

**Regulation of the State Secretary for Economic Affairs and Climate Policy of, no. WJZ/ establishing the application and auction procedures for licenses for radio spectrum in the 3.5 GHz band for mobile communication applications and amending the Capping regulation for mobile communication frequencies 2020 (Regulation on the application and auction procedures for 3.5 GHz licenses)**

The State Secretary for Economic Affairs and Climate Policy,

In view of Section 3.11 of the Telecommunications Act (*Telecommunicatiewet*) and Articles 8, 9 and 10 of the Frequency Decree 2013 (*Frequentiebesluit 2013*);

Orders:

Chapter 1. General provisions

**Article 1. Definitions**

In these regulations, the following terms shall have the following meanings:

*3.5 GHz band*: radio spectrum within the 3450–3750 MHz range;

*applicant*: a party who has submitted a license application;

*notification*: Notification of the auction of licenses for radio spectrum in the 3.5 GHz band;

*bid*: a bid as referred to in Article 25, 32 or 41, submitted by a participant using the Minister's electronic auction (e-auction) system and confirmed by means of this electronic auction system;

*participant*: an applicant who has been admitted to the auction, as referred to in Article 13;

*first part of the primary phase*: the first part of the first phase, as referred to in Article 15, paragraph 4;

*exit bid*: an exit bid as referred to in Article 32, paragraph 8;

*final combination*: a final combination as referred to Article 41, paragraph 5;

*use of radio spectrum*: using radio spectrum as referred to in Article 1 of the Capping regulation for mobile communication frequencies 2020;

*Minister*: the Minister of Economic Affairs and Climate Policy;

*primary phase*: the first phase of the auction, as referred to in Article 15, paragraph 3;

*interest*: the interest paid by the bank where the client account specified in Article 8, paragraph 3, of the civil-law notary designated by the Minister is held, subject to a minimum of 0%;

*allocation phase*: the allocation phase of the auction, as referred to in Article 15, paragraph 7;

*second part of the primary phase*: the second part of the first phase, as referred to in Article 15, paragraph 5;

*associated legal entity*: a legal entity as referred to in Article 3 of the Capping regulation for mobile communication frequencies 2020;

*license*: a license for the use of the 3.5 GHz radio spectrum for mobile communications, as set out in Annex X to the notification;

*Act*: the Telecommunications Act (*Telecommunicatiewet*);

*winning bid*: a bid or an exit bid that has been designated a winning bid as referred to in Article 28 or 35;

*successful participant*: the participant whose bid or exit bid has been designated the winning bid by the Minister.

## **Article 2. Available licenses**

1. Pursuant to the notification, the following are available for allocation through an auction:
  - a. three 60 MHz licenses, and
  - b. twelve 10 MHz licenses.
2. After the first part of the primary phase, the number specified in paragraph 1, subsection (b), will, by virtue of the notification, be increased to:
  - a. eighteen, in the event that one of the licenses referred to in paragraph 1, subsection (a), has not been distributed;
  - b. twenty-four, in the event that two of the licenses referred to in paragraph 1, subsection (a), have not been distributed;
  - c. thirty, in the event that none of the licenses referred to in paragraph 1, subsection (a), have been distributed.

### Chapter 2. The application

- § 1. Requirements to be met by the application and the applicant

## **Article 3. Submitting the application**

1. A party wishing to qualify for the award of a license must submit an application to the Minister.
2. An application must be [PM: dates and times of the application period]:
  - a. received by registered mail at the following address, having been addressed as follows: PM, or
  - b. submitted by hand at the following address, having been addressed as follows: PM [*a digital submission option may also be added.*]
3. Delivery by hand as referred to in paragraph 2, subsection (b), above must take place between 8.30 am and 6.00 pm on working days during the above-mentioned period. In case of delivery of the application by hand, a proof of receipt will be given stating the date and time of receipt and bearing a signature.

## **Article 4. The applicant must be a legal entity**

The applicant must be a private-law legal entity under Dutch law or the equivalent thereof under the law of another Member State of the European Union or one of the other states that are a party to the Agreement on the European Economic Area, and have its registered office, central administration or principal place of business within the European Economic Area.

## **Article 5. No liquidation or moratorium on payments**

1. The applicant:
  - a. is not in a state of liquidation or in the process of being wound up;
  - b. has not been granted a moratorium on payments, nor has the applicant applied for a moratorium on payments.
2. Comparable requirements according to the law of another Member State of the European Union or one of the other states that are a party to the Agreement on the European Economic Area shall be considered equivalent to the requirements referred to in paragraph 1.

## **Article 6. Structure and content of the application**

1. An applicant may submit no more than one application.
2. For the purpose of paragraph 1, associated legal entities will be treated as a single applicant.
3. The application must state the names of at least one and no more than four natural persons, each of whom must be independently authorised to act on behalf of the applicant during the auction and has been granted legally valid and sufficient power of attorney for that purpose.
4. The application must be submitted using the model set out in Annex 1 and, notwithstanding any other requirements specified elsewhere in these regulations, must be accompanied by the information and documents referred to in the model.
5. Comparable information and documents drawn up under the law of another Member State of the European Union or one of the other states that are a party to the Agreement on the European Economic Area shall be considered equivalent to the information and documents referred to in paragraph 4.
6. The application must be drafted in Dutch.
7. By way of derogation from paragraph 6, the information and documents referred to in paragraph 4 may be drawn up in one of the official languages of the European Union or the European Economic Area, provided that information and documents in a language other than English are accompanied by a Dutch translation.

#### **Article 7. Notifying the Minister regarding changes in the information and documents provided**

The applicant shall immediately inform the Minister by way of encrypted email of any change in the information and documents referred to in Article 6, paragraphs 3–5. Within one week after sending the encrypted email, the applicant must also send a written notification in the manner described in Article 43, paragraph 2.

#### § 2. Provision of security

#### **Article 8. Security to be furnished by the applicant**

1. By way of security for the payment of its bid, the applicant must provide a deposit or a bank guarantee in the amount of:
  - a. € 38.750.000,-, if the applicant wishes to participate in either the first part of the primary phase or both parts of the primary phase;
  - b. € 8.700.000,-, if the applicant wishes to participate only in the first part of the primary phase.
2. The deposit shall be provided for the period up and including:
  - a. if the application is rejected, the date of rejection;
  - b. if the application is not considered, the date of the decision not to consider the application;
  - c. if the application is successful, the date on which the amount due in accordance with Article 46, paragraph 2 is paid in full.
3. By no later than the time referred to in Article 3, paragraph 2, applicants must ensure that:
  - a. the deposit has been credited to bank account number PM, or;
  - b. the bank guarantee, issued in accordance with the model referred to in Annex 2, section PM, has been received at the address referred to in Article 3, paragraph 2, subsections (a) and (b).

### **Article 9. Refund of deposits and return of bank guarantees for applications that have been excluded from consideration, rejected or refused**

1. Within two weeks after an applicant has withdrawn its application, the Minister has decided not to consider the application pursuant to Article 11, has rejected the application pursuant to Article 12 or has refused the application pursuant to Section 3.18 of the Act:

- a. the Minister will, with regard to applicants who have provided a deposit, return that deposit to the relevant applicant, or;
- b. the Minister will, with regard to applicants who have furnished a bank guarantee, send a written statement to the bank of the relevant applicant that the bank guarantee will not be called upon, providing a copy of this written statement to the relevant applicant.

2. Where the Minister refunds a deposit as referred to in paragraph 1, subsection (a), on the day of the refund he will also pay the interest on the credited deposit for the period from the date after the date on which the Minister received the deposit up to and including the date preceding the date on which the deposit is refunded by the Minister.

§ 3. Decisions in the course of the application phase

### **Article 10. Omissions and rectifying omissions**

1. Where an applicant has failed to comply with the requirements set out in Article 6, paragraphs 1, 4, 6 and 7 or Article 8, paragraphs 1 and 3, the Minister shall notify the applicant accordingly and give the applicant the opportunity to rectify the omission.

2. Omissions must be rectified before 6.00 pm on the seventh working day after the date on which the notification referred to in paragraph 1 was sent.

3. The information intended to rectify the omission must be submitted in the manner specified in Article 3, paragraph 2, subsections (a) and (b).

4. Rectification of an omission regarding the guarantee deposit must be made using the bank account number referred to in Article 8, paragraph 3, subsection (a).

### **Article 11. Decision in the event an omission is not rectified or not rectified in a timely manner**

If the omission is not rectified within the period referred to in Article 10, paragraph 2, and in the manner stated in Article 10, paragraphs 3 and 4, the Minister may decide not to consider the application in accordance with Section 4:5 of the General Administrative Law Act (*Algemene wet bestuursrecht*).

### **Article 12. Rejection of applications**

Without prejudice to the provisions in Section 3.18 of the Act, the Minister will reject the application if the provisions of Article 3, paragraph 2, and Articles 4 and 5 have not been met.

### Chapter 3. Admission to the auction

### **Article 13. Admission to the auction**

1. The Minister will inform the applicant whose application has not been excluded from consideration, rejected or refused pursuant to Section 3.18 of the Act in writing:
  - a. that it is admitted as a participant to the auction;
  - b. which parts of the primary phase it will be permitted to participate in;
  - c. of the maximum number of MHz which the applicant will be able to acquire, in light of its application as well as Article 3 of the Capping regulation for mobile communication frequencies 2020.
2. The application of paragraph 1, subsection (c) will be based on the amount of radio spectrum used by the applicant and the legal entities associated with the applicant on [start date of the application period/date of the application].
3. In the period from [start date of the application period/date of the application] up to and including the date on which it is awarded a license or its application is rejected as referred to in Article 45, paragraph 1 or 2 as relevant, the applicant must not become affiliated with:
  - a. other applicants, or;
  - b. other legal entities who use radio spectrum for mobile applications in the Netherlands as referred to in Article 1 of the Capping regulation for mobile communication frequencies 2020.

#### **Article 14. Notifications to participants by the Minister prior to the auction**

1. The Minister will notify participants in writing at least three weeks prior to the start of the primary phase of:
  - a. the date, starting time and duration of the first part of the primary phase;
  - b. the date and starting time of the second part of the primary phase and the duration of the first bidding round;
  - c. the software required for the auction;
  - d. the telephone number and email address (including the associated public security key) at which the Minister can be reached;
  - e. the combination of username and password of the participant;
  - f. the Internet address where the participant can log in to take part in the auction.

#### Chapter 4. The auction

- §. 1. General provisions regarding the auction

#### **Article 15. The auction model**

1. The auction will be held online, using an electronic auction (e-auction) system.
2. The auction will consist of two phases: the primary phase and the allocation phase.
3. The primary phase will consist of two parts.
4. The first part of the primary phase will cover the licenses referred to in Article 2, paragraph 1, subsection (a) and will take place by means of a clock auction subject to a first-price rule and exit bids.
5. The second part of the primary phase will cover the licenses referred to in Article 2, paragraph 1, subsection (b) and will take place by means of a clock auction subject to a first-price rule and exit bids.
6. A participant must only participate in the parts of the primary phase to which it has been admitted under Article 13.
7. The allocation phase covers the allocation of specific radio spectrum to winning bidders and will take place by means of a sealed bid auction.

#### **Article 16. Role of the Minister**

The Minister will be in charge of the auction and ensure the smooth running of the auction.

#### **Article 17. Auction on working days**

The auction will exclusively be conducted on working days.

#### **Article 18. Time, duration and end of bidding rounds**

1. The time and duration of bidding rounds will be determined by the Minister.
2. A bidding round will end upon the expiry of the bidding round as set by the Minister.

#### **Article 19. Bids, exit bids and other communication between participants and the Minister**

1. Bids and exit bids may only be made through the electronic auction system.
2. Other communications will exclusively be conducted:
  - a. through the electronic auction system, or;
  - b. by telephone or using secure email, where:
    - 1<sup>o</sup>. the participant will be contactable on the telephone number and email address (including the associated public security key) specified by it in its application; and
    - 2<sup>o</sup>. the Minister will be contactable on the telephone number and email address (including the associated public security key) referred to in Article 14, subsection (d).

#### **Article 20. Exceptional circumstances during the auction**

1. The Minister may suspend the auction in the event of exceptional circumstances that, in his opinion, are beyond the control of the Minister or the participants, or in the event of technical problems as a result of which the auction temporarily cannot proceed.
2. Participants must promptly report exceptional circumstances or technical issues to the Minister by telephone, and in any event within 10 minutes after the end of a bidding round or extended bidding round.
3. If the technical problems occur at a participant, the Minister may demand that its bids or exit bids be submitted using a computer that is made available by the Minister at a location to be determined by him.
4. In the event the auction is suspended, the Minister may decide in respect of the bidding round during which or after which the special circumstances or technical problems occurred that the bidding round and all the bids submitted in that round be declared invalid and that the bidding round should be held again.

#### **Article 21. Prohibited practices**

1. Applicants and participants, including any party that provides an applicant or participant with assistance for the auction or any legal entity that is associated with the applicant or participant:
  - a. must, both prior to and during the auction procedure, refrain from agreements or concerted practices that jeopardise or may jeopardise the smooth course of the auction, which includes competition in the context of the auction procedure.
  - b. must not disclose any information and will not divulge any information or cause any information to be divulged to third parties regarding its strategy, budget, desired or obtained number, type or combination of licenses, and expected or

desired prices, or prices to be paid, in the auction until the notification referred to in Article 43 has been given.

