Commission for
Communications Regulation

Submissions to Consultation 12/76

Submissions to Spectrum Trading in the Radio Spectrum Policy Programme (RSPP) bands

Submissions to Consultation

Reference: ComReg 12/76s

Version: Final

Date: 31/01/2014

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Submissions Received from Respondents

Document No:	12/76s
Date:	31, January 2014

Consultation:	12/76
Response to Consultation:	14/10

Content

1: Eircom Group

eircom Group

Response to ComReg Consultation Paper:

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

ComReg Document 12/76

07 September 2012

DOCUMENT CONTROL

Document name	eircom Group response to ComReg Consultation Paper 12/76
Document Owner	eircom Group
Last updated	*07/09/2012*
Status	Final

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

Response to Consultation

eircom Group welcomes the opportunity to comment on ComReg's proposals to establish a framework and guidelines for spectrum transfers in the RSPP bands.

ComReg's consultation is timely, having regard not only to the forthcoming spectrum auction but also the publication of the National Broadband Plan on 30th August 2012. As the Department recognises, the review of the spectrum policy framework, including issues of spectrum trading and the modernisation of Wireless Telegraphy legislation are an importantpart of facilitating the roll-out of high-speed broadbandin Ireland. We look forward to further engagement with the Department and ComReg on these important issues including further consideration of licence durations. While this is not directly relevant to the substance of the present consultation, we remain of the view that the efficiency gains arising from enabling spectrum trading are greater under a regime allowing for licences of longer duration.

eircom welcomes the recognition by Oxera in its report that "*the rationale for spectrum trading is indeed to promote efficient market outcomes.*" As such it is to be expected that spectrum trading will promote competition by providing a market-led mechanism to enable the continued efficientuse of the spectrum resource.eircom Group believes that this should be the starting point of any review of the competition issues which may arise in relation to specific spectrum trades.

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.

It is clear from the Wireless Telegraphy (Liberalised Use and Preparatory Licences in the 800MHz, 900MHz and 1800MHz bands) Regulations 2012(SI 251 of 2012) that spectrum licences awarded in the forthcoming Multi-Band Spectrum Award process will be tradable. The existing 3G (2100MHz) licences are also in a RSPP band and this is acknowledged in various tables in the consultation material. We would welcome clarification as to whether any further legislative changes are required to complete the process of making the 3G licences tradable.

eircom Group strongly supports the objective not "... *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.*"We believe that this can be achieved with an ex ante regime that is consistent with the broader competition framework and a process that works to conclude assessments in a prompt manner.

In this context, we agree that it is prudent to initially adopt an ex ante framework for all proposed spectrum trades. This can be reviewed in light of experience. eircom Group is generally broadly supportive of the proposed framework for spectrum trading proposed by ComReg, which shares many common features with the merger control approval process used in Ireland. There are, however, a number of important issues in terms of both form and substance which in our view need to be addressed in order that the notification and approval process provide an adequate level of certainty as to the process that will be followed includingthe applicable timelines and the substantive tests that will be used by ComReg in approving transfers. We request that the following be addressed:

- **Nature of the Guidelines**

Regulation 19(1)(a) of the Framework Regulations, 2011 provides that ComReg, as the Regulator for electronic communications, must ensure that undertakings may transfer or lease to other undertakings, in accordance with conditions attached to the rights of use for radio frequencies and any procedures specified by the Regulator, individual rights to use radio frequencies in the bands for which this is provided for in accordance with implementing measures adopted by the European Commission under Article 9b(3) of the Framework Directive – this is the case of the radio frequencies concerned by the consultation. Furthermore, Regulation 19 requires that "*an undertaking intending to transfer rights to use radio frequencies must notify the Regulator of its intention to do so and of the effective transfer of the rights*". It also requires that the notification be in accordance with procedures specified by the Regulatorand that the notifications are made public.

eircom Group understands that the Guidelines proposed by ComReg would set out theprocedures which ComReg must specify in accordance with Regulation 19. Clearly these procedures must comply with the minimum requirements set out in Regulation 19, including in particular in terms of notification and publication. Subject to the comments below, eircom Group accepts that the procedures proposed by ComReg generally meet the minimum requirements of Regulation 19. However, eircom Group does not believe that the term "Guidelines" appropriately describe the nature of the procedures.

