee specified in the Licence or notified to the Commission by the Licensee in accordance with the Licence, renew the Licence for a specified period of up to one year from the day following the expiration of the last previous period during which it was in force. The granting or renewal of a Licence shall not be construed as warranting, representing or otherwise holding out that the Licence shall be renewed at any time in the future, or renewed for any particular period or on any particular terms.
- (4) Notwithstanding paragraphs (1), (2) and (3) of this Regulation, a Licence granted or renewed under these Regulations shall in any event, terminate on 31 January, 2013, or on such earlier termination date as may be decided upon by the Commission and given effect by way of a Licence amendment under Regulation 7(2).

## **Conditions of Licences**

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

successors from time to time, any radiation emission standards of the European Committee for Electrotechnical Standards and any radiation emission standards specified by national and European Community law;

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

- (14) upon becoming aware of any event likely to materially affect their ability to comply with these Regulations, or any conditions set out or referred to in the Licence, notify the Commission of that fact in writing within 5 business days; and
- (15) comply with all obligations under relevant international agreements relating to the use of Apparatus or the frequencies to which they are assigned.

### **Enforcement, Amendment, Withdrawal and Suspension**

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

### **Powers of Authorised Officers**

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



## **Licence Fees**

9. (1) Subject to paragraph (2) of this Regulation, the following fees are hereby prescribed in relation to Licences to which these Regulations apply:
- The Licensee shall pay:
- in respect of each 200 kHz duplex radio frequency channel in the 900 MHz frequency band as specified in the Licence, a fee of €71,338 for a one-year period;
- and
- (2) If the Licence is granted or renewed for a part of a year then the fee in respect of the Licence to be paid by the Licensee shall be calculated on a pro rata daily basis for the period for which the Licence was granted, or renewed, as the case may be.
- (3) The fees specified in paragraphs (1) and (2) of this Regulation shall be paid to the Commission at the time of the making of any application under Regulation 4(1) or Regulation 5(3), and prior to any grant or renewal of a Licence hereunder, as the case may be, by way of banker's draft or such other means and on such other terms, if any, as the Commission may decide. Where the date of payment falls on a Saturday, a Sunday or a public holiday, payment shall be made on or before the last working day before the date on which payment would otherwise have fallen due.
- (4) If a Licence is suspended or withdrawn the Licensee shall not be entitled to be repaid any part of the fee paid by the Licensee under this Regulation, but shall still be liable to pay any sums, including interest, that are outstanding.
- (5) If a Licence is amended under Regulation 7(2) or Regulation 7(4), the appropriate fee specified in paragraph (1) of this Regulation in relation to such channel(s) shall be

paid by the Licensee, or refunded to the Licensee, on a pro-rata basis, based on the proportion of the unexpired period of the Licence on the date of the amendment.

- (6) Where payment is not made in due time, then interest shall be payable by the Licensee at the appropriate Euribor rate standing on the fee or part thereof in respect of the period between the date when such fee or part fell due and the date of payment of such fee or part.
- (7) An amount payable by a person in respect of a fee under this Regulation may be recovered by the Commission from the person as a simple contract debt in any court of competent jurisdiction.

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

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

## SCHEDULE

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

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

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

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

This Licence shall come into operation on **commencement date** and, unless previously withdrawn, shall expire on the **termination date** or on such earlier termination date as may be decided upon by the Commission and given effect by way of a Licence amendment under Regulation 7(2) of the Regulations.

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

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

**Schedule 1**  
**[Company Name] GSM**

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

## **Schedule 2**

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

## **Schedule 3**

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



## **Schedule 4**

**Commitments Made by the Licensee Prior to the Grant Of the Original Licence.**

### **Part 1**

#### **Licence Commencement Date**

## **Schedule 4**

### **Part 2**

#### **The Licensed Mobile Services**

**Schedule 4**  
**Part 3**

**Access to the Emergency Services**

## **Schedule 4**

### **Part 4**

#### **Service Quality, Performance Standards and Obligations**

## **Schedule 4**

### **Part 5**

### **Roaming**

**Schedule 4**  
**Part 6**

**Other Conditions**

(Other relevant commitments made by the Licensee in the Original Licence)



## EXPLANATORY NOTE

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

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



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## Annex 4 – Interim Licence Schedules

### **A4.1 - O2**

#### **Schedule 1**

#### **Telefonica O2 Ireland Limited**

Places at which the Licensee is authorised by this Licence, to keep and have possession of GSM apparatus in the 900MHz band.

