



Commission for  
**Communications Regulation**

# **Spectrum Trading in the Radio Spectrum Policy Programme (RSPP) bands**

## **Framework for spectrum transfers in the RSPP bands**

**Response to Consultation**

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**An Coimisiún um Rialáil Cumarsáide  
Commission for Communications Regulation**

Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland  
Telephone +353 1 804 9600 Fax +353 1 804 9680 Email [info@comreg.ie](mailto:info@comreg.ie) Web [www.comreg.ie](http://www.comreg.ie)

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# Content

<b>Section</b>	<b>Page</b>
<b>1 Introduction and Background</b> .....	<b>5</b>
1.1 Introduction .....	5
1.2 Background to Document 12/76.....	6
1.3 Structure of this Document.....	8
<b>2 Spectrum Trading in the RSPP Bands</b> .....	<b>9</b>
2.1 Introduction .....	9
2.2 Scope of Spectrum Trading in the RSPP bands .....	9
ComReg's Final Position .....	9
2.3 Competition assessment of transfers .....	10
2.3.1 Ex-ante or ex-post competition assessment .....	10
ComReg's Final Position .....	11
2.3.2 Substantive Test to assess Distortion to Competition .....	11
ComReg's Final Position .....	12
2.3.3 Key elements of the distortion to competition test .....	12
ComReg's Final Position .....	14
2.4 Proposed Procedures .....	15
2.4.1 Notification, and publication procedures .....	15
ComReg's Final Position .....	16
2.4.2 Guidance on how ComReg decides whether or not the result of a transfer would be to distort competition.....	16
Distortion to competition assessment.....	17
ComReg's Final Positions .....	18
Overview of indicative timelines .....	19
ComReg's Final Position .....	20
2.5 Giving effect to the transfer .....	21
2.6 Additional issues raised by respondents .....	21
ComReg's response.....	22
<b>3 Next Steps</b> .....	<b>23</b>

# Annex

<b>Section</b>	<b>Page</b>
Annex: 1 Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014, (S.I. No. 34 of 2014).....	24
Annex: 2 RIA on the Procedure for the Competition Assessment of Spectrum Trades.....	25
Annex: 3 Oxera response to stakeholder submissions to the consultation.....	33
Annex: 4 ComReg 14/11 .....	36

# 1 Introduction and Background

## 1.1 Introduction

- 1 This document sets out the Commission for Communication Regulation's ("ComReg") response to its consultation on spectrum trading (Document 12/76)<sup>1</sup>. It includes a framework to facilitate the regulatory review of spectrum transfers under the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014 in the bands designated for transfers or leases by Decision No. 243/2012/EU<sup>2</sup> (the "RSPP Decision") (the "Framework").
- 2 The Framework, which issues alongside this document (see, Document 14/11), is entitled "*Framework for spectrum transfers*" and consists of:
  - procedures specified by ComReg concerning how undertakings must notify their intention to transfer individual rights of use to radio frequencies to ComReg (the "Procedures"); and
  - guidance on how ComReg will determine whether or not a transfer would distort competition (the "Guidelines").
- 3 As the "distortion to competition" test ComReg intends to apply to spectrum transfers is based on the Irish Competition Authority's substantial lessening of competition ("SLC") test, the Framework document is informed by the Authorities 2004 'Notice in respect of guidelines for merger analysis' and its 2006 'Revised Procedures for the Review of Mergers and Acquisitions'. In light of submissions received to Document 12/76, ComReg believes that such an approach is desirable from the point of view of interested parties.<sup>3</sup>

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<sup>1</sup> Document 12/76 on "Spectrum Trading in the Radio Spectrum Policy Programme (RSPP) bands - A framework and guidelines for spectrum transfers in the RSPP bands" dated 11 July 2012.

<sup>2</sup> Decision No. 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual Radio Spectrum Policy Programme.

<sup>3</sup> In preparing the Framework document, ComReg has also had cognisance of the Competition Authority's 2007 submission to the Department of Enterprise Trade and Employment's Public consultation on the operation and implementation of the Competition Act 2002 (<http://www.tca.ie/EN/Promoting-Competition/Submissions/S07008.aspx>) and the Competition Authority's 2013 consultation on draft "merger guidelines" <http://www.tca.ie/EN/Mergers--Acquisitions/Legislation--Guidance/Guidance-on-Mergers.aspx>

- 4 Following careful consideration of all of the above materials, ComReg commenced the preliminary process to obtain the consent of the Minister for Communications, Energy and Natural Resources to the making of wireless telegraphy regulations required to provide for spectrum transfers in the radio frequency bands where Member States are to allow trading, set out in Article 6(8) of the RSPP Decision. With that process now concluded, ComReg publishes alongside this document the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014 (the “Regulations”)(**S.I. No. 34 of 2014**).
- 5 For the avoidance of doubt, the Procedures and Guidelines set out in the Framework are the procedures specified by ComReg pursuant to Regulation 3(4) of the Regulations. Interested parties will note that ComReg may update the Procedures and Guidelines from time to time following public consultation as appropriate.

## 1.2 Background to Document 12/76

- 6 On 14 March 2012, the RSPP Decision was published. The RSPP Decision requires, amongst other things, Member States to allow transfers or leases of rights of use of spectrum in specified harmonised bands.
- 7 As set out in paragraph 1.12 of Document 12/76, spectrum trading includes both:
  - outright transfer from one undertaking to another of rights of use to spectrum including associated conditions from the date of transfer to the end date of the current right of use; and
  - leasing of rights of use of spectrum for a period of time whereby the right of use will revert to the lessor before the end of the term of the original licence.
- 8 In relation to leasing, ComReg noted in Document 12/76 that there was a lack of international precedent in this regard ComReg, therefore, stated that it would return to the matter of leasing rights of use of spectrum in the harmonised bands in due course and would, in the first instance, introduce a regulatory regime for spectrum transfers.

- 9 The radio frequency bands where Member States are to allow trading, set out in Article 6(8) of the RSPP Decision, are collectively referred to as the "*RSPP bands*", and they are currently as follows: 790-862 MHz, 880-915MHz, 925-960MHz, 1710-1785MHz, 1805-1880MHz, 1900-1980MHz, 2010-2025MHz, 2110-2170MHz, 2.5-2.69GHz and 3.4-3.8GHz. Interested parties will also note that the list of bands may be added to from time to time by amendment of the RSPP Decision. For ease of reference, ComReg set out a list of the existing licence types in force in the RSPP bands in the State at Annex 3 to Document 12/76 (Document 12/76a).
- 10 Regulation 9(11) of the Authorisation Regulations (S.I. No 335 of 2011) requires ComReg to ensure that no distortion of competition arises from spectrum trading as follows:
- *"The Regulator shall ensure that competition is not distorted by any transfer or accumulation of rights of use for radio frequencies. For this purpose the Regulator may take appropriate measures such as mandating the sale or the lease of rights of use for radio frequencies"*.
- 11 ComReg noted that Article 5(2) of the RSPP Decision provides some guidance in this regard where it is states that:
- *"...without prejudice to the application of competition rules and to the measures adopted by Member States in order to achieve general interest objectives in accordance with Article 9(4) of Directive 2002/21/EC, Member States may adopt, inter alia, measures:*
  - *(d) prohibiting or imposing conditions on transfers of rights of use of spectrum, not subject to national or Union merger control, where such transfers are likely to result in significant harm to competition."*
- 12 Document 12/76 was issued together with a report prepared for ComReg by Oxera Consulting ("Oxera") entitled "Spectrum trading issues: *A framework for competition assessments*" (see Document 12/76b, the "Oxera Report") and a set of supporting annexes (Document 12/76a)<sup>4</sup>.

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<sup>4</sup> Document 12/76a ("Consultation Annexes") set out five annexes: Annex 1, International Updates; Annex 2, Legal Framework; Annex 3, Existing licence types in the RSPP bands; Annex 4, Draft Guidelines for Spectrum Transfer Analysis and Procedures; Annex 5, Draft Spectrum Transfer Notification Form. Document 12/76b ("Oxera Report").

- 13 Two submissions were received to Document 12/76, one from eircom Group and one from Hutchison 3G Ireland Ltd (“H3GI”) that was submitted in two parts. The submissions received from interested parties are now published alongside this document (see Document 12/76s).
- 14 In the period since the consultation closed, ComReg invited Oxera to analyse and comment on the submissions received and Oxera’s assessment of those submissions is set out in Annex 3.
- 15 This document addresses the specific comments made by the two respondents to Document 12/76 and sets out ComReg’s final position on them. ComReg has reviewed and updated its overall framework to present it in a more accessible manner.<sup>5</sup> In particular, Document 14/11 is clearer in terms of the procedures notifying parties must follow to notify a transfer and the approach ComReg will take in deciding whether or not a proposed transfer would distort competition.

### 1.3 Structure of this Document

- 16 The remainder of this document is structured as follows:

- **Chapter 2:** sets out a summary<sup>6</sup> of interested parties submissions to Document 12/76, Oxera’s analysis of points raised by respondents specifically on the Oxera Report and ComReg’s assessment of all the above material including its final position on the Framework; and
- **Chapter 3:** sets out the next steps in relation to the spectrum transfers framework.

- 17 Annexes attaching to this document include:

- **Annex 1:** The Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014;
- **Annex 2:** sets out ComReg’s final Regulatory Impact Assessment (RIA) supporting an ex-ante competition assessment of notified spectrum trades. ComReg received no comments or views on the draft RIA set out in Document 12/76;
- **Annex 3:** sets out Oxera’s analysis of points raised by respondents specifically on the Oxera Report; and

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<sup>5</sup> Material previously set out in draft form in the annex to Document 12/76 has been made more accessible in terms of layout and presentation.

<sup>6</sup> Where summaries are provided, whether of ComReg’s position in Document 12/76, respondents’ submission or expert reports, reference should be made to the original source for the definitive version thereof.



## 2 Spectrum Trading in the RSPP Bands

### 2.1 Introduction

18 This chapter addresses comments made by respondents on ComReg's proposals set out in Document 12/76 including Oxera's analysis of points raised by respondents specifically on the Oxera Report. For ease of reference, extracts from the respondents' submissions are copied below, noting that the definitive version of respondents' text is set out in Document 12/76s.

### 2.2 Scope of Spectrum Trading in the RSPP bands

#### Position set out in Document 12/76

19 In Document 12/76, ComReg set out the scope of its proposed spectrum trading framework to facilitate the regulatory review of transfers of spectrum rights of use in the RSPP bands.<sup>7</sup>

#### Respondents' views

20 eircom Group stated "*we note ComReg's proposal to limit trading rights to the RSPP bands. We would have no objection if the trading framework was extended to other spectrum bands*".<sup>8</sup> eircom Group provided no further comment in this regard.

21 H3GI stated "*ComReg should introduce a framework and guidelines in respect of spectrum leases*" and "*ComReg is legally obliged to introduce a spectrum leasing framework and guidelines by virtue of regulation 19 (1) of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations, 2011 (the "Framework Regulations")*".<sup>9</sup>

#### ComReg's Final Position

22 Having taken account of the views expressed by respondents to Document 12/76, ComReg does not propose to change its position in relation to the scope of transfers to be initially covered by its spectrum trading regime.

23 ComReg's Framework will cover transfers in the RSPP bands, as these are the bands which have been nominated on a harmonised basis for trading in the European Union. ComReg will however keep the matter under review.

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<sup>7</sup> See Section 3.2 of Document 12/76 for details on the types of transfers that would be covered by the framework and Section 3.4 for a discussion of the issues presented. At paragraph 1.14 of Document 12/76 ComReg stated that it "*will return to the matter of leasing rights of use of spectrum in the harmonised bands in due course*".

<sup>8</sup> Fourth paragraph on page 3 of its submission.

<sup>9</sup> Item 1 on page 1 of its submission

24 ComReg remains of the view<sup>10</sup> that it would be more appropriate to return to the matter of introducing a regulatory regime for spectrum leasing in due course after a framework for transfers has been established and with the benefit of ComReg's experience in managing and administering this new regime. ComReg believes this is an appropriate course of action in light of the dearth of international precedent as ComReg will then be in a position to draw upon its experiences and lessons learned from the new transfer framework.

## 2.3 Competition assessment of transfers

25 Chapter 4 of Document 12/76 noted that spectrum trades must be assessed in order to ensure that they do not result in a distortion to competition. In considering the timing and scope of such an assessment in Document 12/76, ComReg set out its proposals in relation to:

- whether a competition assessment / approval process should be conducted ex-ante or ex-post (see section 2.3.1);
- different tests that could be used to inform the design of an appropriate competition assessment (see section 2.3.2) and
- the key elements that could be involved in the competition assessment of spectrum trades by ComReg (see section 2.3.3).