2. By way of derogation from paragraph 1, subsection (b), an applicant or participant will be able to provide the information listed in that section to its shareholders, in so far as it is required to do so by contract, under its articles of association or otherwise. In that event, the applicant or participant must ensure to the furthest extent possible that the information is provided on a confidential basis, in order to prevent further distribution.

3. Prior to the auction, during the auction procedure and up to and including the notification referred to in Article 43, applicants and participants, including any party that provides an applicant or participant with assistance for the auction or any legal entity that is associated with the applicant or participant, must disclose information on any participation in the auction and the submission of an application to that end in full and without delay, as soon as it has disclosed such information to one or more third parties.

4. The Minister will be able to terminate or suspend the auction if he considers or has reasonable grounds to suspect that any agreements, practices or disclosures of information are contrary to paragraph 1, 2 or 3.

#### **Article 22. Exclusion of applicants or participants**

1. If, prior to or during the auction, it transpires that an applicant or a participant is not or no longer in compliance with Articles 4–7 and Article 8, or if an applicant or a participant has, in the opinion of the Minister, acted contrary to Article 21, paragraph 1, 2 or 3, the Minister will be able to:

- a. exclude the relevant participant or applicant from participation or further participation in the auction and declare the bids or exit bids made by the relevant participant in one or more bidding rounds to be invalid;
- b. declare the outcome of one or more bidding rounds to be invalid; or
- c. decide that one or more bidding rounds should be held again.

2. If it is not established until after the conclusion of the auction that, in the Minister's opinion, a participant has acted contrary to Article 21, paragraph 1, 2 or 3, the Minister may declare the winning bid or bids made by that participant invalid and decide that the auction should be held again.

#### **Article 23. Bids and exit bids must be unconditional and are irrevocable**

A participant will be:

- a. unconditionally and irrevocably bound by its bid;
- b. unconditionally and irrevocably bound by its exit bid, except as provided for in Article 32, paragraph 11.

§. 2. First part of the primary phase (auctioning of the 60 MHz licenses)

#### **Article 24. Auctioning of the 60 MHz licenses**

This paragraph applies to the licenses referred to in Article 2, paragraph 1, subsection (a).

#### **Article 25. Auction regulations for the first part of the primary phase**

1. A participant must submit one bid for each bidding round in which it is taking part.
2. A bid will consist of the number of licenses the participant wishes to acquire for the price set in respect of the bidding round.

3. The number referred to in paragraph 2 cannot be greater than one.
4. In the first bidding round, the price per license will be [reserve price].
5. The price for the second and subsequent bidding rounds will be determined by the Minister.
6. If the participant lowers its bid in relation to its bid in the preceding bidding round, it will be able to submit an exit bid.
7. An exit bid must be an amount expressed in whole euros that:
  - 1<sup>o</sup>. is equal to or higher than the price per license as set by the Minister in respect of the preceding bidding round; and
  - 2<sup>o</sup>. is below the price per license set by the Minister in relation to the bidding round in which the participant is lowering its bid.
8. A participant who allows a bidding round or a bidding round extended for its benefit to expire and no longer has the option of extension under article 26:
  - a. will be considered to have submitted a bid equal to zero; and
  - b. must not submit a bid in subsequent bidding rounds.

#### **Article 26. Extension of bidding rounds in the first part of the primary phase**

1. If a participant has allowed a bidding round to expire without submitting a bid, the relevant bidding round will, by operation of law, be extended once by 30 minutes for the benefit of the participant.
2. A maximum of three bidding rounds will be extended by operation of law for each participant. Bidding rounds in respect of which the Minister has decided in accordance with Article 20 or 22 that they must be held again do not count towards this.
3. At the Minister's discretion, a bidding round in which the non-submission of a bid was the result of technical issues that arose before the expiry of the bidding round, may be disregarded when determining the remaining number of rounds that will be extended by operation of law.
4. By way of derogation from Article 18, paragraph 2, a bidding round as referred to in paragraph 1 will end when the period of 30 minutes has expired or, if this is earlier, as soon as all the participants for whose benefit the bidding round was extended have submitted a bid.
5. The Minister shall communicate any extension of a bidding round to all participants forthwith.

#### **Article 27. Notifications by the Minister after the end of each bidding round in the first part of the primary phase**

As soon as possible after the end of a bidding round, the Minister will notify each participant of:

- a. the number of that bidding round and, where applicable, the starting time, duration and number of the next bidding round and the price in that round;
- b. its bid in the previous bidding round; and
- c. the number of extensions referred to in Article 26, paragraph 2 that the participant is still eligible for.

#### **Article 28. Final bidding round and designation of winning bids for the first part of the primary phase**

1. The final bidding round is the bidding round in which the total number of licenses offered is equal to or lower than the number of licenses referred to in Article 2, paragraph 1, subsection (a).



2. When the total demand for licenses is equal to the number of licenses referred to in Article 2, paragraph 1, subsection (a), the Minister will designate all bids submitted in the final bidding round as winning bids.
3. When the total demand for licenses is lower than the number of licenses referred to in Article 2, paragraph 1, subsection (a), the Minister will designate the following bids as the winning bids:
  - a. all bids submitted in the final bidding round, followed by:
  - b. the highest exit bids for the number of licenses remaining at that time.
4. If, on the basis of paragraph 3, subsection (b), different exit bids have the same highest value, the exit bids are regarded as winning bids by means of a draw between the relevant exit bids.

### **Article 29. Notifications after the end of the first part of the primary phase**

As soon as possible after the end of the first part of the primary phase, the Minister will:

- a. inform all participants in the first part of the primary phase whether their bids were designated winning bids;
- b. inform all successful participants in the first part of the primary phase of the amount referred to in Article 46, paragraph 2, subsection (a).

§. 3. Second part of the primary phase (auctioning of the 10 MHz licenses)

### **Article 30. Auctioning of the 10 MHz licenses**

This paragraph applies to the licenses referred to in Article 2, paragraph 1, subsection (b).

### **Article 31. Notifications by the Minister prior to the start of the second part of the primary phase**

Prior to the start of the second part of the primary phase, the Minister will notify each participant in the second part of the primary phase of:

- a. the number of licenses referred to in Article 2, paragraph 1, subsection (b);
- b. the starting time and duration of the first bidding round of the second part of the primary phase;
- c. the price referred to in Article 32, paragraph 3;
- d. the maximum number of MHz that the participant will be able to acquire in the second part of the primary phase;
- e. the number of extensions referred to in Article 33 that the participant will be eligible for.

### **Article 32. Auction regulations for the second part of the primary phase**

1. A participant must submit one bid for each bidding round in which it is taking part.
2. A bid will consist of the number of licenses the participant wishes to acquire for the price set in respect of the bidding round.
3. In the first bidding round, the price per license will be [price].
4. The price for the second and subsequent bidding rounds will be determined by the Minister.
5. If a participant has not submitted a bid in the first part of the primary phase, the maximum number of licenses it will be able to acquire is five.

6. In the first bidding round, the bid submitted by the participant must not exceed the number of MHz referred to in Article 31, subsection (d).
7. In the second and subsequent bidding rounds, the bid must always be equal to or lower than the bid submitted by the participant in the preceding bidding round.
8. If the participant lowers its bid in relation to its bid in the preceding bidding round, it will be able to submit one or more exit bids.
9. An exit bid is a combination of the following:
  - a. a number of licenses that cannot exceed the number of licenses by which the participant has reduced its bid in relation to the preceding bidding round; and
  - b. an amount per license in whole euros which:
    - 1<sup>o</sup>. is equal to or higher than the price per license as set by the Minister in respect of the preceding bidding round; and
    - 2<sup>o</sup>. is below the price per license set by the Minister in relation to the bidding round in which the participant is lowering its bid.
10. If a participant submits multiple exit bids during a bidding round, the exit bid-related price per license as referred to in paragraph 9, subsection (b), cannot be lower than the amount per license in an exit bid submitted in the same round for a lower number of licenses.
11. A participant will also be able to withdraw one or more exit bids in relation to each bidding round in which it submits a bid.
12. A participant who allows a bidding round or a bidding round extended for its benefit to expire:
  - a. will be considered to have submitted a bid equal to zero; and
  - b. must not submit a bid in subsequent bidding rounds.

### **Article 33. Extension of bidding rounds in the second part of the primary phase**

Article 26 shall apply by analogy.

### **Article 34. Notifications by the Minister after the end of each bidding round in the second part of the primary phase**

As soon as possible after the end of a bidding round, the Minister will notify each participant of:

- a. the number of that bidding round and, where applicable, the starting time, duration and number of the next bidding round and the price in that round;
- b. its bid in the previous bidding round; and
- c. the number of extensions that the participant is still eligible for on the basis of Article 33.

### **Article 35. Final bidding round and designation of winning bids for the second part of the primary phase**

1. The final bidding round is the bidding round in which the total number of licenses offered is equal to or lower than total the number of licenses referred to in Article 2, paragraph 1, subsection (b).
2. When the total demand for licenses is equal to the number of licenses referred to in Article 2, paragraph 1, subsection (b), the Minister will designate all bids submitted in the final bidding round as winning bids.
3. When the total demand for licenses is lower than the number of licenses referred to in Article 2, paragraph 1, subsection (b), the Minister will designate the following bids as the winning bids:
  - a. all bids submitted in the final bidding round, followed by:

- b. the exit bids forming part of the combination of exit bids that results in the lowest number of licenses remaining undistributed.
4. When determining the combination referred to in paragraph 3, subsection (b), the Minister will only consider the exit bids of participants who have already been awarded the number of licenses they bid for in the bidding round during which they submitted the relevant exit bid.
5. If it follows from paragraphs 3 and 4 that multiple combinations of exit bids can be determined, the exit bids that form the combination generating the highest value will be designated the winning bids.
6. If, based on paragraph 5, there are multiple combinations with the same highest value, the winning bids will be the exit bids constituting the combination that is drawn by lots.

#### **Article 36. Notifications after the end of the second part of the primary phase**

As soon as possible after the end of the second part of the primary phase, the Minister will:

- a. inform all participants in the second part of the primary phase whether their bids or exit bids were designated winning bids;
- b. inform all successful participants in the second part of the primary phase of the amount referred to in Article 46, paragraph 2, subsection (a).

#### **§. 4. Allocation phase**

#### **Article 37. Auctioning of alternative radio spectrum combinations**

1. Based on Articles 29 and 36, the Minister will prepare a list for each participant containing the alternative combinations of radio spectrum that the participant is able to bid for in the allocation phase, given the number of licenses acquired by the participant.
2. The Minister will prepare the alternative combinations subject to the following:
  - a. the amount of radio spectrum for each successful participant must correspond with the number of licenses won by that participant;
  - b. the radio spectrum of each successful participant must constitute a block; and
  - c. the radio spectrum of undistributed licenses must be a block adjacent to the upper or lower limit of the 3.5 GHz band.

#### **Article 38. No auction in the allocation if the number of possible combinations is one**

There will be no allocation phase in the event that, pursuant to Article 37, there is only one alternative combination of radio spectrum available for each of the successful participants.

#### **Article 39. Admission to the allocation phase**

All successful participants will be admitted to the allocation phase.

#### **Article 40. Date, time and duration of the allocation phase**

1. As soon as possible after the end of the primary phase, the Minister will notify each participant of:
  - a. the date and starting time of the bidding round in the allocation phase;
  - b. the duration of the bidding round in the allocation phase;

- c. the alternative combinations for which the relevant participant is able to bid.
2. The allocation phase will take place no earlier than three working days from the notification referred to in Article 36.

#### **Article 41. Auction regulations for the allocation phase**

1. The allocation phase will consist of a single bidding round.
2. In the allocation phase, a participant must submit no more than one bid for each alternative radio spectrum combination referred to in Article 38.
3. A bid must be an amount expressed in whole euros and be at least zero euros.
4. If no bid is received in respect of an alternative radio spectrum combination, a bid equal to zero will be assumed for that alternative radio spectrum combination.
5. The final combination of winning bids will be the combination that:
  - a. appears on the list referred to in Article 37; and
  - b. With the highest value.
6. If it follows from paragraph 5 that multiple combinations could be designated the final combination, lots will be drawn between the relevant combinations to determine the final combination.

#### **Article 42. Determination of additional prices**

1. The Minister will set the additional prices once the final combination has been determined.
2. The extra price for a participant:
  - a. will be the difference between:
    - 1<sup>o</sup>. the sum of the bids submitted by the other participants in the combination of winning bids that would generate the highest revenue if the bids by the participant concerned were to be disregarded; and
    - 2<sup>o</sup>. the sum of the bids submitted by the other participants in the final combination of winning bids;
  - b. will comply with the conditions referred to in Annex 3.

#### **Article 43. Notifications after the end of the allocation phase**

As soon as possible after the determination of the additional prices referred to in Article 42, the Minister will inform the successful participants:

- a. that the auction has concluded;
- b. of the identity of the successful participants and the licenses they have acquired; and
- c. of the payable amounts referred to in Article 46, paragraph 2.

#### **Article 44. Publication of the outcomes**

1. The Minister will publish the information referred to in Articles 29 and 36 no later than on the first working day after the allocation phase has ended.
2. Within one week of the end of the auction, the Minister will publish an overview of:
  - a. the bids submitted by all participants during the first part of the primary phase, without disclosing the identity of participants who did not submit a winning bid;
  - b. the bids submitted by all participants during the second part of the primary phase, without disclosing the identity of participants who did not submit a winning bid;
  - c. the bids of all participants in the allocation phase.