## **Schedule 2**

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

### **Schedule 3**

Radio Frequency Channels on which, the apparatus is authorised, by this Licence to be used.

## **Schedule 4**

**Commitments made by the licensee prior to the grant of the original licence.**

### **Part 1**

#### **Licence Commencement Date**

The Licence Commencement Date is the 16<sup>th</sup> day of May 2011.

## **Schedule4**

### **Part 2**

#### **The Licensed Mobile Services**

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

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

- (a) Compatible with the GSM Standard, provided in the 900MHz band; and
- (b) With the international roaming capability as referred to in Part 5 of this Schedule.

##### **2. Additional services**

2.1. The Licensee shall be required to provide the following Services;

- (a) Fax and Data,
- (b) Short Message Service,
- (c) Voicemail,
- (d) Call Diversion,
- (e) Call waiting and Hold,
- (f) Call Barring; and
- (g) Itemised Billing.

## **Schedule 4**

### **Part 3**

#### **Access to the Emergency Services**

##### **1. General**

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

##### **2. Calls to an Emergency Service**

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

##### **3. Directions by the Commission**

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

##### **4. Acceptance of Emergency Calls**

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

##### **5. Routing of Emergency Calls**

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

##### **6. Emergency Calls Free of Charge**

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

##### **7. Identification of Emergency Calls**

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

## Schedule 4

### Part 4

#### Service Quality, Performance Standards And Obligations

##### 1. General Obligations

- 1.1. For the purposes of carrying out service quality surveys, the Licensee shall provide, on request, to the Commission the following;
- (a) Maps showing coverage for in the case of the GSM900 service, 2 Watt terminals; and
  - (b) An up to date list of the locations of the base transceiver stations;
  - (c) A mechanism for identifying the base station that is handling a call at any given time; and
  - (d) An adequate number of test numbers.

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

##### 2. Coverage

- 2.1. "**Coverage**" means the extent to which the strength of the radio signal is sufficient to provide an adequate service for a 2 Watt, GSM900 terminal operating outdoors.

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

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

##### 2.2 Measurement Guidelines for coverage

The appropriate figures contained in the latest population census published by the Central Statistics Office will be used for calculating the base figure when calculating national population coverage.

Measurements to determine coverage shall be carried out using; a 2 Watt, GSM900 terminal operating outdoors.



Signal strength measuring equipment may also be used.

### 2.3 Mandatory Service Standards

The Licensee shall ensure that the national population coverage shall not fall below that given in the Original Licence and in any case the Licensee shall ensure that national geographic coverage shall not fall below 90%.

### 2.4 Other Obligations

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

## 3. Service Unavailability

3.1. "Service unavailability" means the average number of minutes per terminal per year for which the Licensed Mobile Service as defined in the Original Licence, is not available due to a network disturbance, failure or scheduled unavailability.

### 3.2 Measurement Guidelines for Service Unavailability

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

<b>Service Unavailability, Weighting Factors</b> (divide duration of each network event by weighting factor)			
	Monday to Friday	Saturday	Sunday
<b>For periods between 07.00 and 24.00</b>	1	2	4
<b>For periods between 00.00 and 07.00</b>	4	8	16

### 3.3. Mandatory Service Standard

In any case the Licensee shall ensure that service unavailability is less than 60 minutes.

### 3.4. Other Obligations

- (a) The Licensee shall keep a log (the "network log") for the purposes of recording and tracking all periods of system unavailability. The Licensee shall maintain this network log in a manner that will demonstrate, to the satisfaction of the Commission that such a network log is an adequate means of assessing whether the Licensee is complying with its system availability obligations under this licence.
- (b) The network log, or as may be appropriate, part thereof, shall be made available on request to the Commission.
- (c) The Licensee shall calculate the service unavailability for the Licensed Mobile Services for any period specified by the Commission from the information recorded in the network log, and shall upon request and within such time, as may be specified by the Commission, provide the Commission with the results of the calculation.