### 2.3.1 Ex-ante or ex-post competition assessment

#### Position set out in Document 12/76

26 Section 4.3 of Document 12/76 considered whether such competition assessments should follow an ex-ante or ex-post review process.

27 Section 4.3.1 included a draft RIA<sup>11</sup> which evaluated two principal options in relation to the timing of conducting any assessment of proposed transfers, these being either on an ex-ante or ex-post basis. ComReg was of the preliminary view that an ex-ante assessment for all proposed spectrum transfers in the RSPB bands was the preferred option.

#### Respondents' views

28 eircom Group supported the conclusion reached by ComReg. eircom Group noted that *"it is prudent to initially adopt an ex ante framework for all spectrum trades"*<sup>12</sup>.

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<sup>10</sup> See paragraph 1.14 of Document 12/76.

<sup>11</sup> This draft RIA was prepared and conducted in accordance with ComReg's Regulatory Impact Assessment guidelines (Document 07/56a).

<sup>12</sup> Final paragraph on page 3 of its submission.

## ComReg's Final Position

29 Having taken account of the views expressed by respondents to Document 12/76, ComReg will adopt an ex-ante framework for the competition assessment of notified transfers. ComReg notes that respondents to Document 12/76 did not comment on the draft RIA contained therein. Consequently it has not been necessary to amend the draft RIA in light of the responses received. The final RIA is set out at Annex 2 of this document and remains unchanged from the draft RIA set out in Section 4.3 of Document 12/76.

### 2.3.2 Substantive Test to assess Distortion to Competition

#### Position set out in Document 12/76

30 Section 4.4 of Document 12/76 included a review of substantive merger control tests in use by competition authorities in various jurisdictions, noting that these might act as a useful starting point when considering an appropriate distortion to competition test that ComReg could apply when assessing relevant transfers.

31 Paragraph 4.60 of Document 12/76, set out ComReg's view, based on a multi-jurisdictional review carried out by Oxera and set out in the Oxera Report, that a substantial lessening of competition (SLC)<sup>13</sup> assessment would be the most suitable test to adopt in considering whether the result of a transfer would be to distort competition contrary to Regulation 9(11) of the Authorisation Regulations.

#### Respondents' views

32 H3GI stated<sup>14</sup> that it *"welcomes ComReg's proposed approach.....involving the 'substantial lessening of competition' test"*.

33 Whilst eircom Group supported the proposed approach<sup>15</sup>, it noted<sup>16</sup> that *"the draft guidelines refer to the test to be adopted as a "a substantial distortion to competition (SDC)"... eircom group is of the view that whichever test is chosen by ComReg should be clearly set out in its Final Decision"*.

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<sup>13</sup> ComReg's proposed substantive test was informed by the SLC test applied by the Irish Competition Authority in assessing notified mergers or acquisitions. Further detail is provided in section 4.4.1 of Document 12/76.

<sup>14</sup> Second paragraph, on page 1 of its submission

<sup>15</sup> eircom Group stated that *"ComReg concludes that the appropriate test to adopt in its assessment is a 'substantial lessening of competition (SLC)' consistent with the test applied by The Competition Authority in relation to mergers. We support this approach"* (third paragraph on page 6 of its submission).

<sup>16</sup> Third paragraph on page 6 of its submission.

- 34 eircom Group noted that elsewhere in the Document 12/76 ComReg referred to its test as a ‘substantial lessening of competition’ test and sought clarification in relation to the test and/or nomenclature used.

### **ComReg’s Final Position**

- 35 Having reviewed the Document 12/76 and Document 12/76a, ComReg accepts that there was some inconsistency in the language used across the two documents. For the avoidance of doubt, ComReg refers to its substantive test as a distortion to competition test which reflects the language used in the Regulations.<sup>17</sup>

## **2.3.3 Key elements of the distortion to competition test**

### **Position set out in Document 12/76**

- 36 Section 4.5 of Document 12/76 set out the key elements of the distortion to competition test such as including whether or not a notified spectrum trade would lead to the following:

- Unilateral effects; and/or
- Coordinated effects; and
- Detriment to consumers.

- 37 In Annex 4 of Document 12/76a ComReg set out its proposed approach to deciding whether the result of a transfer would be to distort competition.<sup>18</sup>

### **Respondents’ views**

- 38 In relation to the key elements of the distortion to competition test, H3GI provided two views on Oxera’s document and one view on ComReg’s proposed analysis of competitive effects (in particular on market concentration as set out at paragraph A 4.26 of the consultation annexes). These are as follows:

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<sup>17</sup> The Framework document (Document 14/11) sets out the details of the distortion to competition test which will be used by ComReg and which is based on the SLC test used by the Irish Competition Authority in its assessments of mergers and acquisitions.

<sup>18</sup> Specifically paragraphs A4.16 to A4.49.

- H3GI made reference to a section of the Oxera Document<sup>19</sup> relating to unilateral effects stating<sup>20</sup> *“Oxera does not explain why the likelihood of new entry into the (unspecified) market is “likely to be small in almost all instances, given that entry into the market is likely to occur only via the acquisition of spectrum through an MVNO arrangement”. As a result, ComReg should not rely on this view in the absence of an analysis of a relevant market”.*
- H3GI, in its submission, queried Oxera’s theoretical assumption that a spectrum right of use can be treated as a substitutable factor of production with hardware<sup>21</sup>. It stated<sup>22</sup> *“...Oxera’s analysis is too simplistic. Figure 2.1 assumes that hardware can substitute for spectrum and that an operator can always match a given level of capacity and/or quality of service by investing in either spectrum or hardware. Due to propagation characteristics, it might not be possible to match a given level of capacity and/or quality of service.”.*
- In relation to the list of considerations presented in paragraph A4.26 of the Document 12/76a, H3GI stated<sup>23</sup> that *“ComReg should also list availability and quality of service, including speed, as relevant factors. Due to propagation characteristics, certain services cannot be provided at all or comparable quality by using other spectrum at greater cost”.*

### Overview of Oxera’s Response

39 Oxera sets out a detailed response to H3GI’s submission in Section 3 of its response note, contained in Annex 3 of this document. In conclusion Oxera states *“unlike as H3GI seems to suggest, an analysis of unilateral effects in merger control does not necessarily require an explicit definition of the relevant market. While market definition can be a useful tool in some instances, it may be problematic when products are differentiated – that is, close but imperfect substitutes.”*

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<sup>19</sup> First bullet on page 28 of the Oxera Report.

<sup>20</sup> Point 6 on page 4 of its submission.

<sup>21</sup> Section 2.1.1 of the Oxera Report.

<sup>22</sup> Point 5 on page 3 of its submission.

<sup>23</sup> Item 4, final paragraph on page 2 of its submission.

- 40 Oxera states that in relation to H3GI's comments on the treatment of spectrum as a substitutable factor of production with hardware that <sup>24</sup> *"H3GI's observation is accurate in that radio propagation characteristics, which vary across different spectrum bands, do indeed dictate the extent to which network hardware can be used as a substitute for spectrum"*. Further Oxera states *"that Figure 2.1 is entitled 'stylised illustration'"* and *"the precise relationship between spectrum holdings and hardware investments varies across bands, and should be considered for each trade on a case-by-case basis."*

### **ComReg's Final Position**

- 41 In relation to H3GI's views set out at point 6 of its submission, ComReg agrees with Oxera's elaboration set out above. In particular, ComReg agrees with Oxera that an analysis of unilateral effects in merger control may not necessarily require an explicit definition of the relevant market particularly when products are differentiated. Furthermore, ComReg notes that in both its current guidelines<sup>25</sup> and proposed new guidelines (on which it is currently consulting)<sup>26</sup> for merger analysis the Competition Authority acknowledges that its approach to market definition is not mechanical but a conceptual framework within which relevant information can be organised, that is not always necessary to reach a firm conclusion on market definition and, indeed, that a market may not be defined in certain cases.
- 42 In relation to H3GI's views set out at point 5 of its submission, that Oxera's analysis of spectrum as a factor of production is too simplistic, ComReg recognises that there is a need to treat each transfer on a case-by-case basis. It would not be appropriate for Oxera to set out to cover all possible cases in its report to ComReg. In particular, ComReg notes the extent to which spectrum holdings and hardware investments are assessed will depend on the particulars of a notified transfer. Oxera, however, makes a reasonable assumption that propagation characteristics of spectrum, which vary across different spectrum bands, do indeed dictate the extent to which network hardware can be used as a substitute for spectrum. ComReg does not consider, therefore, that H3GI's comment warrants it changing its approach in this regard.

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<sup>24</sup> Section 2 of Annex 4.

<sup>25</sup> See, in particular, paragraph 2.2

<sup>26</sup> See, in particular, paragraph 2.3

43 In relation to H3GI's point that ComReg should also include "*availability and quality of service, including speed*" as relevant factors to be assessed, ComReg notes that Document 12/76a (at paragraph A4.26 therein) presented a non-exhaustive list of considerations which ComReg would take into account when deciding whether the result of a transfer would be to distort competition. In that regard, and depending on the circumstances of a particular transfer, ComReg may also take into account those additional factors suggested by H3GI in conducting its assessment.

## 2.4 Proposed Procedures

44 Chapter 5 of Document 12/76, along with paragraphs A4.50 to A4.79 of the Document 12/76a, set out the spectrum transfer procedures which ComReg proposed to follow in the event of receiving an application for a spectrum transfer. Two main steps were proposed:

- Notification of a proposed transfer with the submission of information set out in a Notification Form (see section 2.4.1); and
- Assessment of the notified transfer (see section 2.4.2).

45 Section 5.4 of Document 12/76 included an overview of indicative timelines associated with the proposed procedural framework.

### 2.4.1 Notification, and publication procedures

#### Position set out in Document 12/76

46 Section 5.2 of Document 12/76 and paragraphs A4.55 to A4.60 of Document 12/76a, set out the proposed notification and publication procedures. The proposed notification process required that a Notification Form be completed by the notifying parties and for an administrative fee of €5,000 to be furnished to ComReg. ComReg invited comments on the proposed Notification Form, which set out categories of information to be provided to ComReg and certain declarations to be made in relation to licence condition attaching to the spectrum to be transferred.<sup>27</sup>

#### Respondents' views

47 In the main, eircom Group supported<sup>28</sup> the notification and publication procedures, however, it raised the following points:

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<sup>27</sup> The term notifying parties refers to both parties who have notified ComReg of a proposed spectrum transfer.

<sup>28</sup> eircom Group stated at page 4 of its submission that "...procedures must comply with the minimum requirements set out in Regulation 19 including in particular in terms of notification and publication... eircom Group accepts that the procedures proposed by ComReg generally meet the minimum requirements of Regulation 19".

- what is ComReg's basis for applying an administrative fee;<sup>29</sup>
- the first declaration on the Notification Form: *"appears to create an ongoing obligation on the current licence holder (the selling party in the trade) to meet licence obligations after the trade has been completed. This may be appropriate in the case of a partial disposal but is not acceptable in the event that the entire licence is sold"*; and
- *"In terms of the specific categories of information listed by ComReg it is not clear why the Parties should provide information on the options considered as 'strategic alternatives to the transfer' nor what is meant by it..."*<sup>30</sup>

## ComReg's Final Position

48 Having considered the views expressed by respondents, save as otherwise provided below ComReg sees no reason to alter its procedures.

49 In relation to eircom Group's specific points set out above, ComReg responds as follows:

- In relation to the proposed €5,000 administrative fee, and in particular the basis for charging it, ComReg notes that this is provided for under Regulation 4 (2) of the Regulations;
- In the case of the declaration requiring the licence holder<sup>31</sup> to be subject to on-going licence obligations, ComReg agrees that this should only apply in the case of a partial transfer (as suggested by eircom Group). In the case of a full transfer, it would not be appropriate for licence conditions relating to the transferred rights of use to continue to apply to the transferor following the spectrum transfer and ComReg has amended the Notification Form accordingly; and
- In terms of the specific categories of information listed in the notification form, where notifying parties are unclear as to what is required under any part of the notification form, ComReg, would be happy to engage with them on a case by case basis at the pre-notification stage. ComReg considers that it is not appropriate to try and give exhaustive details in the present context.

### 2.4.2 Guidance on how ComReg decides whether or not the

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<sup>29</sup> Page 7 of its submission stated *"while eircom Group does not disagree as such with the proposal, the legal basis for requiring the payment of an administrative fee of €5,000 should be clearly set out"*.

<sup>30</sup> Page 5, fourth paragraph of its submission.