#### Chapter 5. Award of licenses and rejection of applications after the auction phase

§ 1. General provision regarding the award of licenses and the rejection of applications

**Article 45. Award of licenses to successful participants and rejection of the applications by unsuccessful participants**

1. The Minister will award successful participants the licenses they have won.
2. The Minister will reject the applications of unsuccessful participants and those of participants who were excluded from (further) participation.

§ 2. Successful participants

**Article 46. Payment and amount due**

1. A successful participant must pay the amount owed by it within two weeks after it has been awarded the license, in the manner specified in its license.
2. The amount owed by the successful participant is the sum total of the following amounts:
  - a. the winning bids submitted by the relevant participant in the first part of the primary phase;
  - b. the winning bids submitted by the relevant participant in the second part of the primary phase; and
  - c. the extra price referred to in Article 42, paragraph 2, as applicable to the relevant participant.

**Article 47. Refund of deposits and return of bank guarantees to successful participants**

1. If a successful participant has lodged a deposit, the deposit will be used to pay the amount due for the license or licenses, on the understanding that:
  - a. where the participant's deposit is lower than the amount due, the participant must pay the remainder of the amount due; and
  - b. where the participant's deposit is higher than the amount owed, the portion of the deposit remaining after payment of the amount owed will be refunded to that participant no later than two weeks after the award of the license.
2. Article 9, paragraph 2 will apply by analogy to the cases referred to in paragraph 1, subsection (b), on the understanding that the Minister will only pay interest on the portion of the deposit that is refunded.
3. If a participant has provided a bank guarantee, Article 9, paragraph 1, subsection (b) will apply by analogy from the date on which the amount due was paid.

§ 3. Unsuccessful participants and excluded participants

**Article 48. Refund of deposits and return of bank guarantees to unsuccessful participants and excluded participants**

Article 9 will apply by analogy to the deposits or bank guarantees provided by unsuccessful participants and participants excluded from (further) participation.

Chapter 6. Concluding provisions

**Article 49. Amendments to the Capping regulation for mobile communication frequencies 2020**

The Capping regulation for mobile communication frequencies 2020 will be amended as follows:

1. Article 1 will be amended as follows:

a. In the definition of "*radio spectrum for mobile communications*", the wording "and 2685–2690 MHz" is replaced by ", 2685–2690 MHz, and 3450–3750 MHz".

b. The following will be added in the alphabetical list:

- *3.5 GHz band*: radio spectrum within the 3450–3750 MHz range;

2. Article 3 is amended as follows:

a. After subsection iv) a subsection is added, reading:

v) has one or more shares with a special statutory right of control;

b. part d, "legal entities in which" is replaced by "legal entities in the Netherlands, as well as legal entities outside the Netherlands insofar as they use, have acquired or applied for frequency space in the Netherlands, in which".

c. In part e, after "a legal entity" is added "that uses, has acquired or applied for frequency space in the Netherlands" and a semicolon is added after "disposes of".

3. Article 4 will be amended as follows:

a. In paragraph 1, "264 MHz" is replaced by "384 MHz".

b. A paragraph will be added which reads:

3. The maximum amount of radio spectrum for mobile communications in the 3.5 GHz band that a legal entity may use at any one time at any location is 120 MHz.

4. In Article 5, the wording ", and will expire on 31 December 2029" is removed.

#### **Article 50. Entry into force**

These regulations will take effect on PM.

#### **Article 51. Short title**

These regulations will be referred to as: Regulations on the application and auction procedures for 3.5 GHz licenses.

These regulations and the associated explanatory notes will be published in the Government Gazette.

The Hague,

The State Secretary for Economic Affairs and Climate Policy,

## **Annex 1 as referred to in Article 6, paragraph 4**

### **Model application form**

#### **Part A**

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

###### **A.1.1. Applicant details**

Name of applicant given in the articles of association: .....

Address for correspondence, post code and town/city of applicant:  
(Address at which the applicant can receive items sent by registered mail)

Physical address, post code and town/city of applicant:  
(Address at which the applicant can accept confidential auction documents  
delivered by hand)

Registration number listed in the Trade Register or comparable register: .....

Country of registration listed in the Trade Register or comparable register: .....

Body responsible for administering the Trade Register or comparable register:  
.....

###### **A.1.2. Contact details of the applicant**

The telephone number at which the authorised representative can be contacted  
during the auction: .....

The email address at which the authorised representative can be contacted during  
the auction and the associated public security key:

.....

Please send the public security key to [email address of the Radiocommunications  
Agency auction team will be added later]**A.1.3. Recent extract from the Trade  
Register**

A recent extract, not older than one month from the date of submission of the  
application, from the Trade Register or comparable register is attached.

##### **A2. Representative authority**

Details of the person/persons who has/have full independent authorisation to  
legally represent the applicant in relation to this application and all acts during the  
auction procedure:

###### **A.2.1. First representative**

Name: .....

First names in full: .....

Position at applicant: .....

Type of identity document: .....

Number of identity document: .....

Representative authority:

Authorisation evidenced by: .....

Signature: .....

**A.2.2. Second representative**

Name: .....

First names in full: .....

Position at applicant: .....

Type of identity document: .....

Number of identity document: .....

Representative authority: .....

Authorisation evidenced by: .....

Signature .....

**A.2.3. Third representative**

Name: .....

First names in full: .....

Position at applicant: .....

Type of identity document: .....

Number of identity document: .....

Representative authority: .....

Authorisation evidenced by: .....

Signature .....

**A.2.4. Fourth representative**

Name: .....

First names in full: .....

Position at applicant: .....

Type of identity document: .....

Number of identity document: .....

Representative authority: .....



Authorisation evidenced by: .....

Signature .....

If the representative authority is not apparent from the Trade Register or a comparable register, but from a power of attorney, a copy of the power of attorney should be attached.

### **A.3. Associated legal entities**

#### **A.3.1 Overview of associated legal entities and related information**

□ An organisation chart as referred to in Article 3 of the Capping regulation for mobile communication frequencies 2020 must be provided, showing the legal structure of the legal entities associated with the applicant and also include:

a. a description of each associated legal entity, including the control structure between the associated legal entities based on the criteria outlined in Article 3 of the Capping regulation for mobile communication frequencies 2020;

b. the mutual relationship between the legal entities arising from shareholdings or membership rights, or comparable controlling rights;

Add an appendix to provide all relevant documents, including as a minimum:

1. the current articles of association of the applicant;
2. shareholder agreements which the applicant is party to, either in the capacity of shareholder or subject. If no such agreements exist, a statement must be added to confirm this;
3. the most recent annual report and annual accounts of the applicant;<sup>1</sup>
4. organisational agreements and/or management agreements which the applicant is party to and which show whether the applicant is authorised to control the affairs of another business. If no such agreements exist, a statement must be added to confirm this.

#### **A.3.2 Declaration of affiliation**

The [applicant/parent company or companies of the applicant\*] hereby declares/declare that none of the applicant's associated legal entities as referred to in Article 3 of the Capping regulation for mobile communication frequencies 2020 has also submitted or will also be submitting an application under this regulations.

The (applicant/parent company or companies of the applicant\*) furthermore declares/declare that only the following of the applicant's associated legal entities within the meaning of Article 3 of the Capping regulation for mobile communication frequencies 2020 are the holder/user of a license for the use of radio spectrum for mobile communication as referred to in Article 1 of the Capping regulation:

...  
...  
...

---

<sup>1</sup> If the applicant is part of a group which prepares an consolidated annual report and consolidated annual accounts that also cover the applicant, it is sufficient to provide those.

(State the names of the legal entities associated with the applicant that are holders or users of licenses for the use of radio spectrum for mobile communication as referred to in Article 1 of the Capping regulation for mobile communication frequencies 2020)

\* Where the applicant forms part of a group of undertakings, this declaration must be issued by the legal entity controlling the entirety of the group that the applicant is part of.

#### **A.4. Written declaration regarding the accuracy of information**

A.4.1 The applicant is a legal entity incorporated in accordance with the laws of a Member State of the European Union or one of the other states that are a party to the Agreement on the European Economic Area, and has its registered office, central administration or principal place of business within the European Economic Area.

A.4.2 The applicant has/has not\* been dissolved.

A.4.3 The applicant has/has not\* been put into liquidation.

A.4.4 The applicant has/has not\* filed its own winding-up petition.

A.4.5 A winding-up petition in respect of the applicant has/has not\* been filed.

A.4.6 The applicant has/has not\* been granted a moratorium on payments.

A.4.7 The applicant has/has not\* filed for a moratorium on payments.

A.4.8 The applicant is/is not\* subject to an obligation to share information with shareholders as referred to in Article 11, paragraph 2.

For applicants who are subject to such an obligation, please indicate the basis for this obligation and what information must be shared by the applicant and at what time: .....

Provide the document that sets out the obligation to share information as referred to in Article 11, paragraph 2. In the event this has not been laid down in a document but otherwise agreed, please provide a written statement in this regard.

A.4.9 The applicant has/has not\* shared information with shareholders as referred to in Article 11, paragraph 2.

Where information listed in Article 11, paragraph 2, has been shared with shareholders, please indicate what information has been shared and with whom:

.....

(\* ) delete as appropriate.

Declaration by civil-law notary

The undersigned, civil-law notary practising in ..... (town/city)

Declares, without reservation, that:

(i) the information provided in this application under A.1.1, A.2, A.4.1, A.4.2, A.4.3 and A.4.6 has been verified by him/her and has been found to be complete and accurate;

(ii) the information provided in this application under A.3.1, A.3.2, A.4.4, A.4.5, A.4.7 and A.4.8 has been verified by him/her to the best of his/her ability and in his/her opinion is complete and accurate;

(iii) the persons named under A.2 have been identified in person by him/her in accordance with the rules of the Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*), on behalf of the Minister, in evidence of which a copy of the identity document used to verify their identity is hereby attached, and that those persons placed their signatures against A.2 in his/her presence.

Name: .....

Place: .....

Date: .....

Signature

.....

The declaration by the civil-law notary may be provided by means of an attachment, if required.

## Part B

Request

I wish to apply for one or more licenses in the 3.5 GHz band and request admission to:

- the first part of the primary phase or both parts of the primary phase
  - the second part of the primary phase
- for the number of MHz that I am permitted to acquire under Article xx of the Capping regulation.

.

As part of this, I am/am not\* requesting deferral of payment under Section 4:94 of the General Administrative Law Act for half of the total price referred to in Article 25, paragraph 3 for a period of one year from the date on which the license is awarded. Pursuant to Section 4:101 of the General Administrative Law Act, this portion will incur statutory interest from the date for payment in accordance with Article 29, paragraph 2, up to and including the day on which payment is made.

(\* ) delete as appropriate.

## Declaration regarding the receipt of electronic communications

Name of applicant: .....

declares as follows pursuant to Section 2:14, paragraph 1, of the General Administrative Law Act:

He/she is contactable by email and agrees to receive in that manner the documents made available by the auction team at the Radiocommunications Agency in connection with the application procedure and auction. For this purpose, he/she can be contacted at the email address specified in the application, using the specified public security key.

The undersigned is authorised to duly represent the applicant or is a representative who has separate and independent authorisation to act on behalf of

the applicant during the application procedure and the auction. The undersigned has the power to duly represent the applicant in connection with the application and all acts in the course of the auction as referred to in these regulations.

Name: .....  
Place: .....  
Date: .....  
Signature: .....

Declaration by director

The undersigned declares that

- (i) the information provided in this application is complete and accurate;
- (ii) this application was not prepared under the influence of an arrangement or agreement with another party or a decision or practice that jeopardises or may jeopardise the smooth conduct of the auction, including competition;
- (iii) during the auction procedure, the participant will refrain from concluding arrangements or entering into agreements with another party and that the participant will refrain from any decision or practice that jeopardises or may jeopardise the smooth conduct of the auction, including competition.

Name: .....  
Place: .....  
Date: .....  
Signature: .....

Non-binding translation

## **Annex 2 as referred to in Article 8, paragraph 3, subsection (b)**

### **Model bank guarantee**

I. The undersigned..... (name of a bank that is established and has its registered office in a Member State of the European Union or one of the other states that are a party to the Agreement on the European Economic Area)\*, with its registered office in ..... and its place of business, among other places, at ....., hereinafter: 'the Bank';

Whereas:

A. Section 3.13, subsection 1, of the Telecommunications Act (Telecommunicatiewet) provides that the use of radio spectrum requires a licence, to be issued by the Minister of Economic Affairs and Climate Policy (hereinafter: 'the Minister');

B. .... (Applicant's name), a legal entity under ..... (the law of a Member State of the European Union or one of the other states that are a party to the Agreement on the European Economic Area) law, with its registered office in ..... and its principal place of business at ....., hereinafter: 'the Applicant, intends to submit a bid in the auction for the purpose of acquiring a licence as referred to in Section 3.13(1) of the Telecommunications Act;

C. the Minister has established rules for the award of licences. These rules are laid down in the Regulations on the application and auction procedure for 3,5 GHz licences;

D. in accordance with these rules, the Minister requires that the Applicant arrange for a bank guarantee to be provided as security for the entire amount to be put up as security by the Applicant, hereinafter: "the Amount Due", for the benefit of the State of the Netherlands, a legal entity under Dutch law, whose seat is established in The Hague, hereinafter: "the State";

E. the Applicant has requested the Bank to provide an irrevocable and independent bank guarantee for the benefit of the State, which is payable on first demand by the State;

II. Undertakes as follows:

1. The Bank irrevocably stands surety, by way of an independent obligation, for an amount of € 38,750,000 (in words: thirty-eight million and seven hundred and fifty thousand euros) or €8,700,00 (in words: eight million and seven hundred thousand euros), to the State for the payment by the Applicant of the entire amount payable to the State in respect of the Amount Due as appears from a written notice by the State, such that the Bank undertakes to pay the amount due to the State as its own obligation.