## 4. Grade of Service

### 4.1 Blocking Rates

(a) **Definitions:**

**"Blocking rate"** means the percentage of total call attempts made for the traffic case concerned, for the Licensed Mobile Service as defined in the Original Licence, during the time consistent busy hour and within coverage, which are unsuccessful; and

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

(b) **Mandatory Service Standards**

The Licensee shall ensure that the blocking rate shall not exceed the percentages in respect of each of the traffic cases specified in the following Table;

<b>Maximum Permissible Blocking Rates</b>		
<b>Traffic Case</b>	<b>Blocking rate</b>	
	Average	Worst Case
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Licensee's Mobile and Personal Communications System)</b>	3%	10%
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Mobile and Personal Communications System of an Other Licensed Operator)</b>	3%	10%
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Telecommunications Network of an Other Licensed Operator)</b>	3%	8%

**4.2 Dropped Calls**

(a) **"Dropped call rate"** means the percentage of total established calls during any measurement period, for the Licensed Mobile Service as defined in the Original Licence, which are prematurely released by the Licensee's Mobile and Personal Communications System within three minutes.

(b) **Measurement Guidelines**

Measurements will be made in the case of the GSM900 service, with a 2 Watt, GSM900 terminal operating within claimed coverage areas;

(c) **Mandatory Service Standards**

The Licensee shall ensure that the dropped call rate shall not exceed the percentage in respect of each of the traffic cases specified in the following Table;

<b>Maximum Permissible Dropped Call Rates</b>		
<b>Traffic Case</b>	<b>Dropped Call Rate</b>	
	Average	Worst Case
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Licensee's Mobile and Personal Communications System)</b>	2%	4%
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Mobile and Personal Communications System of an Other Licensed Operator)</b>	2%	4%
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Telecommunications Network of an Other Licensed Operator)</b>	1.5%	3%

**4.3 Transmission Quality**

The Licensee shall ensure that the speech transmission quality complies with the GSM Technical Specifications of ETSI and in particular, the Licensee shall ensure that appropriate echo treatment equipment is used in the provision of the Licensed Mobile Services and that it is properly configured.

**4.4 Other Obligations**

The Licensee shall provide to the Commission, on request, such grade of service measurement information as the Commission considers necessary to

determine performance against mandatory service standards and specifies to the Licensee.

## 5. Customer Service Centres Response Times

"**Response time**" means in relation to a customer service centre, is, the time taken for a call to the centre to be answered.

### 5.1 Mandatory Service Standards

The Licensee shall ensure that the response time shall accord with the appropriate time specified in the following Table;

<b>Service Period</b>	<b>Response Times</b>
08.00 to 20.00 hours, Monday to Friday, and 09.00 to 17.00 hours, Saturday, Sunday and Public Holidays	less than 15 seconds for 90% of calls, and less than 45 seconds for all calls
00.00 to 08.00 hours and 20.00 to 24.00 hours, Monday to Friday, and 00.00 to 09.00 hours and 17.00 to 24.00 hours, Saturday, Sunday and Public Holidays	less than 20 seconds for 90% of calls, and less than 60 seconds for all calls

## 6. Billing

### 6.1 Mandatory Service Standards

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

<b>Billing Aspects</b>	<b>Standard Requirements</b>	<b>Options and Alternatives</b>
<b>Billing Frequency</b>	Monthly	Alternative frequency or flexible frequency subject to agreement with customer
<b>Billing Itemisation</b>	All billable calls and services	Customised bill layouts with or without summary itemisation subject to agreement with customer
<b>Billing Medium</b>	Paper	Delivery of bills on computer media or on-line subject to agreement with customer
<b>Billing Method</b>	Per Second Billing	At commencement of the service, calls shall attract minimum thirty second charge and charges shall increment in ten second intervals thereafter

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

- (a) the date of the call,
- (b) the start time of the call,
- (c) the number called,
- (d) the duration of the call; and
- (e) the price of the call.