In this regard, eircom Group believes that it is essential to distinguish between, on the one hand, the procedural steps that will be followed and the circumstances determining their relevance (e.g., in relation to a Phase 1/Phase 2 assessment) and, on the other hand, the manner in which ComReg proposes to exercise any remaining discretion within the confines of these processes. In particular, eircom Group does not believe that it is appropriate that the timelines set out in the draft Guidelines are simply indicative or "best efforts". Similarly, the test used by ComReg in deciding whether to proceed to Phase 2 should be clearly set out and so should the substantive test to be used by ComReg in deciding whether to approve a transfer or not. eircom Group is of the firm view that these matters should be binding upon ComReg and that only a further decision by ComReg should be able to amend such timelines and procedures. By contrast, 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.

eircom Group accordingly submits that the spectrum transfer procedures set out in the Draft Guidelines should not be included in the Guidelines but rather in the body of a binding decision of ComReg. We note that this is an approach which has been taken by ComReg in relation to applications for USO funding (at least insofar as the making of applications is concerned). eircom Group would also note that the success of the

merger controlprocedures in Ireland and Europe in large part depends on the fact that mandatory timelines apply, including on the relevant authority, thereby achieving regulatory, legal and business certainty. Unless this is also the case for spectrum trades, there is a significant risk that they will be discouraged due to lack of certainty as to the timing of approval and accordingly, of when the transfer can be effective. As such we do not consider it appropriate that ComReg would not be bound by any timescales and request that firm timelines are set down for the assessment process.

- **Timelines and Procedural Steps**

In terms of the timelines proposed by ComReg, in addition to the comments above, eircom believes that they are realistic and appropriate. There are however other aspects of the timelines and procedural steps which should be given further consideration:

First, it is essential that it is clear what information must be provided to ComReg in order to "start the clock". This means that the list of information to be included in the Notification must be an exhaustive list, in terms of the categories of information required. While the categories of information must be exhaustive, this does not mean that ComReg could not, in a manner similar to what is done under merger control, 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.

We note that the information required in the Notification Form may be quite extensive depending on the nature of the proposed trade. We believe that the proposed 'pre-notification meeting' step in the process is a pragmatic way to manage information requirements.

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.

Second, the test used by ComReg to determine whether a transfer requires an in-depth assessment (in a second phase review) should be clearly set out. eircom in this regard disagrees with the proposal at para A4.19 that "*the trigger thresholds between Phase 1 and Phase 2 are not stringently defined*". eircom understands that ComReg is proposing to use a test similar to that used by the Competition Authority, namely a double negative test where a Phase 2 assessment would be open where ComReg is not satisfied that the transfer will not lead to a distortion of competition. This should be the trigger threshold, and none else.

Third, it is not clear to eircom 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. In particular, it seems to us that the modification of licence conditions are likely to give rise to issues that are

directly related to (but admittedly not limited to) competition in the markets concerned. eircom would therefore suggests that the process proposed by ComReg be reviewed to provide for a single timeline including all issues associated with the transfer. In this context also, eircom notes ComReg's reference in Annex 2 to Regulation 15(1) of the Authorisation regulations. ComReg's position as to the relevance of this provision, and how it should apply if at all in the context of the transfer approval process, is not clear and further clarifications in relation to this matter would be welcome.

Finally, the Decision 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.

- **Substantive Test**

  In ComReg 12/76, 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. However the draft guidelines refer to the test to be adopted as a "substantial distortion to competition (SDC)". eircom notes that Regulation 9 of the Framework Regulations provides that ComReg must ensure that competition is not "distorted" by any transfer or accumulation of rights of use of radio frequencies. This may be why ComReg refers in the Guidelines to a test of "substantial distortion of competition". eircom Group is of the view that whichever test is chosen by ComReg should be clearly set out in its Final Decision and its interpretation and application elaborated upon in theGuidelines. If the test is one of "substantial distortion of competition", then it is essential that ComReg explains the reason for its choice and having regard to the position it has taken in the Consultation Document, also sets out clearly what is the difference with a test of "substantial lessening of competition". Similarly, if the test chosen by ComReg is the SLC test, then any difference with the SDC test referred to in the Guidelines should be explained.