<sup>31</sup> The licence holder refers to the notifying party who holds the rights of use to the spectrum to be transferred prior to the transfer taking place.



## result of a transfer would be to distort competition

50 Section 5.3 of the Document 12/76 set out other details in ComReg's framework for spectrum transfers including in relation to the distortion to competition assessment and the types of determination(s) that could be made on foot of either a phase 1 assessment or a full investigation in phase 2.

### Distortion to competition assessment

#### Position set out in Document 12/76

51 Paragraphs 5.17 to 5.19 of Document 12/76 set out ComReg's proposal that the distortion to competition assessment would take the form of a two phase assessment.

52 Paragraph A4.19 of Annex 4 of the Document 12/76a stated that *"trigger thresholds between Phase 1 and Phase 2 are not stringently defined. Where, having considered the information provided and all submissions received, ComReg is unable on the basis of the information before it to form the view that the result of the spectrum transfer will not be to distort competition in markets for electronic communications networks and electronic communications services and associated facilities in the State, ComReg will make a determination to carry out a full investigation, i.e. proceed to Phase 2."*

53 In paragraph A4.61 of the Document 12/76a, ComReg noted that the commencement of a distortion to competition assessment (the "Commencement Date") would be linked to the receipt of a valid Notification Form (see also paragraphs 5.6 to 5.7 of Document 12/76). ComReg also noted that the information requested in the Notification Form is an exhaustive list for the purpose of a valid notification and that the Notification Form would be subject to periodic review.

#### Respondents' views

54 H3GI welcomed ComReg's proposal to approach the competition assessment in two phases.<sup>32</sup>

55 In its submission, eircom Group made the following points on the distortion to competition assessment:

- It should be clear what information is required of notifying parties to commence the assessment *"what information must be provided to ComReg in order to "start the clock"*<sup>33</sup>.

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<sup>32</sup> Second Paragraph of page 1 of its submission.

<sup>33</sup> Third paragraph, on page 5 of its submission.

- that *“the list of information to be included in the Notification must be an exhaustive list, in terms of categories of information required”*.<sup>34</sup>
- *“while the categories of information must be exhaustive, this does not mean that ComReg could not.....suspend or stop the clock in order to obtain further information within the categories specified in the Notification Form. This should be allowed only during the first phase”*.<sup>35</sup>  
and
- a ‘trigger’ between each phase in the assessment should be clearly defined for example, where ComReg is not satisfied that the transfer will not lead to a distortion to competition it should then move to phase 2.<sup>36</sup>

## ComReg’s Final Positions

56 The competition assessment conducted by ComReg will take the form of a two phase assessment.

57 In relation to eircom Group’s request for clarity on what information must be provided, ComReg confirms that the information requested in the Notification Form is an exhaustive list for the purpose of a valid notification. However, ComReg may suspend the time period within which the assessment of a notification must be completed and a determination made where it requires further information to be furnished to it. For the avoidance of doubt such an information request may be made at Phase 1 and/or at Phase 2 of its investigations.<sup>37</sup>

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<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> Sixth paragraph, on page 5 of its submission.

<sup>37</sup> This is provided for under Regulation 5(3) of the Regulations. ComReg notes that this approach is similar with EU merger control rules and with a proposal by the Authority in its 2007 consultation on the operation and implementation of the Competition Act 2002 (in particular see “Merger Proposal 10”, in which the Competition Authority recommends that it have the ability to “stop the clock” during a Phase 2 investigation.

58 In relation to the trigger threshold for carrying out a full investigation, ComReg would note that there is no divergence between eircom Group's and its view (as was set out at paragraph A4.19 of Document 12/76a). In particular, ComReg confirms that, where, having considered the information provided and all submissions received, ComReg is unable on the basis of the information before it to form the view that the result of the spectrum transfer will not be to distort competition it will make a determination to carry out a full investigation. This is analogous to the Competition Authority's approach to the review of mergers and acquisitions and is reflected in the Framework document attached at Annex 4.

## Overview of indicative timelines

### Position set out in Document 12/76

59 Section 5.4 of Document 12/76 along with paragraphs A4.50 to A4.79 of the Document 12/76a set out indicative timelines for the proposed procedural steps associated with ComReg's distortion to competition assessment.

### Respondents' views

60 eircom Group notes that *"the success of the merger control procedures in Ireland and Europe in a large part depends on the fact that mandatory timelines apply, including on the relevant authority, thereby achieving regulatory, legal and business certainty"*.<sup>38</sup>

61 eircom Group stated that the proposed timelines *"are realistic and appropriate"*<sup>39</sup>, however eircom Group further stated that it *"does not believe that it is appropriate that the timelines set out in the draft Guidelines are simply indicative or "best efforts" 40 and "request that firm timelines are set down for the assessment process"*.

62 eircom Group was of the view that it was unclear why, *"in the case that the Notifying Parties would require certain amendments to the terms and conditions of the licence, ComReg's review should not be conducted in parallel with the assessment of the transfer"*<sup>41</sup>. Furthermore, eircom Group stated *"that the proposed process by ComReg be reviewed to provide for a single timeline"*.<sup>42</sup>

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<sup>38</sup> Page 4, final paragraph of its submission.

<sup>39</sup> Page 5, second paragraph of its submission.

<sup>40</sup> Page 4, third paragraph of its submission.

<sup>41</sup> Page 5, final paragraph of its submission.

<sup>42</sup> Page 6, first paragraph of its submission.

## ComReg's Final Position

- 63 In response to eircom Group's views in relation to the timelines being indicative, ComReg notes the timelines associated with ComReg deciding if a transfer would not distort competition without a full investigation (i.e. at Phase 1) are no longer indicative as the Regulations provide for mandatory timelines with which ComReg must comply (see Regulation 6(1) of the Regulations).
- 64 In the case of making a determination on foot of a full investigation, however, ComReg notes that transfers subject to a full investigation may very well require the analysis a great variety and volume of facts. The analysis of particular issues may need to be tailored to the specific circumstances of a transfer and/or deal with competition issues not specifically considered in the Framework. This is also in the context of deployment of resources for a new regime with no precedent in Ireland and little guidance elsewhere. Noting however, that ComReg must ensure that competition is not distorted by any transfer, it is of the view that flexible timelines are the best way for it to approach complying with this obligation. ComReg does note, however, that it is required, in so far as practicable, to keep within the indicative timeline of 105 working days for carrying out full investigations (see Regulation 7(1) of the Regulations) and that this should provide the notifying parties with a reasonable level of certainty in terms of timelines.
- 65 Furthermore, ComReg notes that the indicative timelines<sup>43</sup> will likely only be relevant to a minority of transfers where ComReg has been unable to find that no distortion to competition will result without carrying out a full investigation. In any case, ComReg will keep the issue of indicative timelines under review in light of the experience gained and lessons learned once the Framework is up and running.

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<sup>43</sup> Where ComReg makes a determination to carry out a full investigation it will form an opinion of a provisional time period required to carry out that investigation and inform the notifying parties accordingly. ComReg is committed to completing its investigation within the provisional time period where practicable but acknowledges that there may be circumstances that there may be circumstances that it would be appropriate to do so given the specific circumstances of any particular case. However, where, within the provisional time period ComReg is unable to make its determination, the full investigation shall continue according to revised timelines which shall be communicated to the notifying parties (see Regulation 7(1) of the Regulations).

66 In relation to eircom Group's comments on assessment of licence condition variations, ComReg notes from its experience in this area that consideration of requests to vary licence conditions can involve a relatively lengthy process and be resource intensive as ComReg is required to ensure that any proposed variation is compatible with its statutory functions, objectives and duties, and it may be required to consult. Indeed, ComReg considers it appropriate to first ensure that all aspects of a proposed spectrum transfer accord with its statutory functions, objectives and duties generally before considering whether a proposed transfer would distort competition contrary to Regulation 9(11) of the Authorisation Regulations. Therefore, should a notified spectrum transfer involve or require an amendment to a licence condition, ComReg may suspend the time period within which the assessment of a notification must be completed and a determination made until such variation has been reviewed by ComReg (see Regulation 5(9) of the Regulations).

## 2.5 Giving effect to the transfer

67 On the basis of the views and analysis set out in section 5.3.4 as to how ComReg would give regulatory effect to a transfer, and noting that no further views were received on this issue ComReg's final position is to implement its proposals as set out at paragraphs 5.32 to 5.35 in Document 12/76.

## 2.6 Additional issues raised by respondents

68 eircom Group requested clarity from ComReg on two topics, as follows;

- *“whether any further legislative changes are required to complete the process of making the 3G licences tradable<sup>44</sup>”; and that*
- *ComReg “should clearly define the transfers that are subject to the approval process, including by reference to the obligation to notify mergers to the Competition Authority or the European Commission, as appropriate”<sup>45</sup>.*

69 eircom Group also raised a number of points in respect of the nature of the guidelines presented in Document 12/76 as follows:

- *It stated that “eircom Group does not believe that the term “Guidelines” appropriately describe the nature of the procedures”<sup>46</sup>.*

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<sup>44</sup> Page 3, fifth paragraph of its submission.

<sup>45</sup> Page 6, second paragraph of its submission.

<sup>46</sup> Page 4, second paragraph of its submission.

- It also stated that *“the manner in which ComReg proposes to interpret the substantive test it proposes and, for example, the circumstances in which it would require remedies, are more properly the subject of guidelines”*<sup>47</sup>.
- Finally eircom Group stated *“that the spectrum transfer procedures set out in the Draft Guidelines should not be in the Guidelines but rather in the body of a binding decision of ComReg”*<sup>48</sup>.

70 H3GI made two additional points as follows:

- that *“ComReg should provide ‘access to the file’ similar to that provided by the Competition Authority in relation to mergers”*. and
- that footnote 29 of Document 12/76 in relation to the reference by ComReg to the permanency of rights of use to spectrum in the UK was factually incorrect.<sup>49</sup>

## ComReg’s response

71 In relation to the issues raised by eircom Group, ComReg notes that the Framework document consists of, on the one hand, procedures specified by ComReg pursuant to Regulation 3(4) of the Regulations and, separately, guidance on how ComReg will decide whether or not the result of a transfer would be to distort competition.

72 In relation to H3GI’s points:

- ComReg sees some merit in following the approach taken by the Competition Authority in relation to ‘access to the file’<sup>50</sup>, and may introduce such procedures in due course. ComReg will keep this matter under review.
- ComReg notes H3GI’s observation in relation to footnote 29 of Document 12/76, but considers that the comment has no material effect on ComReg’s statement in paragraph 3.6 of Document 12/76 that Wireless Telegraphy licences issued by it are granted for fixed finite periods of time rather than indefinite periods as in the UK.

<sup>47</sup> Page 4, third paragraph of its submission.

<sup>48</sup> Page 4, final paragraph of its submission.

<sup>49</sup> H3GI notes that *“even where operators hold indefinite licences, they are still subject to revocation by Ofcom at five-years’ notice “for reasons of spectrum management” ie [sic] at Ofcom’s discretion”*.

<sup>50</sup> [http://www.tca.ie/images/uploaded/documents/Merger\\_File\\_Access\\_Procedures.pdf](http://www.tca.ie/images/uploaded/documents/Merger_File_Access_Procedures.pdf)

### 3 Next Steps

73 The **Statutory Instrument No. 34 of 2014**, Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014, were signed into law on 29 January 2014. These Regulations provide for the transfer of spectrum rights of use within the RSPP bands. The Regulations apply to all existing and future spectrum rights of use allocated in the RSPP bands.

74 ComReg is now in a position to consider proposals for full or partial transfers of spectrum rights of use within the RSPP bands. Prospective spectrum transfers must comply with the Regulations and notifications should follow the Notification procedures as set out in the Framework Document on transfers Document 14/11. All Notification Forms and associated documents should be addressed to:

**Spectrum Licensing Manager**

**The Commission for Communications Regulation**

**Abbey Court**

**Blocks D, E & F,**

**Irish Life Centre**

**Lower Abbey Street**

**Dublin 1**

**email: [licensing@comreg.ie](mailto:licensing@comreg.ie)**

75 ComReg may review the Framework from time to time as appropriate.

76 ComReg will return to the matter of introducing a regulatory regime for spectrum leasing in due course after a framework for transfers has been established and with the benefit of ComReg's experience in managing and administering the new transfer regime.

# **Annex: 1 Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014, (S.I. No. 34 of 2014)**





STATUTORY INSTRUMENTS.