## **6.2. Billing Accuracy and Fraud Detection**

The Licensee shall incorporate in its billing system;

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

## Schedule 4

### Part 5

#### Roaming

1. The Licensee shall not act on foot of any agreement providing for a national roaming capability made between the Licensee and any other provider of a GSM mobile telephony service in the State unless and until the Commission has approved the terms of the agreement.
2. The Licensee shall establish and maintain as part of the Licensed Mobile Services an international roaming capability for its Users that is as wide and comprehensive as is practicable.
3. The Licensee may impose charges in respect of Users roaming on GSM mobile telephony networks in other countries (being outward-roaming Users) and in respect of Users of GSM mobile telephony services in other countries roaming on the Licensee's Mobile and Personal Communications System (being inward-roaming Users) at rates not exceeding those specified in the table below:-

<b>Roaming Services</b>	<b>Licensee's charges</b>	
	<b>Outward-roaming User</b>	<b>Inward-roaming User</b>
<b>Roaming Service Fee</b>	No charge	No charge
<b>Outgoing calls from roaming customer</b>	Other operator's tariff for roaming customers plus administration surcharge not exceeding 15% of that tariff	Licensee's call tariff for roaming customers charged to the other operator and no administration surcharge

## **Schedule 4**

### **Part 6**

#### **Charges to Customers**

1. The Licensee shall endeavour to reduce, in each of its financial years, the amounts of the charges to its customers so that those amounts are, after allowance is made for changes in the value of money in each such year after the first, lower than those obtaining in the previous such year, and shall endeavour to maintain those charges at or below the appropriate international comparators specified from time to time by the Commission.
2. The following supplementary features shall be provided as constituent parts of the service to any customer, on request, without the addition of any amount in respect thereof to the amount of the connection fee or monthly rental specified, that is to say;
  - (a) voice mail,
  - (b) call diversion,
  - (c) call waiting,
  - (d) itemised billing,
  - (e) short message service; and
  - (f) GSM data and fax.



## **Schedule 4**

### **Part 7**

#### **Other Conditions**

The Licensee shall maintain at least one centre (a “customer service centre”) to which access by telephone free of charge is provided to customers and members of the public at all times.

A customer service centre shall make available at all times a facility to receive reports in relation to difficulty in the use of the Licensed Mobile Services of a fault or breakdown in the provision of the Licensed Mobile Services.

## **A4.2 - Vodafone**

### **Schedule 1**

#### **Vodafone Ireland Limited**

Places at which the Licensee is authorised by this Licence, to keep and have possession of GSM apparatus in the 900MHz band.

## **Schedule 2**

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

### **Schedule 3**

Radio Frequency Channels, on which the apparatus is authorised, by this Licence to be used.

#### **Schedule 4**

Commitments made by the licensee prior to the grant of the original licence.

#### **Part 1**

#### **Licence Commencement Date**

The Licence Commencement Date is the 16th day of May 2011.

## **Schedule 4**

### **Part 2**

#### **The Licensed Mobile Services**

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

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

- (a) Compatible with the GSM Standard, provided in the 900MHz band (“GSM900 Service”); and
- (b) With the international roaming capability referred to in Part 5 of this Schedule.

##### **2 Additional services**

2.1 The Licensee shall be required to provide the following services;

- (a) Fax and data,
- (b) Short message service,
- (c) Voicemail,
- (d) Call diversion,
- (e) Call waiting,
- (f) Itemised billing.

## **Schedule 4**

### **Part 3**

#### **Access to The Emergency Services**

##### **1. General**

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

##### **2. Calls to an Emergency Service**

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

##### **3. Directions by the Commission**

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

##### **4. Acceptance of Emergency Calls**

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

##### **5. Routeing of Emergency Calls**

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

##### **6. Emergency Calls Free of Charge**

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

##### **7. Identification of Emergency Calls**

When an emergency call is made from terminal equipment of a customer of the Licensee, the Licensee shall, where technically possible, transmit the customer’s

number to a collection centre for emergency calls in the form of a calling line identification message.



## Schedule 4

### Part 4

#### Service Quality, Performance Standards and Obligations

##### 1. General Obligations

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

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

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

##### 2. Coverage

- 2.1. "**Coverage**" means the extent to which the strength of the radio signal is sufficient to provide an adequate service for a 2 Watt, GSM900 terminal.