2. The Bank undertakes to pay to the State, as if it were its own debt, on first demand and on the mere written notice of the State, without requiring any other document to be presented or any reasons to be given, the amount that the State declares it is due in respect of the Amount Due from the Applicant, on the understanding that the Bank shall never be obliged to pay more to the State than the maximum amount referred to above.

3. Partial reliance is possible under this bank guarantee. The maximum amount of this bank guarantee will be reduced by an amount equal to each partial reliance.

4. This bank guarantee shall expire after receipt by the Bank of a written notice by the State, sent by registered letter, that the bank guarantee has expired and in any event one year after the date on which this guarantee was signed, unless the Bank has received a written notice by or on behalf of the Minister, to be sent by registered letter, at least one month prior to the expiry date of the guarantee stating that this bank guarantee will not expire, in which case the guarantee will be valid for successive new periods of one year.

5. This bank guarantee is governed by Dutch law. Any disputes relating to this bank guarantee may only be submitted to the competent Dutch court in The Hague.

6. Following the expiry of this bank guarantee, the State may no longer make any claim against the Bank under this bank guarantee, unless the Bank received a notice as referred to under 2 above prior to the scheduled expiry date of this bank guarantee with which the Bank has failed as yet to comply. At the Bank's request, the State will return this bank guarantee to the Bank upon its expiry.

Town/city: .....

Date: .....

Name of Bank and signature

.....

\* the details shown in italics above are to be completed by the Bank.

Non-binding translation

**Annex 1 as referred to in article 42, paragraph 42, subsection (b)**

**Calculation additional prices**

The application of Section 40 has resulted in the establishment of n winning bids  $wb_1, wb_2, wb_3, \dots, wb_n$  which were submitted by participants  $w_1, w_2, w_3, \dots, w_n$ . The bid amount in winning bid  $wb_i$  is  $p_i$ . The total proceeds of winning bids  $wb_1, wb_2, wb_3, \dots, wb_n$  amount to T, or  $T = \sum_{i=1}^n p_i$ .

The additional price will be determined in accordance with the provisions of (1) and (2):

1. An additional price  $eb_i$  will be determined for each winning bid  $wb_i$  on the understanding that the following conditions are fulfilled:
  - a.  $eb_i$  equals or is larger than 0;
  - b.  $eb_i$  is smaller or equal to  $p_i$ ; and
  - c. The set  $\{eb_1, eb_2, eb_3, \dots, eb_n\}$  meets the following condition: if all the bids by a winning participant in the assignment bidding round
    - are reduced by  $(p_i - eb_i)$ , for  $i = 1, 2, \dots, n$ ; and
    - are not reduced below zero,
 the application of Section 40(2)(a) will not result in a different bid or a different combination of bids that generates higher proceeds than  $wb_1, wb_2, wb_3, \dots, wb_n$ ;
  - d. The set  $\{eb_1, eb_2, eb_3, \dots, eb_n\}$  has the lowest possible proceeds, subject to supporting the same outcome as the original bid amounts, in other words the sum

of the additional prices  $\sum_{i=1}^n eb_i$  is minimal.

2. If several sets  $\{eb_1, eb_2, eb_3, \dots, eb_n\}$  meet the conditions set out under (1), the set of additional prices chosen from these sets will be the set with the lowest opportunity cost variance OV. The opportunity cost variance OV is the sum of the quadratic differences between the base prices and the corresponding individual

opportunity costs, or  $OV = \sum_{i=1}^n (eb_i - o_i)^2$ , on the understanding that:

- a.  $O_i$  represents the opportunity costs of the winning bid  $wb_i$ , determined by:  $O_i = Z_i - (T - p_i)$ ; and
- b.  $Z_i$  represents the total proceeds of the final combination of winning bids established in accordance with Section 40, if participant  $w_i$  had bid 0.00 for all possible combinations of bids.

## **Explanatory note**

### **I. General section**

#### **1. Introduction**

These regulations set rules regarding the allocation of licenses in the 3450–3750 MHz frequency band (unpaired, hereinafter: “the 3.5 GHz band”). These licenses are intended for electronic communication services (mobile communications) and will be awarded on a national basis. In general, the 3.5 GHz band refers to the 3400–3800 MHz radio spectrum. However, these regulations only cover the allocation of licenses in the radio spectrum 3450–3750 MHz frequency band. The remaining radio spectrum, being the 3400–3450 MHz and 3750–3800 MHz bands, are currently in use for local applications and will be once more from 2026 onwards. This radio spectrum is expressly outside of the scope of the present regulations.

##### **1.1 Background**

The government is fully committed to maintaining the Netherlands' strong position in terms of having an excellent digital infrastructure. The letter to the House of Representatives of 2 July 2018<sup>2</sup> states that the fixed and mobile networks make an important contribution to the favourable business climate and conditions in the Netherlands. The government's Digital Connectivity Action Plan, which accompanied the letter, lays down a comprehensive plan that is in line with the European call to generate new targets and plans for the development of broadband and 5G.

##### *Digital Connectivity Action Plan*

The Digital Connectivity Action Plan (hereinafter: “the Action Plan”) was an initial follow-up to the Radio Spectrum Policy Memorandum of December 2016<sup>3</sup>. This Memorandum sets out that the availability of radio spectrum is an essential condition for a high-quality digital infrastructure. Demand for radio spectrum is increasing and society is imposing ever greater requirements on the availability and reliability of telecommunications infrastructure, wireless or otherwise. These and other developments, including the introduction of new wireless applications and services and the demand for higher data speeds and increasing data volumes, necessitate more efficient and more effective use of the spectrum. Frequency policy therefore has a prominent role to play in contributing to these developments. In addition to performing a traditional regulatory function, to prevent interference and disruption, frequency policy also fulfils a market-regulating function aimed at ensuring a properly functioning market for telecommunication services.

The Action Plan adds that it is essential for connectivity providers that the government act predictably, thereby providing investment security regarding the availability of spectrum. In the Action Plan, the government gives mobile communications providers the security that the award of frequencies on a nationally exclusive basis will in principle be for 20 years, providing certainty regarding the roll-out of the new 5G networks.

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<sup>2</sup> Tweede Kamer der Staten-Generaal, vergaderjaar 2017 – 2018, 26 643, nr.547

<sup>3</sup> Tweede Kamer der Staten-Generaal, vergaderjaar 2015 – 2016, 24 095, nr.409



### *Memorandum on Mobile Communications 2019*

Following the Radio Spectrum Policy Memorandum and the Action Plan, the Memorandum on Mobile Communications 2019 was drawn up, which provides a more specific policy framework on spectrum allocation in the upcoming years. The Memorandum on Mobile Communications focuses on the frequency allocations in the upcoming years and formulates the objective for the government to strive for high-quality services that can cater to a wide range of demands and are available anywhere and at any time at competitive rates. This is the overarching objective for the previously auctioned 700, 1400 and 2100 MHz frequencies (June/July of 2020) and the auctioning of the 3.5 GHz band. As the Memorandum on Mobile Communications deals, in a concrete manner, with the market organisation measures that need to be implemented to ensure competition in the mobile telecommunications market, the drafting of the Memorandum was heavily dependent on actual developments in the market.

### *ACM opinion on the spectrum auctions*

The Netherlands Authority for Consumers and Markets (ACM) provided an opinion regarding market organisation measures during the auction. The merger of T-Mobile Nederland and Tele2 Nederland, which was announced in November 2017, meant that the ACM's opinion on the Multiband Auction inevitably needed to wait until the European Commission's final decision on the merger. Following approval of the merger by the European Commission, the ACM gave its opinion on the measures to be implemented in the spectrum auctions in April 2019. As stated previously, one of the purposes of the frequency policy is to regulate the market. This is because the option to acquire spectrum enables a market party to compete on the market for mobile communications. In light of this, the ACM was asked to advise on possible frequency allocation measures that would need to be put in place during the spectrum auctions in order to guarantee competition on the market for mobile communications. For the opinion issued in 2019 in relation to the Multiband Auction, the ACM considered the level of competition in the market for mobile communications over the next five years. The opinion therefore also covers the 3.5 GHz auction. In its competitive analysis, the ACM concluded that the circumstances on this market are indicative of effective competition. The merger between T-Mobile and Tele2 means that there are currently only three active operators, but this has not led to a significant negative impact on competition. However, this is not to say that competition in the market would not benefit from a fourth or fifth market party. Although the ACM currently does not consider it necessary to reserve spectrum for a new market player, it has emphasised that accession by a fourth MNO remains a possibility and indicated that it is generally in favour of having the highest possible number of players in the market. The band-specific cap of 40% for the 3.5 GHz band ensures that a balanced allocation of the spectrum is maintained, since *at least* of three parties will have the option to acquire radio spectrum in the 3.5 GHz band, as is required for a fully-fledged offering of 5G services and to ensure effective competition.

The key elements of this opinion concerned the introduction of a 40% cap on the total frequencies that an individual operator may possess, an identical cap on the total spectrum possession in what are known as the low-spectrum bands (the 700, 800 and 900 MHz frequencies) as well a band-specific cap of 40% for the 3.5 GHz frequency. The ACM's opinion was incorporated into the Memorandum on Mobile

Communications<sup>4</sup>. The Memorandum also highlights that in order to ensure a market that operates efficiently, it is essential for a threat and possibility of entry to continue to exist, because this creates competitive pressure. A key aim of the auction is therefore that all market parties must have a realistic chance of success.

## 1.2 International solution for satellite interception at Burum

In the explanatory notes of the auction regulations for the Multiband Auction of the 700, 1400 and 2100 MHz bands, further clarity was provided regarding the alternative for satellite interception at Burum. At that time, it appeared that a solution within the context of international cooperation was feasible and that all efforts were geared towards implementing that international solution in good time, so before September 2022. This remains the case at this time.

If it is not possible to achieve the international solution by this date, it may be necessary to implement a bridging measure for a short period of time. At the current time, the likelihood of a bridging measure being required is considered low. If necessary in the interest of national security, the Ministry of Defence, the Ministry of the Interior and Kingdom Relations, the Minister of Economic Affairs and Climate Policy and the parties acquiring radio spectrum in the 3.5 GHz auction will consult to agree further arrangements on the (technical) nature and exact duration of any bridging measure. The expectation is that it will be clarified before the 1<sup>st</sup> of October 2021 whether the bridging measure referred to will be used and if so, what the measure will entail and how many months it will be in place for. The duration of the bridging measure will in any event be restricted to a period of maximum of six months from the 1<sup>st</sup> of September 2022.

## 1.3 European Framework

A final aspect is that the 3.5 GHz band is one of the 5G frequency bands designated by the European Commission. In this context, Article 54, paragraph 1, subsection (a) of Directive (EU) 2018/1972<sup>5</sup> stipulates that, for terrestrial systems capable of providing wireless broadband services, Member States shall, where necessary in order to facilitate the roll-out of 5G, take all appropriate measures to reorganise and allow the use of sufficiently large blocks of the 3.4–3.8 GHz band by 31 December 2020. Article 54, paragraph 2 of the Directive stipulates that Member States are able to extend the 31 December 2020 deadline in accordance with Article 53, paragraph 2, 3 or 4. Article 53, paragraph 3 stipulates that an extension is permitted in the interest of safeguarding national security and defence. This is the stipulation that is relied upon with regard to the situation in the Netherlands. Pursuant to Directive (EU) 2018/1972, Article 1 of the Commission Implementing Decision<sup>6</sup> amending Decision 2008/411/EC (which relates to the 3.5 GHz band) subsequently stipulates that, without prejudice to the protection and continued operation of other existing use in this band, when Member States designate and make available, on a non-exclusive basis, the 3,400–3,800 MHz frequency band for terrestrial electronic communications

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<sup>4</sup> Tweede Kamer der Staten-Generaal, vergaderjaar 2018 – 2019, 24 095, nr. 478

<sup>5</sup> Directive (EU) 2018/1972 of the European Parliament and the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ EU 2018, L 321).

<sup>6</sup> Commission Implementing Decision (EU) 2019/235 of 24 January 2019 on amending Decision 2008/411/EC as regards an update of relevant technical conditions applicable to the 3400–3800 MHz frequency band, OJEU 2019, L 37.

networks, they must do so in compliance with the parameters set out in the Annex to the Implementing Decision. These regulations provide for this.

## **2. Starting points for the award of licenses**

### 2.1 Decision to hold an auction

In the [Notification of the auction of licenses for radio spectrum in the 3.5 GHz band] (*Besluit bekendmaking veiling vergunningen 3,5 GHz-band*), it was announced that the licenses for radio spectrum in the 3.5 GHz band will be allocated through an auction. It was previously stated in the Memorandum on Mobile Communications that scarce frequencies are to be awarded by means of an auction in order to ensure the distribution is as efficient as possible. Demand is expected to exceed supply for the 3.5 GHz band. It also seems an obvious choice to award licenses for this frequency band on a national scale.