**S.I. No. 34 of 2014**



WIRELESS TELEGRAPHY (TRANSFER OF SPECTRUM RIGHTS OF  
USE) REGULATIONS 2014

## WIRELESS TELEGRAPHY (TRANSFER OF SPECTRUM RIGHTS OF USE) REGULATIONS 2014

The Commission for Communications Regulation, in exercise of the powers conferred on it by section 6(1) of the Wireless Telegraphy Act 1926 (No. 45 of 1926) (as substituted by section 182 of the Broadcasting Act 2009 (No. 18 of 2009)) and for the purposes of giving effect to Regulation 19 of the European Communities (Electronic Communications Network and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) and Regulation 9(11) of the European Communities (Electronic Communications Network and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011) and with the consent of the Minister for Communications, Energy and Natural Resources pursuant to section 37 of the Communications Regulation Act 2002 (No. 20 of 2002), hereby makes the following Regulations:

*Citation*

1. These Regulations may be cited as the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014.

*Interpretation*

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

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

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

“assessment commencement date” means the date on which the Commission commences its assessment of a proposed transfer which in any event shall be on the working day following receipt of a valid notification in accordance with Regulation 4;

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

“Commission” means Commission for Communications Regulation;

“condition” means an obligation on the part of an undertaking arising by virtue of a proposal put forward by it being subject to a statement in writing by the Commission such as is mentioned in Regulation 5(5);

“electronic communications network”, “electronic communications service” and “associated facilities” have the meanings assigned to them in the Framework Regulations;

*Notice of the making of this Statutory Instrument was published in  
“Iris Oifigiúil” of 4th February, 2014.*

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

“licence” means a licence granted in accordance with section 5 of the Act of 1926 to keep, have possession of, install, maintain, work and use apparatus for wireless telegraphy in any specified place in the State or in any specified ship or other vessel or aircraft;

“licensee” means the holder of a licence for the time being in force;

“notification” means a notification of a proposed transfer made to the Commission under Regulation 4(1);

“notification fee” means the administrative fee payable by the notifying parties pursuant to Regulation 4(2);

“notifying party” means the transferor and/or the transferee as the context so requires;

“right of use” means the right of a licensee to use certain radio frequencies within the spectrum bands set out in the Schedule and which frequencies are specified in a licence subject to such conditions and restrictions as prescribed by the licence itself or by any Regulations governing the licence made by the Commission under section 6 of the Act of 1926;

“Schedule” means the schedule to these Regulations;

“transfer” means the assignment by a licensee (“the transferor”) of some or all of a right of use granted under a licence to another party (“the transferee”).

(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 or Schedule to these Regulations, unless it is indicated that a reference to some other enactment is intended; and
- (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.

(3) A word or expression that is used in these Regulations and that is also used in the Act of 1926 has, unless the context otherwise requires, the same meaning in these Regulations as it has in that Act;

(4) A word or expression that is used in these Regulations and that is also used in the Act of 2002 has, unless the context otherwise requires, the same meaning in these Regulations as it has in that Act;

(5) A word or expression that is used in these Regulations and that is also used in the Framework Regulations or the Authorisation Regulations has, unless the context otherwise requires, the same meaning in these Regulations as it has in those Regulations.

*Transfer of a spectrum right of use*

3. (1) These Regulations apply to any proposed transfer of rights of use in the spectrum bands set out in the Schedule.

(2) The regulations under which licences are granted to use rights of use in the spectrum bands set out in the Schedule are hereby amended solely for the purpose of permitting the transfer of those rights of use in accordance with these Regulations.

(3) For the purposes of these Regulations a transfer occurs when a transferee lawfully acquires one or more rights of use from a transferor and the transferor divests itself of all such rights of use. The transferor and the transferee must be undertakings.

(4) A transfer notified under Regulation 4(1) must be submitted by the notifying parties in accordance with procedures specified by the Commission and shall be assessed by the Commission in accordance with guidelines published by the Commission, which may be varied by the Commission from time to time.

(5) A transferred right of use shall remain in effect for the remainder of the term of the transferor's licence in which the transferred right of use was originally vested and shall expire in full on the same date as the transferor's licence was due to expire and shall not be renewed or extended beyond that date.

(6) Save as otherwise provided in these Regulations, no part of these Regulations shall operate so as to amend an existing licence condition or to enable or permit a licensee to avoid compliance with any licence condition save where the Commission gives its prior consent in writing to any such amendment or condition not being complied with.

(7) These Regulations shall not apply to any transfer that forms part of a merger or acquisition which is required to be notified to the Competition Authority in accordance with Part 3 of the Competition Acts 2002 to 2012 or to the European Commission in accordance with Council Regulation (EC) No 139/2004. The Commission must be informed of any such merger or acquisition at the same time it is notified to the Competition Authority or the European Commission, as appropriate.

*Notification of Proposed Transfer*

4. (1) Where a proposed transfer to which these Regulations apply is intended or will occur if a public bid that is made is accepted, the transferor and the transferee shall notify the Commission in writing of the proposed transfer.

The notification shall be provided in such format and contain such information and documentation as the Commission may specify.

(2) A notification under paragraph (1) shall be accompanied by an administrative fee of €5,000.

(3) A notification under paragraph (1) shall be invalid if any of the information or documentation required by the Commission or the notification fee is not provided to the Commission in full or if any statement made is found to be false or misleading in a material respect. Any determination made by the Commission on foot of such a notification is void.

*Examination by the Commission of notification*

5. (1) Within 7 working days of the receipt of a notification in accordance with Regulation 4, the Commission shall cause a notice to be published on its website setting out details in respect of the notification and inviting interested parties to make submissions in writing to the Commission no later than 10 working days after the date of publication of such notice, or such shorter or longer period as the Commission may specify. The Commission shall consider all submissions received in writing within the period specified pursuant to this paragraph.

(2) The notifying parties shall, if so requested by the Commission by notice in writing, furnish within a time period specified by the Commission, such additional information as the Commission may reasonably require at any stage of an assessment of a notification. The Commission may extend the time period specified pursuant to this paragraph at the request of the notifying parties.

(3) Save where the Commission states otherwise in writing, where the Commission requires further information to be furnished to it pursuant to paragraph (2) during either the initial stage of its assessment and/or during the full investigation, the time periods indicated in Regulations 6(1) and 7(1) of these Regulations shall be suspended until such information has been provided to the satisfaction of the Commission.

(4) In the course of its assessment of a notification, the Commission may enter into discussions with the notifying parties with a view to identifying measures which would ameliorate any effects of the notified transfer on competition.

(5) In the course of any discussions entered into pursuant to paragraph (4), any of the notifying parties may submit proposals to the Commission of the kind mentioned in paragraph (6) with a view to the proposals becoming binding on it or them if the Commission takes the proposals into account and states in writing that the proposals form the basis or part of the basis of its determination under Regulation 6 or 7.

(6) The proposals referred to in paragraph (5) are proposals with regard to the manner in which the transfer may be put into effect or to the adoption of any other measure referred to in paragraph (4).

(7) Where a transfer notified in accordance with Regulation 4, a measure identified under paragraph (4) or a proposal made under paragraph (5) would involve amending a condition of an existing licence, the Commission shall review any such amendment of a licence condition having regard to its statutory functions, objectives and duties and the relevant facts including the circumstances under which the licence was first granted and is held at that time. Such review may include public consultation.

(8) Where a review under paragraph (7) is required, the time periods indicated in Regulations 6(1) and 7(1) of these Regulations may be suspended by the Commission until such time as the Commission has concluded its review pursuant to paragraph (7) and made a determination in respect of the proposed amendment to the relevant licence condition.

*Determination of issues concerned without full investigation*

6. (1) In respect of a notification received in accordance with Regulation 4, the Commission shall, subject to Regulation 5, within 35 working days of the assessment commencement date, inform the notifying parties of one of the following determinations:

- (a) that the transfer may be put into effect on the grounds that, in the opinion of the Commission, the result of the transfer would not be to distort competition;
- (b) that the transfer may be put into effect subject to conditions specified by the Commission being complied with on the grounds that, in the opinion of the Commission, the result of the transfer will not be to distort competition if the conditions so specified are complied with; or
- (c) that it intends to carry out a full investigation under Regulation 7 in relation to the proposed transfer (referred to as a “full investigation”).

(2) Where the Commission makes a determination under subparagraph (a) or (b) of paragraph (1), it shall publish on its website that determination with due regard for confidentiality, within 2 months after the making of the determination.

*Determination of issues following a full investigation*

7. (1) Within 5 working days of informing the parties of its determination to carry out a full investigation pursuant to subparagraph (c) of paragraph (1) of Regulation 6, the Commission shall form an opinion of the time period necessary to carry out a full investigation (referred to as a “provisional time period”), which shall not, in so far as practicable, and subject to Regulation 5, exceed 105 working days from the forming of that opinion. The Commission shall inform the notifying parties of the provisional time period in writing. Where the Commission does not make a determination under paragraph (2) within the provisional time period, the full investigation may continue according to revised timelines and the Commission may determine further provisional time period(s) and will inform the notifying parties accordingly.

(2) On completion of a full investigation, the Commission shall make whichever of the following determinations it considers appropriate, namely that the transfer:

- (a) may be put into effect on the grounds that, in the opinion of the Commission, the result of the transfer will not be to distort competition;
- (b) may be put into effect subject to conditions specified by the Commission being complied with on the grounds that, in the opinion of the Commission, the result of the transfer will not be to distort competition if the conditions so specified are complied with; or
- (c) may not be put into effect on the grounds that, in the opinion of the Commission, the result of the transfer will be to distort competition.

(3) Before making a determination under paragraph (2), the Commission shall have regard to any relevant international obligations of the State.

(4) Where the Commission makes a determination under paragraph (2), it shall furnish the notifying parties a copy of the written determination within the time period specified by the Commission under paragraph (1) and will publish on its website the determination with due regard for commercial confidentiality, within 2 months after the making of the determination.

*Limitation on transfer being put into effect*

8. (1) A transfer that has been notified to the Commission in accordance with Regulation 4 shall subject to paragraph (3), not be put into effect until:

- (a) the Commission, in pursuance of Regulation 5, has determined under Regulation 6(1)(a) or (b) or Regulation 7(2)(a) or (b) that the transfer may be put into effect; or
- (b) subject to Regulation 5, a period of 35 working days after the assessment commencement date has elapsed without the Commission having informed the notifying parties of the determination (if any) it has made under Regulation 6;

whichever first occurs.

(2) Any transfer which purports to be put into effect where the putting into effect contravenes paragraph (1), is void.

(3) Any transfer which purports to be put into effect following the occurrence of one of the events listed in paragraph (1) must be put into effect within 12 months of the day immediately following the date on which that event occurs, or it shall be void.

(4) A transfer which purports to be put into effect, where that putting into effect would contravene Regulation 4 shall be void.

(5) The Commission may refuse to consider a notification where the proposed transfer is dependent upon the proposed transferee becoming an authorised undertaking under the Authorisation Regulations, and the transferee has not already done so.

(6) In the event that the Commission consents to a proposed transfer notified to it pursuant to Regulation 4(1), the Commission shall grant or amend all relevant licences.

(7) Compliance by the notifying parties with a determination made by the Commission under Regulation 6(1)(a) or (b) or Regulation 7(2)(a) or (b), including any conditions forming the basis or part of the basis of such determination in accordance with Regulation 5(5), shall be made a condition of any licence under which the rights of use to the transferred spectrum are made available by the Commission.



## SCHEDULE

Spectrum Bands to which these Regulations apply

790-862 MHz
880-915 MHz
925-960 MHz
1710-1785 MHz
1805-1880 MHz
1900-1980 MHz
2010-2025 MHz
2110-2170 MHz
2.50-2.69 GHz
3.40-3.80 GHz



GIVEN under the Official Seal of the Commission for Communications Regulation this,  
29 January 2014.

KEVIN O'BRIEN,  
Chairperson for and on Behalf of the Commission of  
Communications Regulation.

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



GIVEN under the Official Seal of the Minister for Communications, Energy and Natural Resources this,  
24 January 2014.

PAT RABBITTE,  
Minister for Communications, Energy and Natural Resources.

EXPLANATORY NOTE

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

These Regulations provide for the transfer of spectrum rights of use between undertakings in accordance with published procedures adopted by the Commission and not otherwise.

BAILE ÁTHA CLIATH  
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR  
Le ceannach díreach ó  
FOILSEACHÁIN RIALTAIS,  
52 FAICHE STIABHNA, BAILE ÁTHA CLIATH 2  
(Teil: 01 - 6476834 nó 1890 213434; Fax: 01 - 6476843)  
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# Annex: 2 RIA on the Procedure for the Competition Assessment of Spectrum Trades

## Introduction

A 2.1 This Annex sets out ComReg's Regulatory Impact Assessment (RIA) on the procedure for assessing the potential effects of spectrum trades on competition. ComReg conducted this RIA cognisant that the introduction of spectrum trading could significantly impact on the electronic communications sector in Ireland by facilitating a more efficient use of spectrum, and in the interests of continuing to ensure openness and transparency.