An adequate service is achieved outdoors if the average field strength measured outdoors is at least 46dBuV/m for the GSM900 service at a height of 1.5 metres above ground level.

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

##### 2.2. Measurement Guidelines for coverage

The appropriate figures contained in the latest population census published by the Central Statistics Office will be used for calculating the base figure when calculating national population coverage.

Measurements to determine coverage shall be carried out using; a 2 Watt, GSM900 terminal;

Signal strength measuring equipment may also be used

**2.3. Mandatory Service Standards**

The Licensee shall ensure that the national outdoor population coverage shall not fall below that given in the Original Licence and in any case the Licensee shall ensure that national geographic coverage shall not fall below 92%.

**2.4. Other Obligations**

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

**3 Service Unavailability**

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

**3.2. Measurement Guidelines for service unavailability**

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

<b>Service Unavailability, Weighting Factors</b>			
(divide duration of each network event by weighting factor)			
	<b>Monday to Friday</b>	<b>Saturday</b>	<b>Sunday</b>
<b>For periods between 07.00 and 24.00</b>	1	2	4
<b>For periods between 00.00 and 07.00</b>	4	8	16

**3.3. Mandatory Service Standard**

The Licensee shall ensure that service unavailability is less than 45 minutes

**3.4. Other Obligations**

- (a) The Licensee shall keep a log (the “network log”) for the purposes of recording and tracking all periods of system unavailability. The Licensee shall maintain this network log in a manner that will demonstrate, to the satisfaction of the Commission, that such a network log is an adequate means of assessing whether the Licensee is complying with its system availability obligations under this Licence.
- (b) The network log or, as may be appropriate, part thereof shall be made available on request to the Commission.
- (c) The Licensee shall calculate the service unavailability for the Licensed Mobile Services for any period specified by the Commission from the information recorded in the network log, and shall upon request and within such time as may be specified by the Commission, provide the Commission with the results of the calculation.

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

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

(a) **Definitions:**

**"Blocking rate"** means the percentage of total call attempts made for the traffic case concerned, for the Licensed Mobile Service as defined in the Original Licence, during the time consistent busy hour and within coverage, which are unsuccessful.

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

(b) **Mandatory Service Standards**

The Licensee shall ensure that the blocking rate shall not exceed the percentages in respect of each of the traffic cases specified in the following Table;

<b>Maximum Permissible Blocking Rates</b>		
<b>Traffic Case</b>	<b>Blocking rate</b>	
	Average	Worst Case
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Licensee's Mobile and Personal Communications System)</b>	3.47%	10%
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Mobile and Personal Communications System of an Other Licensed Operator)</b>	4%	10%
<b>Terminal equipment (connected to the Licensee's Mobile and Personal Communications System) to Terminal equipment (connected to the Telecommunications Network of an Other Licensed Operator)</b>	2%	8%

4.2. **Dropped Calls**

(a) **"Dropped call rate"**: the percentage of total established calls during any measurement period, for the Licensed Mobile Service as defined in the Original Licence, which are prematurely released by the Licensee's Mobile and Personal Communications System within three minutes.

(b) **Measurement Guidelines**

Measurements will be made in the case of the GSM900 service, with a 2 Watt terminal operating within claimed coverage areas

(c) **Mandatory Service Standards**

The Licensee shall ensure that the dropped call rate shall not exceed 3% on average or 6% worst case.

4.3. **Transmission Quality**

The Licensee shall ensure that the speech transmission quality complies with the GSM Technical Specifications of ETSI and in particular, the Licensee shall ensure that appropriate echo treatment equipment is used in the provision of the Licensed Mobile Services and that it is properly configured.

4.4. **Other Obligations**

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

5. **Billing**

5.1. **Mandatory Service Standards**

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

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

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

- (a) the date of the call,
- (b) the start time of the call,
- (c) the number called,
- (d) the duration of the call; and
- (e) the price of the call.

## 5.2. **Billing Accuracy and Fraud Detection**

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

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

## **Schedule 4**

### **Part 5**

#### **Roaming**

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