### 2.2 Memorandum on Mobile Communications policy choices

#### *2.2.1. How the caps work*

The Memorandum on Mobile Communications describes the interrelated market organisation measures for the Multiband Auction of the 700, 1400 and 2100 MHz bands, which has now been completed, and the auction of the 3.5 GHz frequencies. These measures involve the application of caps. These are maximums imposed on the total spectrum owned by operators, or in other words, the amount of radio spectrum they have acquired. To begin, there is a general 40% cap on the total spectrum across the different frequency bands. In addition to this, the 3.5 GHz band is subject to a band-specific cap of 40%. The band-specific cap has no impact on the general cap, since operators who acquired radio spectrum under the general cap of 40% during the Multiband Auction will not be able to increase their ownership above 40% in the 3.5 GHz auction. This is because the total number of frequencies of the 3.5 GHz band will be added to the total spectrum in the various frequency bands coming under the general cap. In the 3.5 GHz auction operators will, however, be able to increase their spectrum ownership in relative terms. The caps apply during the auction, as well as to any post-auction rearrangements, for example in the case of transfers or leases. In order to give effect to the above, these regulations also provide for an amendment to the Capping regulation. Please refer to the explanatory notes on individual articles for details on this.

#### *2.2.2. 3 licenses of 60 MHz and 12 licenses of 10 MHz*

The auction of the 3.5 GHz band will involve the auctioning of a total of 300 MHz in 3 licenses of 60 MHz and 12 licenses of 10 MHz, ranging from 3450 to 3750 MHz. The reasoning behind this can be found in the study conducted by Dialogic<sup>7</sup> into the logical size for the licenses to be auctioned in the 3.5 GHz band. Based on the 3GPP standard for 5G NR, Dialogic established that 5 MHz is the lowest common denominator for the lot sizes. However, although a 5 MHz denominator yields a limited number of additional options, it mostly also increases the number of suboptimal potential outcomes. This is because, aside from 15 MHz and 25

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<sup>7</sup> Dialogic, *Onderzoek kavelgrootte veiling 3,5 GHz-vergunningen* [Lot size study for auctioning 3.5 MHz licenses], Utrecht, 25 March 2020

MHz, the 3GPP standard only supports MHz in round tens. For this reason, a denominator of 10 MHz is preferred.

Dialogic found that a common denominator of 10 MHz allows for different distributions. Dialogic distinguishes between even distributions, where the size of all licenses is the same, and uneven distributions, where there is a range of different sizes. If licenses are kept the same, the most obvious choices would be 100 MHz (3 licenses) and 10 MHz (30 licenses). However, three licenses of 100 MHz don't offer the option to obtain the maximum of 120 MHz or achieve differentiation between mobile network operators. Three licenses of 100 MHz could prevent the strategic acquisition of spectrum but would always result in an outcome with three parties and would furthermore mean that a new (wealthy) entrant always comes at the expense of one of the existing mobile network operators. A distribution into even licenses of 10 MHz would give more flexibility and create options for new entrants as well as differentiation between existing network operators. In its study, Dialogic also notes that there is a tipping point around the 50–60 MHz mark in terms of economies of scale and costs. This is the minimum amount of spectrum required to make the placement of one carrier worthwhile. This means that each 10 MHz acquired over and above 60 MHz has a diminishing value – a value below the average value of the first 60 MHz. This is why, with a view to safeguarding all the objectives in the auction design, DotEcon advised to initially auction three licenses of 60 MHz and subsequently organise a round in which 12 licenses of 10 MHz will be auctioned (see paragraph 5.1.1, Primary phase). That way, each participant still has the opportunity to tune his demand to a multiple of 10 MHz, which is in line with Dialogic's advice.

The frameworks for the award, the technical conditions and the various obligations and requirements for the license holders are set out in the explanatory notes to the licenses, which are attached as an annex to the [Notification of the auction of licenses for radio spectrum in the 3.5 GHz band]. The frequencies acquired in the auction will be awarded as a block. The manner in which this is implemented in the auction is described in Chapter 5 of these explanatory notes.

### *2.2.3. Licensing period*

The Memorandum on Mobile Communications stated that the 3.5 GHz licenses to be auctioned would be valid until 2040, without further specifying a precise date. The expiry date is set at 31 December 2040. This synchronised expiry date aligns perfectly with the allocation schedule given in the Memorandum on Mobile Communications. It will be possible to use the licenses from 1 September 2022, meaning the licensing period is set at eighteen years and four months.

### *2.2.4. Frequency usage requirement*

The Memorandum on Mobile Communications specifies the frequency usage requirement that is attached to the 3.5 GHz licenses to be auctioned. A frequency usage requirement imposes an obligation on a license holder to offer a public electronic communications service and combines this with the obligation to provide this service in an area of a certain size. The frequency usage requirement for the 3.5 GHz band as set out in the Memorandum on Mobile Communications has been incorporated in the licensing requirements without any changes. The frequency usage requirement per license of 10 MHz is 54 km<sup>2</sup> after two years and

536 km<sup>2</sup> after five years. For a license with a size of 60 MHz, the obligations are 324 km<sup>2</sup> after two years and 3216 km<sup>2</sup> after five years.

### **3. Application procedure**

Section 3.13, paragraph 1, of the Telecommunications Act provides that a license for the use of radio spectrum must be obtained from the Minister of Economic Affairs and Climate Policy. An application needs to be submitted to obtain a license. For the purposes of Article 8 of the Frequency Decree 2013 (*Frequentiebesluit 2013*), these regulations set out how an applicant should submit an application for a license for mobile communications applications and which information it must provide in the application. The regulations also lay down which requirements referred to in Article 9 of the Frequency Decree 2013 an applicant needs to comply with in order to be admitted to the allocation procedure (admission requirements). In addition, these regulations are intended to implement Article 10 of the Frequency Decree 2013, pursuant to which, with regard to the consideration of a license application, rules are laid down regarding the manner in which the auction should take place.

The application procedure will begin with the submission of an application in accordance with Article 4.

Only one application may be submitted per applicant (Article 7, paragraph 1). Reference is made to Article 3 of the Capping regulation for establishing whether two or more applicants are to be considered as a single applicant. To facilitate this check, applicants are required to include an organisation chart showing their legal structure and associated documents with their application (see Annex I, under A.3). Compared with the application for the Multiband Auction of the 700, 1400 and 2100 MHz licenses, a number of simplifications have been introduced that reduce the administrative burden on applicants. In this context, a requirement has been added for applicants to submit a declaration of affiliation, in order to ensure these simplifications can be implemented without incurring risks for the execution of the auction. In this declaration the applicant will state that any legal entities associated with it are not themselves applicants within the meaning of the Capping regulation. The applicant must also confirm which of its associated legal entities are holders/users of a license for the use of radio spectrum for mobile communications as referred to in Article 1 of the Capping regulation. The notarial declaration also covers this declaration. Here, too, the intention is to ensure the requirement to provide information on affiliations results in as small an administrative burden on applicants as possible. Applicants are advised to ensure the information they are required to provide is as complete as possible. If the information is not sufficient to allow a proper judgement to be formed of the mutual relations, Section 18.7 of the Act may be applied. This Section permits any and all information to be demanded that may be needed to implement the provisions under or pursuant to the Act. In the event that individual applications are submitted by different legal entities that are affiliated within the meaning of Article 3 of the Capping regulation and must, in accordance with Article 7, paragraph 2, therefore be qualified as a single applicant, the possibility of rectifying the omission will be offered. If the number of applications is not reduced to one within the period provided for that purpose, it may be decided in accordance with Article 12 that the applications submitted by these applicants will not be considered because the applicants have acted contrary to Article 7, paragraph 1, of the Capping regulation. Parties must take due account of the fact

that legal entities that should be qualified as one and the same applicant will, in principle, not have any of their applications considered.

The application and the information and documents that must be provided with it should, in principle, be drafted in Dutch. The only exception to this requirement applies to market players that are established in a Member State of the European Union or one of the other states that are a party to the Agreement on the European Economic Area (see Article 7, paragraphs 6 and 7). The information and documents referred to in Annex 1 may be drafted in the language of these states. However, if any of the documents are written in a foreign language other than English, a Dutch translation of those documents must be included.

Section 4:5 of the General Administrative Law Act (*Algemene wet bestuursrecht*) provides for the possibility of rectifying an omission where the applicant has failed to comply with a legal requirement for considering the application, or if the information provided is not sufficient to enable an assessment of the application or preparation of the decision. Article 12 provides that, in accordance with Section 4:5 of the General Administrative Law Act, the Minister may decide not to consider an application if, following the possibility of rectifying an omission, the application does not satisfy, or does not fully satisfy, the specified requirements. The following is relevant as regards the manner in which the Minister will use the power granted to him in this Section. Major commercial interests are at stake with any spectrum allocation. It is important that future license holders and their investors are able to make a realistic assessment of the legal and commercial consequences of the Minister's decisions. There may be major implications in the unfortunate event that an applicant is wrongly admitted to an auction or wrongly excluded from an auction. It is therefore essential to ensure as much clarity as possible. In so far as permitted by the legal framework, the policy is designed to allow applicants one opportunity to rectify an omission. If an applicant still does or does not entirely satisfy the specified requirements, its application will, in principle, not be considered.

As security for payment of its bid, an applicant must provide a deposit or a bank guarantee, the amount of which depends on the parts of the auction in which it wishes to participate. An applicant who wishes to participate in the first and second part of the primary phase must pay a deposit of 38.75 million euros. The deposit for participating in only the second part of the primary phase is set at 8.7 million euros. The use of these deposits is to prevent non-serious bidders from participating in the auction. In addition, Article 6, paragraph 1 imposes several requirements that applicants must fulfil in order to ensure their creditworthiness. Here, too, the intention is to avoid a situation where an applicant is unable to honour its bids. In connection with this, an applicant may not be in a state of liquidation or in the process of being wound up, and it may not have requested or been granted a moratorium on payments.

The 3.5 GHz frequencies are deemed scarce, in view of the (tens of) millions of euros they represent according to the study carried out by SEO (which is described in the next paragraph). A scenario as referred to in Section 3.10, paragraph 2, in which there is a reasonable expectation that the available radio spectrum is sufficient to meet demand, can therefore not be said to exist. There will be no separate determination of scarcity on the basis of applications that are received. For this reason, it is not necessary for applicants to state in the application the number of licenses they wish to obtain in the auction at the

reserve prices discussed below. Applicants can wait to express this in the first and/or second part of the primary phase, once they have been admitted to the auction.

#### **4. Reserve prices**

##### 4.1. Basic principles regarding reserve prices

On behalf of the Minister of Economic Affairs and Climate Policy, SEO Economic Research has prepared a recommendation regarding the reserve price to be used for the 3.5 GHz auction. This recommendation has been adopted in its entirety. The reserve price represents the minimum price during the auction. The Telecommunications Act<sup>8</sup> stipulates that the purpose of the reserve price is two-fold: it increases the speed and efficiency of the auction and deters non-serious bidders. However, it is important that the reserve price should not be set so high as to deter serious bidders. In other words, the reserve price is also important in terms of the level of competition in the auction.

The recommendation is in part based on information from market parties regarding the spectrum's value. This information has competitive value and can trigger strategic behaviour during the auction. For this reason, the valuation of the spectrum will be explained in terms that are as abstract as possible and in a way that ensures individual parties cannot be identified.

##### 4.2. Auction model

The level of the reserve price is strongly dependent upon the auction model. When preparing its recommendation, SEO was made aware of the DotEcon recommendation (2020) as regards the auction model to be used. DotEcon's recommendation is to auction the frequencies in two parts. During the first part, three licenses of 60 MHz will be offered and bidders will not be able to acquire more than one license. The remaining spectrum (120 MHz or more if not all of the licenses are distributed in the first part) will be offered in the second part, in licenses of one 10 MHz license each. This not allows tenders to acquire additional spectrum but also provides tenders who require less spectrum with an opportunity to acquire spectrum. This makes it possible to take account of the fact that the first 60 MHz represents greater value to an participant of the auction than additional spectrum over and above this. A further effect of this is that the reserve prices for each of the 60 MHz licenses are set at a higher average price than the reserve price for each of the 10 MHz licenses. This serves to implement the objective of achieving a realistic revenue during the auction.

##### 4.3. Valuation method

The reserve price is set as a percentage of the expected value of the spectrum. This value is established using the benchmark method. In this method, the value of the spectrum is derived from the results of spectrum auctions in other countries. The outcomes of foreign auctions have been corrected for currency

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<sup>8</sup> House of Representatives of the States General, 2007–2008 session, 31412, No. 3

differences, differences in licensing periods and price levels. A total of 13 international auctions were identified on the basis of similarity and used by SEO to develop four different benchmarks.

SEO calculated the value of the spectrum to be auctioned using two preferred benchmarks. The first preferred benchmark comprises the outcomes of the 3.5 GHz auctions in eight European countries: Germany, France, Spain, the United Kingdom, Finland, Ireland, Luxembourg and Austria. Auction outcomes from Italy and the Czech Republic were omitted from this benchmark as a result of exceptional market conditions and auction set-ups that impacted on the price-setting during these auctions. The second preferred benchmark is based on the outcomes of 3.5 GHz spectrum auctions in four European countries which were organised in blocks between 40 and 80 MHz, because this size corresponds with the recommended auction model for the Netherlands. The four countries included in this benchmark are Germany, France, the United Kingdom and Spain.