A 2.2 ComReg requested that interested parties review the draft RIA contained in Document 12/76 and submit any comments or information which they believed ComReg had not considered, and should consider, in finalising its decision on the procedure for competition assessment of spectrum trades. This final RIA has taken account of respondents' views expressed in response to Document 12/76, as addressed in Chapter 2 of this document.

A 2.3 The RIA was prepared in accordance with ComReg's RIA Guidelines (Document 07/56a<sup>3</sup>) ("RIA Guidelines") and having regard to the RIA Guidelines issued by the Department of An Taoiseach in June 2009 ("Department's RIA Guidelines") and any relevant Policy Directions issued to ComReg by the Minister for Energy, Communications and Natural Resources under Section 13 of the 2002 Act (the "Policy Directions").

## Regulatory Impact Assessment

A 2.4 ComReg's RIA Guidelines set out, amongst other things, the circumstances in which a RIA might be appropriate. In summary, ComReg will generally conduct a RIA in any process that might result in the imposition of a regulatory obligation (or the significant amendment of an existing regulatory obligation) or which might otherwise significantly impact on a market or on stakeholders or consumers.

A 2.5 As set out in ComReg's RIA Guidelines, there are five steps to this RIA:

1. Identify the policy issue and the objectives;

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<sup>3</sup> Guidelines on ComReg's approach to Regulatory Impact Assessment, August 2007, ComReg Document 07/56a.

2. Identify and describe the regulatory options;
3. Determine the impacts on stakeholders;
4. Determine the impacts on competition; and
5. Assess the impacts and choose the best option.

## **Identify the Policy Issue and the Objectives**

A 2.6 Under Regulation 19(1) of the Framework Regulations, ComReg is required to ensure that undertakings may transfer or lease their spectrum rights of use, subject to various other provisions including Regulation 9(11) of the Authorisation Regulations which requires ComReg to ensure that radio frequencies are efficiently and effectively used. Regulation 9(11) also empowers ComReg to take appropriate measures such as mandating the sale or the lease of rights of use for radio frequencies.

A 2.7 In setting out a procedure for assessing the competition impacts of spectrum trades which reflects its relevant statutory functions, duties and objectives, ComReg does not wish to adversely affect the extent to which trades would otherwise take place. ComReg does not wish to reduce incentives to engage in trades which would be neutral in terms of any effects on competition, or which may result in more efficient use of spectrum to the benefit of consumers without having any distortive effect upon competition<sup>4</sup>.

A 2.8 Similar to merger analysis, a crucial consideration in the choice of procedure for the competition assessment of spectrum trades is whether the chosen procedure is intended to avoid Type 1 or Type 2 errors. A Type 1 error would arise where the assessment process resulted in a trade, which would result in more efficient use of spectrum without distorting competition, being blocked. A Type 2 error would arise where the assessment process allowed trades, which would have a distortive effect on competition, to nevertheless proceed. If the goal is to minimise Type 1 errors, the process should be designed so that all trades are allowed in principle, with specific trades contested only where it was very clear that the trade would result in a distortion to competition. If the goal is to minimise Type 2 errors, all trades would be blocked in principle and only allowed to proceed in cases where it was very clear that the trade would not result in a distortion to competition.

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<sup>4</sup> In certain instances anti-competitive effects could be compensated for by improvements in efficiencies resulting directly from the spectrum transfer.

## Regulatory Options

A 2.9 The competition impacts of spectrum trades could be assessed by relying solely on an ex post review or by introducing an ex ante framework. Therefore the two options under consideration are as follows:

- Option 1 - Ex post: Under Option 1 all proposed spectrum trades notified to ComReg pursuant to Regulation 19(4) of the Framework Regulations could be implemented without the need for prior approval from ComReg. Regulatory intervention could arise after the trade had been implemented if there was a suspected breach of sections 4 and/or 5 of the Competition Act - i.e. unlawful arrangements between undertakings or an abuse of dominance.<sup>5</sup> An ex post procedure, therefore could be considered as a 'do nothing' option, in that it would not involve a new framework per se, but rather would involve relying on existing legislative provisions for the assessment of the competition impacts of notified spectrum trades. This approach would reduce or eliminate the potential for Type 1 errors but could increase the likelihood of Type 2 errors.
- Option 2 - Ex ante: Under an ex ante framework all proposed spectrum trades notified to ComReg pursuant to Regulation 19(4) of the Framework Regulations, would be subject to prior assessment by ComReg, before they could be implemented, and ComReg could either allow or disallow any notified trade, or could allow such a trade subject either to one or both parties accepting certain conditions. This approach would reduce or eliminate Type 2 errors but could give rise to Type 1 errors. A transfer which was approved under such an ex ante framework would still be subject to the provisions of the Competition Act 2002.

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<sup>5</sup> It is worth noting that sections 4 and/or 5 of the Competition Act apply in the event of any suspected breach of those provisions, at any time and in any industry. The Competition Authority enforces the provisions generally while ComReg may enforce them in relation to anti-competitive practices in the electronic communications sector. Therefore, an ex post review of spectrum trades would not, strictly speaking, involve the creation of a new regulatory framework but would merely involve the application of existing legislative provisions.

## **Stakeholder Analysis (Impact on trading parties, existing operators and potential new entrants)**

A 2.10 Option 1 may be favoured by operators and potential new entrants, as against an ex ante framework, for a number of reasons. Firstly Option 1 would reduce the administrative burden and compliance costs for the notifying parties at least at the outset of any trade (and provided that there was no later intervention in relation to the potential breaches of the Competition Act 2002). Option 1 is also likely to lead to faster implementation of the trade as a regulatory approval process would not be required to put the trade into effect. As a result, Option 1 may encourage higher levels of trading which may be particularly beneficial to potential new entrants.

A 2.11 If undertakings considered the likelihood of ex post intervention by ComReg to be low then this may affect their (assumed) preference for Option 1 over Option 2. Assuming Option 1 was chosen, if ComReg initiated an ex post investigation under the Competition Act 2002, the burden of proof would lie with ComReg to establish that a trade had prevented, restricted or distorted competition in a market or markets for electronic communications, or that an abuse of dominance had occurred, with a Court having final decision in the matter. Under an ex ante analysis (Option 2) ComReg would determine whether a notified trade may be put into effect, or may not be put into effect, or may be put into effect subject to conditions specified by ComReg being complied with. In some ex post investigations it may be difficult to isolate the effect of the trade from other market developments, thus limiting ComReg's ability to intervene ex post in relation to the trade. Therefore, an operator(s) that was seeking to engage in a trade that could have anti-competitive effects may also favour Option 1 over Option 2.

A 2.12 As against the above, a number of factors could make Option 1 less attractive for operators compared to Option 2. Firstly, Option 1 would offer less protection for those not involved in the trade itself. Trades could proceed which have anticompetitive effects, with intervention only ever happening at a later date. Given the length of time it may take to initiate and complete a case under the Competition Act 2002, competing operators and consumers could suffer harm in the time period between when the trade takes place and when the case is completed. Therefore an ex ante framework may be favoured by undertakings, as against Option 1, on the basis that it may provide better protection for those parties not involved in the trade itself as ComReg would ensure that trades would not be permitted which would distort competition.

A 2.13 Secondly, implementation of a trade may involve significant sunk costs on the part of the trading parties. If, on the basis of ex post intervention, the trading parties were required to comply with a court decision to terminate a trade and reverse its effects, this could involve significant additional costs and administrative burdens on the trading parties to unwind the transaction.

A 2.14 An ex ante framework could discourage trading due to the greater administrative burden for trading parties, as any analysis of the cost and benefits of a trade for the trading parties would need to include the cost of passing the regulatory hurdle and the time involved in the approval process. Regulatory approval would be required in all cases and would involve notifying ComReg, and supplying relevant information to ComReg regarding the transfer. ComReg would determine whether a notified trade may be put into effect, or may not be put into effect, or may be put into effect subject to conditions specified by ComReg being complied with.

A 2.15 An ex ante framework might result in slower implementation of all notified trades as regulatory approval would be required before parties could proceed with the trade.

## **Impact on competition**

A 2.16 Certain spectrum trades could improve competition or increase efficiencies in a market(s), and could thus benefit players in the market(s) and their customers. Insofar as the trade has a positive impact on competition, and in the absence of Type 2 errors, the benefits for competition (and consumers) would be achieved regardless of whether ComReg chose Option 1 or Option 2, although such benefits would likely occur earlier under Option 1. Such “pro-competition” trades could be delayed under an ex ante framework (Option 2), with the length of delay being determined by the assessment process put in place and the nature of the trade itself. Option 1 would also remove the potential for Type 1 errors.

A 2.17 However, under Option 1, it may be difficult to establish, through an ex post investigation of a trade, that any perceived distortion in competition is attributable to a spectrum trade which has already occurred. Any post-trade market developments which were negative in terms of the effect on competition may result from inefficient spectrum allocations resulting directly from the trade, but on the other hand they may result from other causes unrelated to the trade. The potential difficulties in linking a trade to the resultant negative effects on competition could reduce ComReg's ability to effectively intervene in cases where a trade, which has been implemented, appears to be having anti-competitive effects on a market. Also, because it is often far more difficult and costly to unwind a commercial transaction rather than to prevent it from occurring in the first place, it may be especially difficult to convince a court that a spectrum trade should be dissolved and unwound, in order to reverse its anti-competitive effects.

A 2.18 Subjecting a proposed trade to an ex ante assessment of its likely effects upon competition would likely provide better protection for existing competition in any market, since trades that would likely result in a distortion to competition would not proceed after the review process. However if the test was too restrictive, it could prevent trades which, on balance, were pro-competitive or neutral as to their effect upon competition (Type 1 errors). On the other hand, if the test was too loose, it could fail to prevent trades which were likely to result in a distortion in competition (Type 2 errors).

A 2.19 Provided that the test applied under an ex ante framework was appropriate, ComReg could determine that a proposed trade which was likely to result in a distortion in competition may not be put into effect, or may be put into effect subject to conditions specified by ComReg being complied with.

## **Impact on consumers**

A 2.20 Under Option 1, consumers may benefit from the earlier implementation of trades which, on balance, were pro-competitive or neutral as to their effect upon competition. Such benefits would likely result from increased efficiencies and lower incurred costs for undertakings, leading to improved services and/or lower retail prices.



A 2.21 However, under Option 1, a distortion in competition resulting from a spectrum trade may have already occurred by the time an investigation by ComReg commences, and such ex post investigations often take a considerable length of time to complete and are dependent upon the requisite amount of evidence being found. Therefore, consumers may have already been negatively affected by the time any such investigation commences and may continue to be negatively affected for a considerable period of time thereafter. Further, depending on the particular circumstances, it may be difficult to reverse the negative effects that have occurred to competition or compensate consumers who have been negatively affected.

A 2.22 Under an ex ante framework, consumers would likely have to wait longer for spectrum trades to proceed, and would therefore have to wait longer for the resultant benefits to flow from such trades. However, as against any such delays, an ex ante framework would protect consumers by ensuring that spectrum trades which were likely to result in a distortion in competition may not be put into effect, or may only be put into effect subject to conditions specified by ComReg being complied with.

## **RIA: ComReg's Preferred Option**

A 2.23 ComReg is of the view that an ex ante framework is preferable, provided that such a framework is carefully designed in terms of it not being overly onerous on the parties involved in spectrum trades, that third parties would have proper opportunity to submit their views to ComReg and to provide information to assist ComReg's assessment, and that such assessment would be carried out by ComReg in a timely manner.

A 2.24 ComReg recognises that under an ex ante framework, in the case of trades which were pro-competitive or neutral as to their effects upon competition, the parties thereto and consumers would have to wait longer for such trades to be implemented. However, to the extent that any such delay may disadvantage the trading parties and/or consumers, such disadvantage is likely to be outweighed by the following benefits of an ex ante framework:

- It would provide greater certainty to the market that competition would be protected;
- It would provide greater comfort to the parties to the trading arrangements where ComReg approved the arrangement up front;
- It would better enable ComReg to prevent anticompetitive effects in the market (resulting from trades) and would therefore better protect the interest of consumers;

- It would pre-empt any structural competition concerns before they materialise; and
- It would be consistent with merger controls in Ireland where mergers are also assessed on an ex ante basis.
- Adopting an ex ante framework would also be in line with Oxera's recommendation as outlined in its Spectrum Trading Issues Report, a framework for competition assessments, ComReg 12/76b.