- In relation to Remedies, the reference at para A4.49 to Article 17(10) of the Framework Directive is not clear – there is no such Article.

- We do not agree with the first declaration on the Notification Form as currently drafted. "*All obligations and rights attached to a right of use of radio frequencies in a Wireless Telegraphy Licence in the proposed transfer are currently being met and will continue to be met by the current licence holder after the transfer (declaration by holder of right of use of radio frequencies being transferred).*" This 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. The declaration should be amended accordingly.

- Finally, 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.

2: Hutchinson 3G Ireland Limited

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7 September 2012

Dear Fiachra

COMREG DOC. NO. 12/76

I refer to ComReg Doc. No. 12/76, "*Spectrum Trading in the Radio Spectrum Policy Programme (RSPP) bands*" (the "Consultation"). The Consultation is of critical importance, detailed and complex. As a result, we are currently finalising a detailed response and will forward this to you shortly.

Yours sincerely

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12 November 2012

Dear Fiachra

COMREG DOC. NO.S 12/76, 12/76a AND 12/76b

I refer to: (i) ComReg Doc. No. 12/76, *"Spectrum Trading in the Radio Spectrum Policy Programme (RSPP) bands, A framework and guidelines for spectrum transfers in the RSPP bands"* (the "Consultation"); (ii) ComReg Doc. No. 12/76a, *"Annexes: Spectrum Trading in the Radio Spectrum Policy Programme (RSPP) bands, A framework and guidelines for spectrum transfers in the RSPP bands"* (the "Consultation Annexes"); and (iii) ComReg Doc. No. 12/76b, *"Spectrum trading issues, A framework for competition assessments, Report prepared for Commission for Communications Regulation"* (the "Oxera Report"). Hutchison 3G Ireland Limited ("H3GI") responds as follows.

Subject to the following comments, H3GI welcomes ComReg's proposed approach of mirroring the Competition Authority's approach to mergers ie a two phase assessment involving the 'substantial lessening of competition' test:

1. In order to promote certainty and investment, ComReg should introduce a framework and guidelines in respect of spectrum leases. It is neither sufficient nor legally permissible to fail to introduce such a framework and guidelines by reference to a lack of international precedents. In order to ensure that Ireland remains competitive and ComReg aids in its economic recovery, ComReg needs to lead in terms of such matters. 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").

2. In relation to the second type of transfer[1] and at paragraph 1.26 of the Consultation, ComReg states: *"ComReg notes that it may be inappropriate to approve the variation of the conditions attaching to a licence where such variation would effectively place other parties who acquired similar rights of use of spectrum when initially granted at a*

[1] 'Where all of the licence conditions attaching to a right of use of radio frequencies in Wireless Telegraphy Licence would not remain applicable to the spectrum transferred to another undertaking, noting that (i) the original licence holder would be required to continue to meet all the conditions in its licence, and (ii) the transfer proposal containing any variation to the conditions attaching to the original right of use of radio frequencies would require to be considered by ComReg to be objectively justified and proportionate in the context of its statutory objectives'.

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disadvantage. ComReg retains discretion to decline variations where concerns in this regard arise". H3GI submits that this will require careful consideration.

3. At footnote 29 of the Consultation, ComReg states: *"... in the UK certain spectrum rights of use have been bought outright from the State, by private undertakings, and are held in perpetuity. In such cases, the spectrum right of use may be considered to be permanently "transferred" to an undertaking".* This is not correct. Even where operators hold indefinite licences, they are still subject to revocation by Ofcom at five-years' notice *"for reasons of spectrum management"* ie at Ofcom's discretion. As a result, the spectrum cannot be considered as permanently transferred.