Based on the two preferred benchmarks, SEO has estimated the average value of the 3.5 GHz spectrum to be auctioned between €0.122 and €0.167 per MHz/pop<sup>9</sup>. It is evident from the sensitivity analysis that the calculated benchmark values are sufficiently robust. SEO also validated the set-up of the benchmark, the data used and the valuation in discussions with an expert panel consisting of three independent telecommunications experts.

#### 4.4. Recommended reserve prices

SEO concluded that the reserve price to be used in the 3.5 GHz auction should preferably be between 40 and 60% of the estimated value of the spectrum. SEO considers that the bandwidth between the percentages provides the best fit between the objectives for the auction and the expected competition between bidders. A percentage of 60% reflects a situation in which the issuer is relatively certain of the value of the spectrum but in which there is a real risk of (tacit) collusion, for example as a result of a small/potentially small number of candidates. A percentage of 40% (or less) is in line with a situation in which the level of uncertainty is high and exclusion of the risk of collusion is considered subordinate to the risk that the spectrum is not allocated. Percentages of 70% or higher are seen frequently ex-post but carry a high risk of failure if set in advance.

In relation to the **first part of the primary auction phase**, SEO recommends a reserve price of €0.073 per MHz/pop (60% of €0.122 per MHz/pop). Based on a Dutch population of 17.685 million citizens in 2022, this leads to a reserve price of 77.5 million euros (after rounding) for each of the 60 MHz licenses. This reserve price has been calculated as a percentage of the lower limit of the spectrum's value, in light of the fact that a higher reserve price increases the risk that spectrum could remain undistributed. An auction outcome of €0.10 per MHz/pop (60% of €0.167) was only found in countries where four or more parties acquired spectrum. The recommended reserve price ensures that the chances of a new entrant in this part of the auction are maintained to the furthest extent possible.

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<sup>9</sup> This is the price per MHz per capita. SEO has based its calculation on a Dutch population of 17.685 million.



SEO also considers that this reserve price simultaneously minimises the financial risk of bids at or near the level of the reserve price.

A key distinction between the first and second part of the primary phase is that during the second part twelve (or more) smaller licenses are on offer. In this phase of the auction, there is greater scope for competition. Setting the reserve price too high would create barrier for parties to participate in this part of the auction. In relation to the **second part of the primary auction phase**, SEO therefore recommends a lower reserve price at €0.049 per MHz/pop (40% of €0.122 per MHz/pop). This is equivalent to a reserve price of 8.7 million euros (after rounding) for each of the 10 MHz licenses.

## **5. Auction model**

The model used for the current auction consists of two phases – a primary phase to distribute the available amount of spectrum and an allocation phase to determine the position in the spectrum band. The primary phase will consist of two parts, the first of which will serve to auction three licenses of 60 MHz in a simple multiple-round clock auction including exit bids, whereas the second part will be used to auction 12 single 10 MHz licenses, again by means of a simple multiple-round clock auction including exit bids. The auction will take place online. Any party having a computer with an Internet connection and the required software can, from a technical viewpoint, take part in the auction.

There is one respect in which the model used in these regulations differs from the model as advised by DotEcon and published on 17 December 2020<sup>10</sup>. DotEcon's advice was to organise the first part of the primary phase as a sealed-bid auction with a third-price rule to prevent strategic bidding among participants. However, Peter Cramton (see paragraph 5.1.4, Peer review) has reservations regarding the sealed-bid element of the auction. A sealed-bid element makes it more complicated for all participants in the auction to place a bid. Cramton also argues that a simple multiple-round clock auction can also achieve an efficient distribution of the spectrum without compromising the auction objectives. In this context, Peter Cramton estimates the risk that a simple multiple-round clock auction with a restricted information policy might encourage strategic bidding and thus have a negative impact on the efficient distribution of the spectrum to be lower than DotEcon. Although DotEcon did not formally adjust its advice as a result of the peer review, it did indicate that a deviation from its advice in this regard (that is, organising the first part as a multiple-round clock auction with exit bids and a restricted information policy, rather than a sealed-bid auction) will not adversely affect the achievement of the auction objectives.

### **5.1 Considerations for choosing this model**

The auction model should safeguard the auction objectives, according to which the auction should result in an efficient allocation of spectrum, with the spectrum being assigned to the party able to generate the most value with it. The auction should offer realistic chances of success to all the potential participants and result in a realistic revenue from auctioning. Simplicity and transparency are also important. This means that the mechanism behind the model must be clear to all

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<sup>10</sup> <https://www.government.nl/documents/reports/2020/12/17/advice-on-the-auction-model-for-the-3500-mhz-band-award>

participants and explanations regarding the outcomes must be beyond challenge. Account is also taken of the fact that it is undesirable for spectrum to remain unsold. In addition, the auction model should ensure that strategic bidding is discouraged. DotEcon, was asked to advise on the selection of a suitable auction model. With the exception of one element, this advice is adopted as-is. DotEcon is also an expert in auction software and will therefore also develop the software that will be used for the auction. The recommendation largely has the support of renowned expert on auction theory and practice Peter Cramton. He argues that, although the use of a sealed-bid element in the primary phase would appear to be the appropriate model in theory, this could turn out differently in practice. He has therefore recommended that the first part of the primary phase should be organised according to the same model as the second part of the primary phase. A simple multiple-round clock auction with exit bids would reduce uncertainty during the auction, without decreasing the chances of participants, including newcomers, to acquire spectrum. Less uncertainty and thus more possibilities for "price discovery" in the auction serve the objective of an efficient allocation. He has estimated the risk of strategic bidding by operators to prevent newcomers from acquiring spectrum in a multi-round auction to be lower than DotEcon. DotEcon recognizes Peter Cramton's analysis that the proposed adjustment of this element of the auction design has no negative consequences for the auction objectives and furthermore recommends adopting the information policy of the second part of the primary phase for the first part as well. Considering that a simple multiple-round clock auction leaves the auction objectives unaffected but does reduce uncertainty for all participants in the auction, the Minister has decided to also use a multi-round clock auction with exit bids in the first part of the primary phase.

DotEcon prepared its advice on the basis of the spectrum to be auctioned, the Dialogic study into the lot size to be used, the auction objectives as set out above and the market organisation measures that were decided on in the Memorandum on Mobile Communications based on an ACM opinion<sup>11</sup>. In addition, DotEcon analysed the course of bidding during the Multiband Auction and incorporated the insights gained from this in its recommendation. In light of the market situation after the Multiband Auction, DotEcon states that a distribution whereby each operator acquires 100 MHz can be regarded as a focal point in the auction, and that the participants might seek to bring about such an outcome. If this is not accounted for in the auction model, this may impact on the other auction objectives, in particular a realistic chance of success for all participants and a realistic revenue, despite the fact it could be an effective distribution of the spectrum. If a newcomer participates in the auction, the presence of a focal point may elicit strategic bidding to block entry and, as a result, hinder an efficient allocation of the spectrum. This also impacts the information policy for the same reason.

#### 5.1.1 Primary phase

DotEcon's advice is to split the available spectrum into two parts during the primary phase and offer three licenses of 60 MHz during the first part and 12 licenses of 10 MHz in the second part of the primary phase. Both parts will take place according to the same auction model, which is a simple multiple-round clock auction with exit bids.

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<sup>11</sup> <https://www.acm.nl/sites/default/files/documents/frequentieverdeling-advies-2019.pdf>

Aside from the market situation, another factor in the decision regarding the design of the primary phase is the development in the valuation of the spectrum, which shows synergies up to a bandwidth of 50–60 MHz and declining marginal values thereafter. As previously described in paragraph 4, this is also a key ratio for the different levels of the reserve prices during the auction. If the spectrum is offered all at once using small licenses, ensuring that no spectrum remains unsold would require the reserve price to be set at such a low level that other objectives would be compromised. This is because the effect of a low reserve price is that it encourages strategic bidding aimed at bringing the auction to a premature end. By strategically reducing their demand – i.e. setting it below the level they actually wish to acquire – participants can acquire spectrum at relatively cheap prices and benefit from significant windfalls. This could, however, result in an inefficient distribution of the spectrum, since the participants are not expressing their actual demand.

Offering bandwidth in two stages provides better incentives to participants to compete for marginal additional spectrum, which reduces the likelihood of an inefficient distribution, in particular if there is a new entrant. Nor does this approach reduce the flexibility that allows participants to cover their frequency demand, as they are still able to bid for additional licenses of 10 MHz in the second part of the primary phase. Offering bandwidth in two stages means the auction is more accessible for small entrants looking to acquire no more than 50 MHz, because they have the option to participate only in the second part of the primary phase.

#### *First part of the primary phase*

In the first part of the primary phase, three licenses of 60 MHz each will be auctioned. The choice of 60 MHz is determined by a conservative minimum requirement based on the development in the valuation of the spectrum. The use of 60 MHz licenses also ensures that in extreme cases, a participant who does not acquire a license in the first part of the primary phase still has the ability to acquire the maximum under the cap, i.e. 120 MHz, during the second part. During the first part, the acquisition by participants will be restricted to one license only. This prevents strategic bidding for multiple licenses, which in turn prevents unintended asymmetrical outcomes. It is undesirable for a participant with a high spectrum requirement to acquire two out of the three 60 MHz licenses in the first part, since it could mean that another participant with a high spectrum requirement would have to acquire all its licenses in the second part. The fact that bidders are able to bid for one license only and that the number of bidders in the first part is expected to be low has led DotEcon to propose a single-round auction using sealed bids. However, a low chance that the number of bidders will exceed the number of available licenses is not the same as a chance of zero. This means that this particular model would result in a high level of uncertainty for all participants in the auction. A multiple-round auction will also enable any newcomers to acquire spectrum. In this first part, the three participants assigning the highest value to a 60 MHz license will win the spectrum. This part of the auction will be subject to a restricted information policy (see paragraph 5.1.3, Information policy) in order to prevent strategic bidding. Participants who reduce their demand will also have the option to submit an exit bid. This ensures that spectrum will not remain unsold and contributes to an efficient distribution of the spectrum.

### *Second part of the primary phase*

An open multiple-round clock auction is also appropriate for the second part of the primary phase as the offer consists of a relatively large number of small homogeneous licenses, the minimum spectrum required by participants in the second part of the primary phase is relatively low and the risk of aggregation is restricted by the fact that no provisional winning bids are selected. In the second part, each license consists of one 10 MHz license. The number of licenses consists of the licenses that remain undistributed after the first part of the primary phase, increased by twelve 10 MHz licenses. Participants who only take part in the second part of the primary phase will not be able to acquire more than five 10 MHz licenses (a total of 50 MHz) during the second part. This prevents participants with a high spectrum requirement from only participating in the second part of the primary phase for strategic reasons. This approach allows participants to tailor their demand to 10 MHz licenses, in light of the development of price. In order to prevent strategic bidding in the second part of the auction, it is necessary to restrict the information policy prior to and during the auction. This is explained in greater detail in paragraph 5.1.3, which deals with the information policy. Participants who reduce their demand will also have the option to submit an exit bid, which ensures that spectrum will not remain unsold and contributes to an efficient distribution of the spectrum.

#### 5.1.2. Allocation phase

With regard to the allocation phase, which takes the form of an allocation bidding round, the recommendation of DotEcon is to allocate specific licenses by means of an auction model combining a second-price sealed bid and a single auction round. This ensures that the winners of the primary phase will receive block spectrum, irrespective of whether they acquired spectrum in the first or second part. This is in line with the approach used during the Multiband Auction and previous auctions, including the 2012 Multiband Auction and the 2010 2.6 GHz auction.

#### 5.1.3 Information policy

In its recommendation, DotEcon indicates that, in case of any concerns around strategic incentives, these can be addressed in the auction design, for example as part of the notifications provided to participants prior to, during and after the auction. For this reason, it has been decided not to disclose the number of participants or their identity prior to and during the auction. This does not prevent participants from disclosing their intended or actual participation in the auction themselves. Any participant who wishes to do so must disclose its participation in a *public* manner, for example by means of a press release. In addition to this, participants will only receive a minimum of information regarding the course of bidding during the auction. The cumulative demand is not revealed in the first part of the primary phase, nor will the winners of the 60 MHz licenses be disclosed. In the second part of the primary phase, in the event that the surplus demand is equal to or lower than four licenses, the demand will only be disclosed after each bidding round. This only applies to bids for licenses at the round price. Exit bids are not included. DotEcon has indicated that releasing information in the event that the surplus demand is higher could encourage strategic bidding but disclosing

a surplus demand of four licenses or less can help bidders arrive at the appropriate bidding decision during the conclusion of the second part of the primary phase. This information will also ensure there is a level playing field between participants. A participant with a high demand for spectrum would otherwise be able to use small reductions in its demand as a means to discover how many participants there are in the second part and whether other participants are reducing demand. This may result in asymmetries in the available information, which in turn could prompt strategic bidding. The bids from each of the bidding rounds will all be disclosed after the auction. The bids submitted by participants in the auction who did not acquire spectrum will be anonymised as part of this.

#### 5.1.4 Peer review

The DotEcon recommendation was subject to a peer review by professor Peter Cramton. His review discusses three models for the allocation of the 3.5 GHz frequencies selected at his initiative, including the model recommended by DotEcon. One key consideration is whether the models were tested in practice. This element, in combination with the substantive elements of the models, have led him to endorse the model recommended by DotEcon. Cramton proposes that the DotEcon model could be improved by replacing the sealed-bid element with a clock auction. The choice made by the Minister in this regard has been described in paragraph 5.1.1 above.