# **Annex: 3 Oxera response to stakeholder submissions to the consultation**



## Oxera's response to stakeholder submissions to the consultation

### Note prepared for ComReg

November 28th 2012

#### 1 Introduction

Oxera's report, prepared together with Helios, presented a framework for competition assessments for spectrum trades in Ireland and was published as an appendix to ComReg's consultation.<sup>1</sup> ComReg's proposed framework is consistent with the approach proposed by Oxera. ComReg has received responses from various stakeholders, one of which—the submission from Hutchison 3G Ireland Limited (H3GI)—includes comments specifically on the Oxera report. This note presents Oxera's response to H3GI's comments.

#### 2 Spectrum as a factor of production

H3GI refers to page 14 of the Oxera report, noting that the analysis is 'too simplistic'. Specifically:

With respect and notwithstanding its qualification, Oxera's analysis is too simplistic. Figure 2.1 assumes that hardware can substitute for spectrum and that an operator can always match a given level of capacity and/or quality of service by investing in either spectrum or hardware. Due to propagation characteristics, it might not be possible to match a given level of capacity and/or quality of service.<sup>2</sup>

H3GI's observation is accurate in that radio propagation characteristics, which vary across different spectrum bands, do indeed dictate the extent to which network hardware can be used as a substitute for spectrum. As H3GI points out, a given level of capacity and/or quality cannot *always* be matched with investing in spectrum or hardware, and the extent to which the two are substitutable varies across spectrum bands.

<sup>1</sup> Oxera (2012), 'Spectrum trading issues: A framework for competition assessments', report prepared for Commission for Communications Regulation, July 11th.

<sup>2</sup> H3GI response, November 12th, p. 3.

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It is noted that Figure 2.1 is entitled 'stylised illustration', and the shapes of the curves in the figure should not be interpreted as accurate reflections of the relationship between spectrum holdings and network investments underlying any particular service. Indeed, the purpose of the section is to clarify that, from an economic perspective, a concentration of spectrum alone is not a sufficient reason to block or alter a spectrum trade, but rather the analysis should recognise the cost and capacity implications of spectrum holdings. Put another way, as established in various parts of the Oxera report, the starting point for any competition analysis is to recognise a spectrum right of use as a factor of production that combines with other intermediate inputs to provide a product to end-users. The precise relationship between spectrum holdings and hardware investments varies across bands, and should be considered for each trade on a case-by-case basis. Furthermore, H3GI's argument that 'any competition assessment should also consider availability and quality of service' is well founded and fully consistent with the Oxera report (eg, p. 14).

### 3 Unilateral effects

H3GI makes a further comment in relation to the mechanisms through which spectrum trades could give rise to 'unilateral effects'. Specifically, H3GI does not agree with Oxera's argument that:

[The assessment of its ability to increase prices should take into account (among other factors)...] the likelihood of new entry into the market (**although this is likely to be small in almost all instances, given that entry into the market is likely to occur only via the acquisition of spectrum or through an MVNO arrangement**). [emphasis added]<sup>3</sup>

H3GI is of the view that Oxera does not explain the emphasised statement in parentheses in sufficient detail, and does not specify a market, and that, therefore, 'ComReg should not rely on this view in the absence of an analysis of the relevant market.'<sup>4</sup>

Oxera's argument about the limited prospect of *new* entry is premised on the finding that, in most cases, the (wireless) products and services provided over RSPB bands require significant amounts of spectrum, most of which is currently held by the existing operators, and some of which may become available through future auctions. It appears reasonable to assume that, insofar as new entry requires acquisition of spectrum, the barriers to entry are relatively high, although an efficiently functioning spectrum market can facilitate new entry (as articulated in the Oxera report). Entry through an MVNO agreement requires less investment and may, to some extent, constrain prices at the retail level. However, MVNOs' ability to shape the market structure throughout the supply chain is limited, as they are dependent on the wholesale access terms with MNOs that, in turn, hold the spectrum rights of use.

It is also worth noting that, contrary to what H3GI seems to suggest, an analysis of unilateral effects in merger control does not necessarily require an explicit definition of the relevant market. While market definition can be a useful tool in some instances, it may be problematic when products are differentiated—that is, they are close but imperfect substitutes.<sup>5</sup>

<sup>3</sup> Oxera (2012), op. cit., p. 28.

<sup>4</sup> H3GI response, November 12th, p. 4.

<sup>5</sup> See, for example, Oxera (2011), 'Unilateral effects analysis and market definition: substitutes in merger cases?', June 15th.

# **Annex: 4 ComReg 14/11**



Commission for  
**Communications Regulation**

# **Framework for spectrum transfers**

## **Spectrum transfer Notification Form**

### **Procedures and guidelines**

**Reference:** ComReg 14/11

**Date:** 31/01/2014

**An Coimisiún um Rialáil Cumarsáide**  
**Commission for Communications Regulation**

Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland  
Telephone +353 1 804 9600 Fax +353 1 804 9680 Email [info@comreg.ie](mailto:info@comreg.ie) Web [www.comreg.ie](http://www.comreg.ie)

## Additional Information

Document No:	14/11
Date:	31, January 2014



# Contents

<b>Chapter</b>	<b>Page</b>
1 Introduction.....	5
2 Spectrum transfer procedures.....	7
3 Guidelines for assessment.....	13
3.1 Introduction .....	13
3.2 Market definition.....	15
3.3 Market concentration.....	16
3.4 Analysis of competitive effects .....	17
3.5 Other competitive effects considered by the Commission.....	20

# Annex

Section	Page
Annex: 1 Notification Form .....	23

# 1 Introduction

1. This document sets out the Commission for Communications Regulation's (the "Commission") framework for the transfer<sup>1</sup> of rights of use of spectrum in the bands designated by Decision No. 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual Radio Spectrum Policy Programme (the "RSPP Decision") (the "Framework").
2. The Framework consists of:
  - procedures specified by the Commission concerning how undertakings must notify their intention to transfer individual rights of use to radio frequencies to the Commission (the "Procedures"); and
  - guidance on how the Commission will determine whether or not a transfer would distort competition (the "Guidelines").
3. For the avoidance of doubt, the Procedures detailed in Chapter 2 are the procedures specified by the Commission pursuant to Regulation 3(4) of the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014 (the "Regulations")(Statutory Instrument **No. 34 of 2014**).
4. Chapter 3 offers guidance on how the Commission will determine whether or not a transfer would distort competition. These Guidelines reflect the Commission's analytical approach at the time of publication and should provide an enhanced level of predictability and certainty to notifying parties, their advisers, the business community and the public. However, it is not possible for the Guidelines to cover every issue or circumstance that may arise in a review of a notification. In practice, individual notifications involve a great variety of facts and situations, and the analysis of particular issues may need to be tailored to the specific circumstances of a transfer or deal with competition issues not specifically considered in these guidelines. Therefore, the Guidelines are interpreted in a flexible manner, and the Commission reserves the right to deviate from the Guidelines if it forms the view that it would be appropriate to do so in the specific circumstances of any particular case.

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<sup>1</sup> A transfer means the assignment by a licensee of some or all of a right of use granted under a licence to another party for the duration of the period in which the licensee's licence remains in force.

5. A notification form is attached at Annex 1 (the “Notification Form”) which sets out the information which must be provided to the Commission in accordance with Regulation 4 of the Regulations. Interested parties are reminded that under Regulation 4(2) of the Regulations every notification of a spectrum transfer must be accompanied by a administrative fee of €5,000.
6. Interested parties will note that the Commission may update the Procedures and Guidelines from time to time following public consultation as appropriate.

## 2 Spectrum transfer procedures

### Notification and Publication

7. In accordance with Regulation 4 of the Regulations, a notification of an intention to transfer rights of use to radio frequencies between undertakings must be made on the Notification Form made available by the Commission for that purpose.<sup>2</sup>
8. Undertakings may make a joint notification, though they are not obliged to do so.<sup>3</sup>
9. Notification Forms must be delivered to the below address between the hours of 09.00 and 17.00, Monday – Friday (excluding public holidays). Where a Notification Form is received later than 17.00 it shall be deemed to have been received on the next working day. In addition to the hard copy, the Notification Form and as many of the associated supporting documents as are capable of being supplied electronically should be so supplied. All Notification Forms and associated supporting documents should be addressed to:

**Spectrum Licensing Manager**

**The Commission for Communications Regulation**

**Abbey Court**

**Blocks D, E & F,**

**Irish Life Centre**

**Lower Abbey Street**

**Dublin 1**

**email: [licensing@comreg.ie](mailto:licensing@comreg.ie)**

10. Every notification of a spectrum transfer must be accompanied by a administrative fee of €5,000 made payable to the Commission. A notification unaccompanied by the administrative fee of €5,000 is invalid.

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<sup>2</sup> Annex 1 sets out the details of the Notification Form.

<sup>3</sup> Interested parties should note that prior to making any formal notification of a proposed spectrum transfer, the parties thereto may request a 'pre-notification meeting' with the Commission in order to discuss the information that they shall be required to provide as part of their formal notification.

11. Notifying parties should clearly identify information provided on the Notification Form and in any other associated supporting documents which should be treated as confidential.<sup>4</sup>

## **PHASE 1 ASSESSMENT**

### **(a) Preliminary assessment**

12. Upon its receipt by the Commission, the notification will be assessed as follows: (i) to ensure that it is a transfer to which the Regulations apply; and (ii) to confirm that all requisite information and the administrative fee have been furnished.
13. Where the Commission considers that the transfer is not a transfer to which the Regulations apply, it will so inform the notifying parties as soon as possible. In such an event, the Notification Form and associated supporting documents and the administrative fee paid will be returned to the notifying parties involved.
14. If, a notified transfer would involve an amendment to a licence condition, the time period within which the Commission will assess the notification and issue a determination will be suspended until after it has completed its review of the amendment. In carrying out its review, the Commission will consult with the notifying parties and may publicly consult on the matter. Where, following its preliminary review of the amendment, the Commission considers that the amendment should not be permitted, the Commission will inform the notifying parties of its preliminary view and the reasons for same. The notifying parties will then be given the opportunity to amend the notified transfer to address the Commission's concerns. For the avoidance of doubt, the time period will remain suspended until the Commission's concerns regarding the amendment have been addressed to the Commission's satisfaction.

### **(b) Publication**

15. Within 5 working days from the receipt of a valid notification, the Commission will publish a notice on its website, which will contain the following information:
  - the names of the notifying parties (and trading names);
  - the reference number of the notification (which will be assigned by the Commission);

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<sup>4</sup> Guidance on the treatment of confidential information by the Commission is set out in its published Guidelines on the treatment of confidential Information (Document 05/24).

- the name and contact details of the Commission's officer(s) assigned to the transfer;
  - the technical details of the transfer;
  - the business activities of the undertakings involved in the transfer; and
  - notice to third parties wishing to make submissions about the transfer that they must do so within 10 working days from the Commencement Date.
16. The above mentioned notice will indicate whether the Commission's assessment has been suspended in order to carry out a review of any proposed amendments to licence conditions (see paragraph 14 above). Upon receipt of a valid notification and Notification Form, and subject to paragraph 14 above, the Commission's assessment of the notification will commence. The date on which the assessment commences is referred to herein as the 'Commencement Date'.

### **(c) Submissions**

17. A closing date for submissions will be clearly set out in the above mentioned notice. The Commission will consider all submissions made within the specified deadline. The Commission may by notice on its website change the time limit for receipt of submissions, if it considers that circumstances so require. Submissions from third parties should clearly indicate any information which they consider should be treated as confidential, and that material should be set out in a separate annex.

### **(d) Requirement to provide further information**

18. The Commission may request further information from the notifying parties and from other sources to aid in its assessment of the notification.<sup>5</sup>

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<sup>5</sup> Where information requested from the notifying parties, pursuant to Regulation 5(2) of the Regulations, is not provided to it within the timeframe specified in such a request, the Commission will suspend the time period within which the assessment of a notification must be completed and a determination made.

**(e) Proposals**

19. In the course of its assessment of a notification, the Commission may enter into discussions with the notifying parties with a view to identifying measures which would ameliorate any effects of the notified transfer on competition (as referred to in paragraphs 4, 5 and 6 of Regulation 5 of the Regulations). In the course of any such discussions entered into, any of the notifying parties may submit proposals to the Commission with a view to the proposals becoming binding on it or them if the Commission takes the proposals into account and states in writing that they form the basis or part of the basis of its determination pursuant to the Regulations.