4. At paragraph A 4.26 of the draft guidelines for spectrum transfer analysis and procedures contained in Annex 4 of the Consultation Annexes (the "Draft Guidelines"), ComReg states:

"ComReg will assess the potential effects of any proposed spectrum transfer on the concentration of spectrum holdings having regard to the following (non-exhaustive) considerations:

• 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 capacity constraints for undertakings with smaller holdings; and

• whether any relevant spectrum right of use is being used efficiently or whether any allocated spectrum is being hoarded."

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.

5. At page 14 of the Oxera Report, Oxera states:

"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 rationale for this 'technologically neutral' approach is a focus on the actual use of spectrum, rather than on the technology employed, on the assumption that end-users of a particular wireless electronic communications service generally have no preference as to the particular technological means of delivering that service. In this context, technologies used in electronic communications are inputs which, combined with spectrum rights of use in the RSPP bands, are able to provide wireless transmission services to end-users.

Thus, any competition assessment should recognise the cost (dis)advantages and capacity constraints determined by the allocation of spectrum rights of use. This economic principle that lies behind any economic analysis relating to spectrum management is illustrated in Figure 2.1. The curve illustrates what combinations of the

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two main factors of production (spectrum and hardware) are required to deliver a given level of capacity and/or quality of service. In simple economic terms, a spectrum right of use is therefore, to some extent, a substitutable factor of production with hardware investment – a given market output can be reached with different combinations of spectrum and network hardware.

Figure 2.1 (attached)

While this stylised relationship between hardware investments and spectrum is present (one way or another) with respect to all RSPP bands and the associated services downstream, other factors need to be taken into account when assessing the likely affects of a proposed trade on competition, notably the following.

- ***Substitutability between different frequency bands.*** *Owing to the different physical properties of different radio frequency bands, some bands have the ability to support the same services at a higher quality and/or more efficiently (at a lower cost). For example, with the improved propagation characteristics, low frequency spectrum generally has superior properties. Different frequencies can be used to provide services that may be substitutable, from the end-users' point of view, and operators' ability to compete depends on the composition of their overall portfolio of spectrum holdings. Therefore, any assessment of the effects on competition of a proposed spectrum trade should recognise the extent to which, and at what cost, different bands can be employed to provide substitutable wireless electronic communications services. The extent of these potential comparative advantages depends substantially on parameters, such as the future take-up of the services in question by consumers, or the rate employed to discount benefits that could be realised in the future.*

- ***Aysmmetric positions to use spectrum.*** *Different operators have different production functions. For example, some incumbent operators can use their existing sites and apparatus to deploy new services in 'new' spectrum bands (such as those used for LTE). This implies that the incremental cost of achieving a given level of output and quality is higher for new entrants than for operators that can draw on their existing infrastructure. Hence, an assessment of a proposed spectrum trade should include an appraisal of the operator-specific costs of providing certain services downstream for each operator, post trade. For example, when assessing whether the use of spectrum by an alternative operator would facilitate greater competition, it would need to be understood how and over what timescale a small new entrant without any existing network would be able to bring competitive offers to the market."*

With respect and notwithstanding its qualification[2], 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. As stated above, any

[2] At page 14 of the Oxera Report: "*… a spectrum right of use is therefore, to some extent, a substitutable factor of production with hardware investment*" [Emphasis added].

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competition assessment should also consider availability and quality of service, including speed.

6. At page 28 of the Oxera Report, Oxera states:

> *"… The assessment of its ability to increase prices should take into account (among other factors) the ability of competitors to compete effectively with the acquirer post-acquisition, 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), and the ability of customers to react to a price increase by switching to competitors (ie, countervailing buyer power). …"*

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 or through an MVNO arrangement"*. As a result, ComReg should not rely on this view in the absence of an analysis of a relevant market.

7. ComReg should provide 'access to the file' similar to that provided by the Competition Authority in relation to mergers.[3]

Yours sincerely

MARK HUGHES
Head of Regulatory

[3] http://www.tca.ie/images/uploaded/documents/Merger_File_Access_Procedures.pdf