## 5.2 How the model works

The auction consists of two phases: the primary phase and the allocation phase. The primary phase will consist of two parts, the first of which involves three licenses of 60 MHz and the second of which relates to twelve licenses of 10 MHz each, all to be auctioned by way of an open, multiple-round clock auction. The allocation phase is restricted to the participants that have acquired licenses in the primary phase. The primary and allocation phases are discussed further in the following paragraphs.

### 5.2.1 Primary phase of the auction

The purpose of the primary phase is to distribute the licenses amongst the participants in the auction.

#### 5.2.1.1 First and second part of the primary phase

During the first part, a simple multiple-round clock auction with exit bids will be used to offer three 60 MHz licenses. Each participant in the first part may bid for a maximum of one license.

The second part of the primary phase will also consist of a simple multiple-round clock auction. A minimum of 12 licenses of 10 MHz will be auctioned. If any of the licenses from the first part of the primary phase remain undistributed, the remaining spectrum will be added in blocks of 10 MHz to the spectrum to be auctioned in the second part, which will be notified to the participants prior to the start of the second part. Participants in the second part of the primary phase who did not submit a bid in the first part of the primary phase will not be able to acquire more than 50 MHz in the second part. This maximum has been introduced in order to prevent from bidders from only participating in the second part of the

primary phase for strategic reasons. This could hinder an efficient distribution. Participants who did bid for a lot during the first part will be able to acquire the maximum amount of spectrum possible in light of the band-specific spectrum cap. This means that a participant who acquired a license during the first part will be able to acquire a maximum of 60 MHz in addition to this during the second part. A participant who submitted a bid during the first part but who ultimately did not acquire any spectrum, would be permitted to bid for twelve licenses (a total of 120 MHz) during the second part. A potential newcomer with a low spectrum requirement has the option to not bid in the first part and only bid for the 10 MHz licenses in the second part. In view of the above, the total this participant will be able to acquire is restricted to 50 MHz.

### *Bid*

In each round, participants must submit a bid for the number of licenses they wish to acquire at the price set for that round. Where the first part of the primary phase is concerned, the number will always consist of one or zero licenses. Where applicable, participants can also submit one or more exit bids and, when submitting a bid, they also have the option to withdraw earlier exit bids. If demand in a particular round exceeds the number of available licenses, the round price will increase. Participants must submit a bid in each round. In the second part of the primary phase, the number of licenses in a bid cannot exceed the maximum that the relevant bidder is able to acquire in view of the spectrum cap (which maximum, if applicable, will be reduced by the 60 MHz won by the bidder in the first part), nor can the bid exceed the number of licenses the bidder wished to acquire at the round price in the previous round. Bidders who are only participating in the second part are also restricted to bidding for five licenses or less. It is not possible to skip a round. Participants must continue to submit a bid for each round until their bid is zero and no more further exit bids can be submitted. In the event the participant does not submit a bid – that is, it allows a bidding round/extended bidding round to expire – it will be considered to have submitted a bid equal to zero and will not submit a bid in the subsequent round.

### *Exit bids*

A participant who reduces its demand in relation to the preceding round is able to submit what are referred to as exit bids. Exit bids are linked to the bidder's specific reduction of its demand and specify the price at which the bidder would like to acquire licenses over and above the licenses it wishes to acquire at the round price. An exit bid cannot exceed the number of licenses by which the demand was reduced, and the price offered must at least be equal to the round price in the round preceding the reduction in demand but cannot exceed the round price applicable at the time the demand is reduced.

### *Exit bid in the first part of the primary phase*

If a bidder in the first part of the primary phase considers that the increase in the round price is too high, it has the option to submit an exit bid in respect of the single license. In this case, the bid must be for zero licenses and the exit bid must comply with the price rules set out earlier. In the event that the demand in the last round has reduced to two licenses at the round price, an exit bid from a previous round can be designated the winning bid. In this context, the method for

designating winning exit bids is the same as the method described in the paragraph 'Evaluation of winning exit bids'.

#### *Exit bid in the second part of the primary phase*

During the second part of the primary phase, there will be more options for the submission of exit bids. The evaluation of any winning exit bids is also more complex. During this part, the acquisition of licenses by participants will be subject to individual restrictions, which depend on the spectrum cap, participation in the first part of the primary phase and any spectrum acquired in the first part of the primary phase.

Example: during the second part, a bidder wishes to acquire nine licenses at a price of 100 and in that particular round, the total demand outstrips the number of licenses on offer. The round price increases to 110 and the bidder reduces its demand to seven licenses. The bidder could simply leave things at this but also has the option to submit an exit bid for one or two licenses. For example, the bidder could submit an exit bid for two licenses at a price of 103 and an exit bid for one lot at a price of 106. In this way, this bidder indicates that if the second part of the primary phase is concluded in that round, it wishes to acquire seven licenses at a price of 110 along with an eighth lot at a price of 106, or a total of nine licenses consisting of seven licenses at the round price of 110 and two licenses at a price of 103. Exit bids remain valid throughout the auction and may become winning bids. However, an exit bid can only become a winning bid if the bidder has already been allocated a number of licenses that is equal to the number of licenses that it wishes to acquire at the price applicable in the round in which it submitted the exit bid. This is to exclude the risk of aggregation. Bidders are able to withdraw previously submitted exit bids in each round in which they are still able to submit a bid.

#### *Evaluation of winning exit bids*

Let's assume that twelve identical licenses are being auctioned in the second part of the primary phase and the price per lot is 100 in the first round. In the example as shown in Table 1, there are four bidders: bidder A, bidder B, bidder C and bidder D. The cumulative demand for the first round comes to 21 licenses. As the demand outstrips supply, the second part of the primary phase has not yet been brought to a close and the round price goes up. In the second round, bidder B drops its demand from six to three licenses and at the same time submits a number of exit bids. In doing so, the bidder signals that if this part of the auction concludes, it wishes to acquire:

- three licenses at a price of 110 per lot; or
- six licenses, three of which at a price of 110 per lot and three at a price of 100 per lot; or
- five licenses, three of which at a price of 110 per lot and two at a price of 102 per lot; or
- four licenses, three of which at a price of 110 per lot and one at a price of 105 per lot.

In this scenario, bidder B is not able to acquire only the three, two or single lot(s) in the exit bids. Exit bids come on top of the standard bid at the round price, which in this case is equivalent to three licenses. In the event that bidder C had reduced its bid to zero licenses in round 2 and bidder A had reduced its bid to three, bidders A and D would each win three licenses at the round price of 110 per

lot, and bidder B would win three licenses at the round price of 110 per lot and three licenses at a price of 100.

Table 1

Round	Round price	Bidder A	Bidder B	Bidder C	Bidder D
1	100	Number of licenses: 6	Number of licenses: 6	Number of licenses: 6	Number of licenses: 3
2	110	Number of licenses: 6	Number of licenses: 3 Exit bid: +3 @ 100 Exit bid: +2 @ 102 Exit bid: +1 @ 105	Number of licenses: 6	Number of licenses: 3
3	120	Number of licenses: 6	Number of licenses: 1 Exit bid: +2 @ 110	Number of licenses: 4 Exit bid: +1 @ 115	Number of licenses: 3
4	130	Number of licenses: 4	Number of licenses: 1	Number of licenses: 4	Number of licenses: 0 Exit bid: +3 @ 125

In round 4, the cumulative demand has reduced to nine licenses so there is now an excess supply of three licenses. Given that supply now exceeds demand, the second part of the primary phase comes to an end and the winning bids will be determined. In this example, bidder A wins four licenses at a price of 130, bidder B wins one lot at a price of 130, bidder C wins four licenses at a price of 130 and bidder D wins three licenses at a price of 125. This leaves no licenses remain unsold. In this example, bidder D only wins its exit bids but these still constitute winning exits bids in addition to the standard bid. This is because bidder D bid for zero licenses at the round price.

Let's assume the following bids, as in Table 2, bidder A does not reduce its demand in round 3. Bidder B considers the round price for round 3 too high and indicates it only wishes to acquire three licenses at a price of 110. Bidder C reduced its demand to five licenses in round 2 and submits an exit bid for one lot at a price of 109. Bidder D equally considers the round price too high and also submits an exit bid for three licenses, however its exit bid is priced at 118 rather than 110.

This brings the cumulative demand for round 3 to ten licenses and the oversupply to two licenses. In this scenario, bidder A and bidder C win six and four licenses respectively at the round price of 120. This leaves two licenses. Bidders B and C only submitted an exit bid for three licenses. These exit bids can therefore not qualify as a winning bid. Bidder C submitted an exit bid for one additional lot in case it were to win four licenses. This exit bid is therefore designated a winning bid. This means bidder C has now acquired five licenses. In round 2, it submitted an exit bid for one lot in addition to five licenses. As a result of having its round 3 exit bid designated a winning bid, bidder C wins and is allocated five licenses, which in turn means the exit bid for round 2 can now also be designated a winning bid. This is because bidder C's exit bid in round 2 is linked to a bid in that round for five licenses. In this example, bidder C acquires four licenses at a round price of 120, one lot at the price of 115 and one lot at the price of 109. In this way, no



licenses remain unsold and the spectrum is acquired by the bidder who values it most. Bidder C acquires the fifth lot at a lower price than the price bidder D was prepared to pay for one lot in round 3. However, bidder D only submitted an exit bid for a set of three licenses. The number of remaining licenses is less than three so its exit bid cannot be designated a winning bid. In the event bidder D acquires only one out of three licenses at a price of 118, this could create a risk of aggregation as bidder D has indicated it wishes to acquire a minimum of three licenses. The price paid by bidder C for its sixth 6 is also below the price which bidders B and D are prepared to pay for licenses in round 3, but again bidders B and D wish to acquire a minimum of three licenses rather than a single lot. If bidder C had not submitted an exit bid in round 2, one lot would have remained unsold. In the event that bidder B had submitted additional exit bids in round 3, for example +2 @ 115 or +2 @ 110 and + 1 @ 113, bidder B would have acquired two licenses at a price of 115, or bidder B would have acquired a single lot at a price of 113 and bidder C would have acquired a fifth lot at a price of 115.

Table 2

<i>Round</i>	<i>Round price</i>	<i>Bidder A</i>	<i>Bidder B</i>	<i>Bidder C</i>	<i>Bidder D</i>
1	100	Number of licenses: 6	Number of licenses: 6	Number of licenses: 6	Number of licenses: 3
2	110	Number of licenses: 6	Number of licenses: 3 Exit bid: +3 @ 100 Exit bid: +2 @ 102 Exit bid: +1 @ 105	Number of licenses: 5 Exit bid: +1 @ 109	Number of licenses: 3
3	120	Number of licenses: 6	Number of licenses: 0 Exit bid: +3 @ 110	Number of licenses: 4 Exit bid: +1 @ 115	Number of licenses: 0 Exit bid: +3 @ 118

As indicated in the explanation on how exit bids work, it is not mandatory to submit an exit bid. As can be seen in round 4 of the example in Table 1, bidder A reduces its bid from six to four licenses without submitting exit bids for one or two licenses. Bidders also have the option to submit a partial exit bid. In round 3, bidder C reduces its demand from six to four licenses and submits an exit bid to indicate that, in addition to these four licenses, it would like to acquire one further lot at a price of 115. This means it is now only able to acquire a total of five licenses, rather than six.

#### *Round prices*

At the start of the first bidding round in the first part of the primary phase, the initial round price will be 77.5 million euros for a PM license. At the start of the first bidding round in the second part of the primary phase, the initial round price will be 8.7 million euros for a PM license. This minimum amount is the reserve price. The reserve prices are explained in Chapter 4. If the demand across all bids in a round exceeds the number of available licenses, the auctioneer will increase the round price and a next round will be scheduled.

#### *Extension options*

In either the first and second part of the primary phase each participant will be granted three extension options, each of which it can use once to be granted an extra 30 minutes to submit its bid, in so far as it has not done so during the standard length of the round. An extension will be activated automatically, including in the event of technical issues at the end of a round. A round will end either when a bidder submits a bid or when the 30-minute extension has expired without the bidder submitting a bid and without there being any technical issues.

#### 5.2.1.2 End of the primary phase

The primary phase comes to an end when the first and second parts have been completed. The first part of the primary phase comes to an end when the demand is equal to or lower than the number of available licenses. The second part of the primary phase comes to an end when the demand is equal to or lower than the number of available licenses.

### **5.2.2 Allocation phase**

The allocation phase of the auction consists of an allocation bidding round, during which spectrum winners are able to indicate their preferred position within the spectrum band.

#### *5.2.2.1. Purpose of the allocation bidding round*

This round determines how the spectrum in the frequency band allocated in the primary phase will be divided up. After the primary phase, it will be clear who the winners are, although they will only know how many licenses (and therefore how much spectrum) they have won. However, the position of those licenses within the spectrum is as yet unknown. It is a given that the spectrum will be in blocks and that any unsold licenses will also form a continuous spectrum. The allocation bidding round allows participants to submit a bid to indicate their preferred position within the spectrum band. Participants may have a preference for a position in the lower, upper or middle part of the band. Participation in the allocation bidding round is restricted to participants that submitted a winning bid in the primary phase.

#### *5.2.2.2. Course of the allocation bidding round*

The allocation bidding round consists of a single sealed bid-round in which bids can be submitted for the various positions within the frequency band. Before the allocation bidding round commences, the Minister will use the e-auction system to draw up a list of the bidding options available to each participant in the allocation bidding round (Article PM). This list will show each participant the specific spectrum for which it may potentially be awarded consecutive licenses. A participant in the allocation bidding round may only make a bid on the bidding options that appear on this list.