**(f) Determination that the Spectrum Transfer may be put into effect**

20. Having considered the information provided and all submissions received, the Commission, if it forms the opinion that the result of the transfer will not be to distort competition, will determine that the transfer may be put into effect. The Commission will, within 35 working days after the Commencement Date inform the notifying parties and any other undertakings or third parties who have made submissions, that it has so determined. On the date of the determination, the Commission, in addition to informing the notifying parties, will publish notice of the making of the determination on its website. The Commission will publish a non-confidential version of the text of its determination on its website at the earliest possible date thereafter (and in any event, no later than two months from the date of the determination).

**PHASE 2 (FULL INVESTIGATIONS)****(a) Determination to carry out a full investigation**

21. Where having considered the information provided and all submissions received, the Commission is unable on the basis of the information before it to form a view that the result of a transfer will not be to distort competition, the Commission will make a determination to carry out a full investigation, i.e. to proceed to phase 2.

**(b) Publication of the determination to carry out a full investigation**

22. The Commission will publish a notice on its website that it has decided to conduct a full investigation. The Commission will also engage with the notifying parties as to the basis for its determination to conduct a full investigation.



**(c) Submissions**

23. The notifying parties and any other undertakings or other third party is entitled to make submissions in writing no later than 15 working days from the date of publication of the above mentioned notice to conduct a full investigation. The Commission will consider all submissions made within the specified deadline. The Commission may by notice on its website change the time limit for receipt of submissions, if it considers that circumstances so require. Submissions should clearly indicate any information which should be treated as confidential which should be set out in a separate annex.

**(d) Early determination to transfer**

24. If the Commission, within the provisional time period (as referred to in Regulation 7(1) of the Regulations), is satisfied that in its opinion the result of the transfer (without or subject to conditions as the case may be) will not be to distort competition, it will, without proceeding to make an Assessment of the proposed transfer, determine that the transfer may be put into effect, or may be put into effect subject to conditions. The Commission will inform the notifying parties on the same date of its determination.

**(e) Assessment**

25. If, having considered all submissions, the Commission is not satisfied that the result of the transfer will not be to distort competition, it will, within 40 working days of the date of the determination<sup>6</sup> to conduct a full investigation, furnish its assessment (the "Assessment") to the notifying parties. This time period may be adjusted following discussion and agreement between the notifying parties and the Commission. The Assessment will set out clearly the Commission's concerns regarding the effect of the proposed transfer on competition.

**(f) Response to Assessment**

26. Within 15 working days from the delivery of the Assessment, the notifying parties may respond thereto in writing.

**(g) Consequences of failure to respond**

27. Failure by any one of the notifying parties to respond within the time provided may be deemed to constitute a waiver of that party's right to contest the issues set out in the Assessment. Failure of all notifying parties to so respond may authorise the Commission, without further notice, to find the facts to be as set out in the Assessment and to adopt a final determination on the basis of such findings.

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<sup>6</sup> Subject to any suspension of the time period within which the Commission must complete its assessment and make a determination.

**(h) Discussions and Proposals**

28. Within 15 working days from the furnishing of the Assessment, the Commission may enter into discussions with the notifying parties and the notifying parties may make proposals to the Commission with regard to the manner in which the transfer may be put into effect, or to the adoption of measures which would ameliorate any effects of the notified transfer on competition.

**FINAL DETERMINATION****(a) Phase 2 Final Determination**

29. On completion of the phase 2 review period, the Commission shall make one of the following determinations:
  - That the transfer may be put into effect;
  - That the transfer may not be put into effect; or
  - That the transfer may be put into effect subject to conditions specified by the Commission being complied with.

**(b) Publication of Commission's determination**

30. The Commission will publish notice of its determination on its website on the same day as the determination is made.

**(c) Contents of the Commission's written determination**

31. In every case, the Commission's final written determination in regard to the transfer will include a statement of the facts, a summary of the information, evidence and submissions considered by the Commission and the reasons grounding that determination. The Commission will publish the written determination on its website, within 2 months after the making of that determination, after allowing the notifying parties an appropriate period to indicate whether certain information in the written determination should be redacted on the grounds of constituting a business secret. Such requests will be assessed in accordance with the Commission's procedures on the treatment of confidential information (Document 05/24) as may be amended from time to time.

## 3 Guidelines for assessment

### 3.1 Introduction

32. This chapter offers guidance on how the Commission will determine whether or not a transfer would distort competition.
33. Circumstances may arise that are not clearly envisaged in these guidelines, and the Commission shall consider such circumstances on a case-by-case basis. These guidelines are interpreted in a flexible manner, and the Commission reserves the right to deviate from the Guidelines if it forms the view that it would be appropriate to do so given the specific circumstances of any particular case. Statements relating to distortive effects of the spectrum transfer in this document should be interpreted as referring to the views of the Commission based on the information available to it.
34. To assist readers, explanations are set out below of a number of technical terms that are used in these guidelines, as follows:
  - a) The term **coordinated effects** refers to engagement between competitors in coordinated interaction, such as agreeing amongst themselves, either tacitly or expressly, to raise their prices or reduce their output;
  - b) The term **non-horizontal transfer** refers to a situation where there is no overlap in terms of the products or services provided on the transferee's current (if any) and acquired spectrum rights of use;
  - c) The term **notification** means a notification of a proposed transfer made to the Commission under Regulation 4(1) of the Regulations;
  - d) The term **notifying party** means the transferor and for the transferee as the context so requires;
  - e) The term **transfer** means the assignment by a licensee (the 'transferor') of some or all of a right of use granted under a licence to another party (the 'transferee'); and

- f) The term **unilateral effects** in relation to transfers refers to a situation where a transfer would strengthen any undertaking's position in a market to such an extent as to allow it to act more independently, to an appreciable extent, of its competitors than it could otherwise do. For example, increasing the undertaking's market power to such an extent that it could largely ignore the reactions of its competitors and/or customers to actions on its part such as (but not limited to) profitably increasing its prices.
35. Transfers are considered by assessing a number of factors, including amongst others:
- a) The effect of the transfer on market structure (both wholesale and retail)<sup>7</sup>;
  - b) Whether the transfer would likely have an effect on the level of competition among existing competitors in the market. In this regard, both unilateral and coordinated effects are examined; and
  - c) Whether the transfer would likely have an effect of leading directly to efficiency gains<sup>8</sup> that cannot be realised by any means other than the transfer.
36. All lists of factors in these guidelines are considered to be non-exhaustive unless otherwise stated.

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<sup>7</sup> This can, for example, involve reviewing whether the spectrum transfer would give rise to changes in the number of market participants, their capacity to provide wireless electronic communications services or other services, their market shares for different services (data, voice, etc) and other factors.

<sup>8</sup> A transfer of spectrum may lead to potential benefits to customers in terms of higher quality services and/or at lower prices (translated from the lower costs enjoyed by the undertaking), which may outweigh any potential distortions to competition (see also, paragraph 71 in relation to efficiencies).

## 3.2 Market definition

37. Having regard to established economic principles, relevant European Commission guidance<sup>9</sup> and Irish and EU statutes and case law, the Commission will, where appropriate, seek to define the product and geographic scope of the relevant market(s) which may be impacted by all proposed spectrum transfers which are notified to it. This provides a basis for deciding whether or not a transfer would distort competition. In defining the relevant product and geographic scope of the market, the Commission may also distinguish between wholesale and retail markets (i.e. “upstream” and “downstream” markets) that are directly and indirectly relevant to a spectrum transfer.
38. However, it should also be noted that in some circumstances the Commission may assess the effects upon competition directly, without having first defined the relevant market(s). For example, the distortion to competition test can be applied by identifying the competitors of the parties to the proposed spectrum transfer. This may include competitors who are outside the relevant market(s) but are nevertheless potentially impacted by the proposed spectrum transfer. Such additional factors may be relevant for the assessment of a proposed spectrum transfer and therefore may be taken into consideration by the Commission when deciding whether or not a transfer distorts competition.
39. Market definition, where utilised, provides a conceptual framework within which the impact of a proposed spectrum transfer can be assessed. It is not always necessary to reach a firm conclusion on market definition - for example, where it is clear that the proposed spectrum transfer is not likely to raise competition concerns on any reasonable definition of the market.
40. Market definition recognises that a spectrum right of use is a factor of production that combines with other intermediate inputs to provide a product to end-users. The Commission’s approach is generally to be technologically neutral (unless specific circumstances dictate otherwise) and to focus on the actual use of spectrum, rather than on the technology employed. This general approach is based on the assumption that end-users of a particular electronic communications service, provided over a wireless network, generally have no preference as to the technological means of delivering that service (subject to considerations regarding quality, price and relevant product parameters, and speed of services). In this context, technologies and spectrum rights of use are both factors of production which enable undertakings to provide electronic communications networks and services.

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<sup>9</sup> European Commission (1997), ‘Commission Notice on the definition of relevant market for the purposes of Community competition law’, Official Journal C 372 , 09/12/1997 P. 0005 – 0013.

41. In defining any relevant market(s), the Commission will consider whether any effective demand-side or supply-side substitutes exist such as would directly or indirectly constrain the price setting behaviour of a hypothetical monopolist supplier of the product being sold by the firm in question. To the extent that such effective substitutes may exist, and may constrain pricing behaviour, a broader product market definition may be appropriate.
42. A geographic market, is an area in which the parties to a proposed spectrum transfer are involved in the supply of the relevant products or services, and in which the conditions of competition are sufficiently similar or homogeneous as to distinguish that area from other geographic areas in which the conditions of competition are appreciably different.
43. Overall, in order that the Commission may decide whether or not a transfer would distort competition in any market(s), the parties thereto are encouraged to identify all relevant markets which may be affected (in the Notification Form attached at Annex 1), even though a firm conclusion on market definition may not be necessary in every case.

### **3.3 Market concentration**

44. Assessment of market concentration takes into account the number of competitors in a market and their shares in that market. High concentration means a market containing a relatively small number of large firms. Any assessment of the effects of a proposed spectrum trade on market concentration, pre and post transfer, should include an assessment of the extent to which different spectrum bands can be employed to provide substitutable services to end-users, or to other undertakings in the context of wholesale arrangements, while comparing the differing costs of providing the same service using different spectrum bands.
45. The Commission may assess the concentration of spectrum holdings across substitutable bands (rather than market shares or turnover which are unlikely to immediately change as a result of a transfer). Any assessment would need to ensure that the bands being compared are in fact comparable. Assessments would be carried out in a flexible manner and on a case-by-case basis and also consider the extent to which pre and post transfer that the two parties are able to provide specific services across their entire spectrum holdings.
46. The Commission will assess the potential effects of any proposed spectrum transfer on the concentration of spectrum holdings having regard to a number of considerations, including:

- Cost advantages for undertakings with larger (or more suitable) spectrum holdings and cost disadvantages for undertakings with smaller (or less suitable) spectrum holdings;
- Increased capacity for undertakings with larger spectrum holdings and relative capacity constraints for undertakings with smaller holdings;
- ability of holders of larger quantity of spectrum rights to provide specific services (e.g. with faster speeds) versus holders of smaller quantity of spectrum rights; and
- Whether any relevant spectrum right of use is being used efficiently.

### 3.4 Analysis of competitive effects

47. This section outlines the Commission's approach to analysing the effects of a spectrum transfer on rivalry between existing competitors. It includes analysis of the effects on the behaviour of the parties to a transfer and on the reactions of other market participants, particularly competitors and customers. The Commission's focus is on identifying the immediate constraints on the exercise of market power.
48. Spectrum transfers do not affect undertakings' competitive positions directly. Without a corresponding sale of the hardware assets and customer base, undertakings' actual market shares in any upstream or downstream markets are generally unaffected in the direct aftermath of transfers. The Commission's assessments of the likely competitive effects of spectrum transfers recognise that allocated spectrum rights of use influence undertakings' ability to compete.
49. While spectrum transfers will in many instances be expected to have positive results, some such transfers could increase unilateral market power or increase the likelihood of collusion among existing competitors (known as coordinated effects). In both cases, only an increase in market power that is sustainable over time may be problematic.
50. Any assessment of potential unilateral and coordinated effects must cover a sufficiently long time horizon over which spectrum holdings can affect undertakings' cost structures and capacity (as opposed to focusing on immediate market shares and pricing which most likely would not change in the immediate aftermath of a spectrum transfer).
51. The factors which the Commission may consider include all or any of the following:
  - Wholesale and retail market shares;

- Concentration of spectrum holdings;
- Incentives to increase prices post-transfer owing to unilateral effects;
- Incentives to coordinate;
- Barriers to entry;
- changes in potential service quality (e.g. speeds) post transfer that could be replicated by competitors, absent increased costs to competitors; and
- Efficiencies arising from the transfer.

## Unilateral effects

52. The Commission shall consider whether a proposed spectrum transfer would strengthen any undertaking's position in a market to such extent as to allow it to act more independently of its competitors than it could otherwise do. For example, if a spectrum transfer resulted in such significant cost advantages or quality of service advantages for one undertaking or in such a concentration of spectrum held by one undertaking, which increased the undertaking's market power to such extent that it could largely ignore the reactions of its competitors and/or customers to actions on its part such as profitability increasing its prices by a small but significant amount, then that would constitute a unilateral effect of the spectrum transfer.
53. The Commission will assess whether any increased spectrum holding, post-transfer, would likely give an undertaking the ability and incentive to increase its prices (or reduce its output) without concern as to the reactions of its competitors and/or customers. The Commission will consider both the short-term and the long-term effects of a proposed transfer. The long-term horizon is relevant, in particular, if spectrum acquired through a transfer is likely to lead to a significant long-term cost advantage for the acquiring undertaking over its competitors.
54. The Commission's assessment of an undertaking's ability and incentive to increase its prices will take into account a range of factors including the following:
  - The ability of the undertaking's competitors to compete effectively with it, post-transfer;
  - The likelihood of new market entry;
  - The likelihood of new spectrum bands becoming available;



- The ability of the undertaking's customers to react to a price increase by switching to a competitor; and
- whether there are any strong customers or groups of customers that can constrain the pricing behaviour of the undertaking (countervailing buyer power).

## Coordinated Effects

55. A spectrum transfer may negatively distort competition if it facilitates competitors engaging in coordinated interaction (tacitly or expressly), such as agreeing amongst themselves to raise their prices or reduce their output. Such behaviour is known as coordinated effects.
56. The Commission's assessment of the coordinated effects of any proposed spectrum transfer would consider whether the transfer would increase the ability and/or incentivise undertakings to engage in tacit or explicit collusion. The factors which the Commission shall consider include:
  - Whether the transfer has an impact on transparency in the market;
  - The availability of a punishment mechanism; and
  - Barriers to entry.
57. Concentration of spectrum may feed into further concentration in upstream and/or downstream market(s), and could create a situation whereby two or more undertakings could collude, in any market or markets.
58. The Commission's assessment would focus on whether the spectrum transfer may result in more symmetric cost structures and capacities among competitors and/or a reduction in product differentiation, which may be conducive to tacit or explicit collusion.
59. Collusive behaviour need not be equivalent to monopolist behaviour to be harmful to consumers, and collusion may harm consumers even where some competitors are not party to the collusive arrangements or where there are occasional lapses into price wars.
60. The Commission also recognises that there are dynamic factors such as new technologies which may make it difficult to sustain collusive behaviour even if the spectrum transfer were to result in a more concentrated and/or symmetric market structure.

61. If a spectrum transfer was likely to increase cost heterogeneity then the likelihood of resulting coordinated effects should reduce. Where appropriate, the Commission may choose to consider dynamic factors in its analysis of competitive effects.

### **Spectrum transfer with an entrant**

62. Spectrum transfers do not necessarily increase market concentration. A spectrum right of use may be transferred to a smaller competitor by a larger competitor, or to a new entrant without any existing spectrum rights of use.
63. While each notified spectrum transfer shall be assessed on its own merits, the Commission is unlikely to prohibit a transfer from being put into effect where a new entrant without any existing spectrum right of use acquires such a right of use. Such a transfer leading to the entry of an additional competitor would generally result in a more fragmented market and is accordingly less likely to result in competition concerns.

## **3.5 Other competitive effects considered by the Commission**

### **Entry**

64. If entry into a market is relatively easy, such that the behaviour of competitors in the market is constrained by the threat of potential entry, then the impact of a spectrum transfer on competition in such a market may be minimal as the threat of potential entry may prevent both unilateral and coordinated effects.
65. The Commission would note, however, that in some markets for electronic communications services, there is a scarcity of spectrum and so market entry is difficult (although some barriers to entry may be lowered by liberalisation of the usage of spectrum in certain bands which may allow for the provision of substitutable services utilising alternative technologies).

### **Closeness of competition between parties**

66. The extent to which the notifying parties were competitors before the transfer may affect the impact on competition, and therefore the distortion to the competitive dynamic in the market. In particular, the impact on or reduction of competition would be greater the closer competitors the undertakings were before the transfer (e.g. two undertakings targeting similar customer profiles and/or offering similar tariffs and bundles, which are perceived by consumers to be close substitutes).

### **Implications on adjacent markets (non-horizontal transfers)**

67. A spectrum transfer could take place as a 'non-horizontal' transfer where there is no overlap in terms of the services provided on the transferee's current (if any) and acquired spectrum. Such a transfer does not produce any change in the level of concentration in the relevant market. However, while non-horizontal transfers are less likely than horizontal transfers to create competitive concerns, distortions to competition are still possible in certain circumstances.
68. For an example, an undertaking with a strong position with respect to certain services provided using spectrum could enter a new market and leverage its market power to the detriment of competition in the long term. In considering the likelihood of anti-competitive leveraging, the Commission will consider, in particular:
- if the services are unrelated (i.e. neither substitutes nor complements), in which case it is unlikely that the undertaking could engage in anti-competitive leveraging;
  - whether the transfer may be efficiency-enhancing, in particular if the downstream services are complements, which may offset any detriment to competition;
  - whether the acquiring undertaking may provide greater variety of services post-transfer and achieve economies of scope which may offset any detriment to competition;
  - the market position of the acquiring undertaking pre-transfer, in particular whether that undertaking already holds a position of market power one of the markets.

## Efficiencies

69. If a spectrum transfer gives rise to anti-competitive effects, it is possible that these could be compensated for/outweighed by improvements in efficiencies resulting directly from the spectrum transfer. A transfer of spectrum may lead to potential benefits to customers in terms of higher quality and lower prices (translated from the lower costs enjoyed by the undertaking), which may outweigh any potential distortions to competition. This depends on the spectrum band in question, as the marginal benefits of holding spectrum, and the ability to aggregate spectrum across bands, or holding contingent blocks of spectrum, differ across bands. It will be important to assess the likely magnitude of these benefits and to ensure that any benefits are passed on to customers.
70. The burden of proof for demonstrating that any efficiency benefits outweigh any negative effects would lie with the notifying parties, who may also need to demonstrate that the efficiencies would emerge with a sufficient likelihood.
71. The spectrum transfer could also result in demand-side efficiencies that result in either an increase in the demand for one or more of the products provided over a certain spectrum band or bands in the spectrum trade, or that result in the creation of a new product or set of products (for example, a new wireless service).
72. Factors which the notifying parties may label as “efficiencies” but which the Commission would not consider to be relevant as part of its assessment include:
  - savings due to the integration of administration or head office functions;
  - input price reductions related to buyer power;
  - efficiencies related to economies of scale and scope that do not involve marginal cost reductions; and
  - efficiencies that may reduce prices in one market but cannot compensate for price increases in another.

# Annex: 1 Notification Form

Undertakings involved in a transfer of spectrum rights of use to which the Wireless Telegraphy (Transfer of Spectrum Right of Use) Regulations 2014 (**S.I. No. 34 of 2014**) apply, must provide the following information set out below.

Undertakings may make a joint notification, though they are not obliged to do so.

## List of required information:

### 1. General information<sup>1</sup>

- i. Please specify the undertakings intending to transfer individual rights of use to spectrum i.e. the 'Transferor'. Please also specify the other party to the proposed transaction i.e. the 'Transferee' (the transferor and transferee shall together be referred to as the "notifying parties").
- ii. Please provide the legal name, business address, telephone number, fax number, and web site of each notifying party and state the jurisdiction in which each is incorporated and their respectively geographical area of activity.
- iii. Please provide a description of the notifying parties (including their respective corporate groups, if relevant) in the proposed transfer.
- iv. Please provide the name and contact details of the authorised legal representative, for each notifying party and an address for service of correspondence. Indicate to whom acknowledgement of receipt of the administrative fee paid should be sent.
- v. Please indicate whether the notifying parties are providing information separately or together as part of making a joint notification of the intention to transfer.
- vi. Please provide the turnover of each of the notifying parties (including that of their respective corporate groups), both worldwide and in the State for the last financial year for which such information is available and for any available interim period in the current year.
- vii. Please provide details of the spectrum holdings of each notifying party and details of the spectrum holdings that the parties' subsidiaries hold in Ireland.

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<sup>1</sup> Interested parties should note that prior to making any formal notification of a proposed spectrum transfer, the parties thereto may request a 'pre-notification meeting' with the Commission in order to discuss the information that they shall be required to provide as part of their formal notification. At such a meeting, parties may request to submit less information than is set out in the Notification Form (because, for example, it is very clear that the proposed transfer would not distort competition) and the Commission will consider any such request and may adjust its information requirements accordingly – i.e. the Commission may inform the parties that they may omit certain information from their notification (while reserving its right to require this information at a later stage).

## 2. Description of proposed transfer

- i. Please specify the licence number of the licence involved in the transfer, the specific spectrum blocks to be transferred and the intended usage of the spectrum after the transfer.
- ii. Please provide an explanation about the current and post-transfer capacity utilisation with the appropriate technical information.
- iii. Please provide information on the options considered as strategic alternatives to the transfer such as equipment upgrades, spectrum re-farming and change of technology.
- iv. Please outline a proposal for the division of spectrum usage fees between the licence holder and the transferee so that there is no net reduction in the spectrum usage fees payable to the Commission as a result of the transfer.
- v. Please outline network investment plans in relation to the spectrum bands associated with the Transfer.
- vi. Please outline any contractual arrangements made in relation to the transfer.

## 3. Market information

- i. Please provide a description and definition of what the notifying party/parties consider to be the relevant upstream and downstream markets that may be affected by the usage of the spectrum which it is proposed to be transferred.<sup>2</sup>
- ii. Please provide an estimate of the size of the markets described above, information on recent entry, any potential entry, cost of entry, comment on the minimum efficient scale and minimum spectrum requirements for a viable business.

## 4. Views of notifying parties

- i. Please provide your views as to why you consider that the transfer will not be to distort competition in markets described by you above in the State.
- ii. Please provide estimates of the shares of each of the Transferee (including aggregated market share of any relevant group companies) and Transferor in the market(s) described by you above. Provide also estimates of the shares of competitors in these markets and explain the basis of these estimates.
- iii. Please provide your views as to possible efficiencies which may occur as a result of the transfer. Quantify these efficiencies and the extent to which consumers would benefit from them.
- iv. Please provide your views as to why the notifying parties believe the transfer does not create a risk of radio interference.

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<sup>2</sup> This should include wholesale markets such as any MVNO arrangements

## 5. Supporting Documentation

- i. Provide a copy of the most recent audited annual report for each of the notifying parties.
- ii. Provide a copy of any reports or other documentation relating to any analysis undertaken on the competitive effect of the transfer on any market.

## 6. Licence Conditions

- i. Where the notifying parties consider that an amendment to a condition in the original licence<sup>3</sup> may be necessary, or desirable, as a result of the transfer (see also paragraph 7 iii below) please describe same in detail and the reasons why. In addition please provide detailed reasoning as to why in your view such an amendment with accord with ComReg’s statutory functions, objectives and duties.

## 7. Notifying Parties Declarations

- i. Declaration by the transferor (i.e. the current holder of the right of use of spectrum to be transferred): The transferor is and will continue to comply with all the licence conditions attaching to the rights of use to spectrum to be transferred following a partial transfer.<sup>4</sup>
- ii. Declaration by the transferee: The transferee will comply with all licence conditions attaching to the original rights of use of radio frequencies that are to be transferred.
- iii. Declaration by both the Transferor and Transferee: The notifying parties confirm that they have considered whether an amendment to a condition in the original licence may be necessary, or desirable, as a result of the transfer, and where this is the case have provided details of same pursuant to paragraph 6 above.
 

Transferor	<input type="checkbox"/>
Transferee	<input type="checkbox"/>

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<sup>3</sup> Please note some licence conditions must transfer irrespective of the declaration made by the notifying parties in paragraph 7iii, including, for example, international obligations in relation to spectrum use and any spectrum harmonization requirements.

<sup>4</sup> In the case of a transfer where all the rights and obligations transfer (i.e. a full transfer), the Commission notes that as the original licence holder would no longer have rights to the transferred spectrum it cannot continue to comply with all the licence conditions attaching to the transferred spectrum and therefore this declaration does not apply to full transfers.

**8. Declaration and Signature**

	<b>Transferor</b>	<b>Transferee</b>
<b>Signed:</b>	.....	.....
<b>Name (Print):</b>	.....	.....
<b>Position:</b>	.....	.....
<b>Company:</b>	.....	.....
<b>Date:</b>	.....	.....