If a participant has no preference for a specific place in the spectrum, it may submit a bid of zero euros pursuant to Article PM or waive submitting a bid, which is considered as being equivalent. The allocation bidding round will end once all the participants have submitted a bid in the e-auction system (consisting of the price they are prepared to pay for each of the bidding options presented in the system), or on the expiry of the time for the bidding round.

#### *5.2.2.3. Determining the final combination of winning bids*

From amongst the bids for places in the respective frequency band submitted in the allocation bidding round, the combination that results in the highest revenue will be designated as the final combination of winning bids. The licenses will be awarded to the successful participants in accordance with this band allocation.

#### *5.2.2.4 Setting the additional price*

The participants who have made a winning bid in the assignment stage must pay an additional price. This extra price is based on the so-called "second price rule", which is elaborated in Appendix 3 to the Regulation. The price is calculated in a combined manner for all participants taking into account, per participant, the bids made on the band allocation with the combination of winning bids that would have had the highest value if the bids of that particular participant were disregarded. That way the participant does not pay too much for his preferred place in the band. This price rule is also used in the multi-band auction.

#### **5.2.3 Setting the total price**

After the assignment stage, it is determined on the basis of article PM which total price the participants must pay. This price consists of the round price or exit bid if the participant has won one license in the first part of the primary phase and the round price and possibly the price for the exit bids designated as winning bids if the participants have won licenses in the second part of the primary phase. If a participant has made a winning bid in the allocation phase of the auction, the additional price, if not equal to zero, will be added to the total price.

#### **5.3 End of the auction**

Once the additional prices and the total prices have been determined, the Minister will inform the participants as soon as possible that the auction has concluded and will notify them of the names of the successful participants, which licenses they have won and the total prices determined on the basis of Article PM, while also providing an overview of the base prices and additional prices (Article PM). The Minister will publish this information no later than on the first working day after the second phase of the auction has ended. Participants will be prohibited from making any statements in this regard until this public announcement has been made. Within one week of the conclusion of the auction, all the participants' bids from all the primary rounds and the allocation bidding round will be published, without disclosing the identity of the unsuccessful and/or not publicised participants. After the auction has concluded, the Minister will proceed to award the licenses in accordance with Article PM. It is specified in the licenses that the total prices may be paid in two equal instalments: the first instalment two weeks after the award of the licenses and the second part one year later. This option can be selected on the application form.

#### **5.4 Technical problems and special circumstances**

A participant who is unable to submit a bid in a bidding round using the e-auction system due to a technical problem or special circumstance, must notify this to the

Minister by telephone immediately, and in any event within ten (10) minutes after the end of the bidding round in question.

This refers in particular to a force majeure situation or event, such as where a participant's computer or Internet connection is not working or not working satisfactorily. [PM: an explanation will need to be added here regarding the absence of extension options in the first part of the first round, as well as in the allocation bidding round (I believe this are still discussion items within DE) and regarding the automatic extension by operation of law in the second part of the first phase in the event no bid is submitted.] The Minister may subsequently suspend the auction pursuant to Article X. It is suggested to participants that they themselves put measures in place to avoid delays by ensuring they have a back-up computer and Internet connection available. In the event a participant is unable to connect to the auction software in spite of the aforementioned measures, the Minister may require the participant's bids to be submitted using a computer provided by the Minister at a location made available by the Minister. This is to prevent any further delay to the auction.

Each participant in primary phase will be granted three extension options per part, each of which it can use once to be granted an extra 30 minutes to submit its bidding decision, in so far as it has not done so during the standard length of the round. An extension will be activated automatically and will end either when a bidder submits a bid or when the 30-minute extension has expired without the bidder submitting a bid. In the event a round is extended by operation of law, for example as a result of technical issues, the Minister may decide that the relevant round will not count towards the total number of rounds that can still be extended by operation of law (Article 31, paragraph 3). The Minister may allow communication by telephone in case of special circumstances, for instance if communication via the e-auction system or other digital channel is not possible.

## **5.5 Orderly conduct of the auction**

It is of the utmost importance for the orderly conduct of the auction that the participants can determine for themselves without interruption what value they assign to the auctioned spectrum. The price-setting and allocation of the spectrum may not be disturbed by participants consulting with one another (collusion) or otherwise influencing one another during the auction. The rules that apply to applicants and participants in this regard have been laid down in Article 20.

A party is designated as having the status "applicant" upon submitting an application. The status of "participant" arises upon being admitted to the auction. The parties are not formally bound by Article 20 of the auction regulations until they have submitted an application, although they are subject to general competition law.

Article 20, paragraph 1, prohibits applicants and participants, including any parties that provide them with assistance for the auction and legal entities that are associated with the applicant or participant in accordance with Article 3 of the Capping regulation, from using practices or making agreements that jeopardise or may jeopardise the smooth conduct of the auction, including competition in the auction procedure. For instance, applicants or participants must refrain from providing information on matters that may offer other (potential) participants pointers for modifying their own conduct prior to and during the auction. Article

20, paragraph 1 also lists the information that must remain confidential prior to and during the auction. This includes information on strategy, budget, the desired or obtained number, type or combination of licenses, as well as information on the expected or desired prices, or prices to be paid, in the auction. Any such communication on the auction prior to and during the auction by applicants or participants, amongst one another, through the media or otherwise, is prohibited and can result in the imposition of an administrative fine in the amount of €900,000 and/or an incremental penalty order, and also exclusion from (further) participation in the auction.

This will in principle also apply to (potential) applicants or participants who each hold shares in the other applicant or participant (but who are not considered associated legal entities as referred to in Article 3 of the Capping regulation, meaning they could in principle take part in the auction independently of one another). Where an applicant or participant is required to share this information with its shareholders, for example under its articles of association, shareholder agreements, management regulations, legislation in other EU Member States or otherwise, the sharing of this information will not result in the exclusion of an applicant who was required to share the information with its shareholders.<sup>12</sup> In this regard, an applicant or participant who is required to share this information with its shareholders must take measures to ensure the information is treated as confidential by its shareholders and is not distributed further. The sharing of information for the purpose of complying with such an obligation may result in the shareholder with whom the information was shared being excluded from (further) participation in the auction, in its submitted bids and exit bids being declared invalid if the shareholder is an applicant or a participant itself, in the outcome of one or more bidding rounds being declared invalid or in a decision that one or more bidding rounds should be held again (Article 21, paragraph 1). Although the relevant shareholder may have a legitimate interest in independently participating in the auction, the fair and efficient conduct of the auction is accorded very high priority. If the information shared would place the shareholder in an unequal position compared with the other participants and the scenario would hinder the fair and efficient conduct of the auction, it will be necessary to exclude the shareholder from (further) participation. This is so the fair and efficient conduct of the auction can be safeguarded. In order to ensure this, the application form asks applicants to state whether they have shared the information listed in Article 20, paragraph 3, with shareholders and if so, with whom. This will be verified as required, using minutes of shareholders' meetings for example.

There is nothing to prevent applicants and participants themselves from disclosing their intended or actual participation in the auction, if they so wish. Article 20 therefore does not prevent a (potential) participant from bringing legal action with regard to the application or auction procedure during those procedures where it believes this to be necessary. In the same manner, standard operational meetings between providers relating to other topics, for example the conclusion of procedural arrangements regarding the installation of license-free antennas or shared use of installation sites, can go ahead as normal, provided the topics listed in Article 20, paragraph 1, subsection (b) are not raised. Applicants and participants are also permitted to discuss their ambitions in relation to the roll-out of 5G, provided they do not communicate any specific information with regard to

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<sup>12</sup> The documents providing evidence of these obligations must be submitted as part of the application.

the topics listed in Article 20, paragraph 1, subsection (b). It is therefore for the applicant or participant to decide whether it wishes to disclose its participation in the auction, although they are not permitted to disclose this to only one or some of the applicants or participants. This could harm the proper conduct of the auction and is therefore prohibited on the basis of Article 20, paragraph 3. Where an applicant or participant chooses not to keep its participation confidential, it will therefore need to announce this publicly, by means of a press release for example.

The Minister will not disclose the identity of the successful participants until after the end of the auction (Article 44).

Where a participant acts contrary to Article 20, paragraph 1, 2 or 3, the Minister may, in order to prevent recurrence, decide to exclude the relevant participant from further participation and/or impose an administrative fine or incremental penalty order under Article 21. The appropriate intervention will be determined on an individual basis, depending on the circumstances of the case. In these situations, Article 20, paragraph 4 authorises the Minister to suspend the auction temporarily, for example in order to conduct further investigations. Under Article 21, paragraph 1, the Minister may also decide to declare the result of one or more bids or bidding rounds invalid, or decide that one or more bidding rounds should be held again. This may be necessary, for instance, because the development of the prices for the different licenses would have been different if the participant that acted contrary to Article 20 had not taken part in the bidding rounds concerned.

The auction will take place, in principle, in a continuous period. The Minister is only authorised to suspend the auction in the situations referred to in Article 20 and Article 19, paragraph 1. In accordance with Article 20, paragraph 4, the Minister may, as mentioned, exercise this authority in the event of what they consider to be conduct contrary to Article 20, paragraph 1, 2 or 3. In addition, the Minister may suspend the auction in accordance with Article 19, paragraph 1, in the event the Minister considers that the auction is temporarily unable to continue due to special circumstances beyond the control of the Minister or the participants. In accordance with paragraph 4, the Minister may also decide, if necessary, to hold one or more bidding rounds again. In the interest of the fair and efficient conduct of the auction, it may then be necessary to order that one or more bidding rounds be held again, since the omission of a participant may have an impact on the development of the price of the licenses. This could include, for instance, the situation referred to in paragraph 4, where an applicant, following the decision on admission, finds itself in a position where it no longer meets the requirements imposed on it pursuant to Articles 5 and 6. This may be the case inter alia where an applicant, after being admitted to the auction, applies for a moratorium on payments, is put into liquidation or is in the process of being wound up. In this case, the applicant concerned may be excluded from (further) participation in the auction.

Only one application may be submitted per applicant. Reference is made to Article 3 of the Capping regulation for establishing whether two or more applicants are to be considered as a single applicant. Article 14, paragraph 2, stipulates that the amount of radio spectrum used by an applicant and an associated legal entity, as referred to in the Capping regulation, is determined using the date on which the regulation entered into force/the start date of the application period. This is to

safeguard the orderly conduct of the auction. In connection with the determination of the maximum amount of radio spectrum that an applicant will be able to acquire during the auction, requests to transfer licenses or requests to change the name on a license submitted in the eight weeks before the regulation enters into force will be dealt with no earlier than one week after the award of the licenses. In addition to this, it has been stipulated that, after this period, the applicant and its associated legal entities cannot become affiliated with other applicants as referred to in the Capping regulation or legal entities using radio spectrum as referred to in the regulation.

This provision ensures that there will be no need to halt the auction as a result of changes in affiliation that are pertinent to the implementation of these regulations and the Capping regulation. After all, the auction is organised in multiple phases, including the admission, the two parts of the primary phase of the auction and the allocation phase. In practical terms, it will be simply unworkable to take account of changes in affiliation prior to and during each phase. This condition does not place unnecessary restrictions upon the participants in the auction as the Capping regulation still offers scope for changes before and after the auction procedure.

## **6. Consultation**

[...]

## **7. Regulatory burden**

The applicant should submit the appropriate information with its application. This information will be used to assess whether the applicant meets the requirements set out in the regulations. Providing this information places a regulatory burden on the applicant. It is a general regulatory principle that the regulatory burden to businesses arising from regulations should be kept to a minimum. Against this background, the information that applicants are required to provide concerns, as far as possible, information that they are able to readily furnish.

A party that decides to bid for a license must prepare and submit an application. The procedure starts with the submission of the application and the provision of the security. The application should be accompanied by:

- information on the applicant, including the applicant's name, registration number in and extract from the Trade Register or a comparable register;
- a list of persons who are authorised to duly represent the applicant (including a copy of power of attorney, where applicable);
- information on the legal entities affiliated with the applicant within the meaning of Article 3 of the Regulation establishing the maximum amount of radio spectrum for mobile communications (Capping regulation) in the form of an organisation chart showing their legal structure;
- a statement by the application/parent company of the applicant that none of the legal entities associated with the applicant within the meaning of Article 3 of the Capping regulation will submit or have submitted an application under these regulations, also specifying which of the legal entities associated with the applicant use spectrum as referred to in Article 1 of the Capping regulation;
- a declaration from a civil-law notary concerning the accuracy of the above details, also stating inter alia that the applicant is not in a state of liquidation, has not been granted suspension of payments and has not been dissolved.

The latter declaration is needed to obtain sufficient certainty regarding the correctness of the applicant's statements. The civil-law notary needs only carry out relatively simple research for this declaration.

An applicant should also provide security when submitting an application. This security can be furnished by making a deposit or providing a bank guarantee. In the event an applicant decides to provide a deposit, this will not result in any increase in the costs related to the regulatory burden. If an applicant chooses to furnish the security in the form of a bank guarantee, this will lead to an increase in costs. The choice is up to the applicant, according to the level of the costs arising from regulatory requirements it is willing to accept. It is assumed the allocation will be between a total of five to eight candidates. It is not known how many participants will acquire licenses. Furthermore, it is assumed that each applicant party will require three employees to work on this full-time for one week. Because this commitment is necessary at the level of supervisors and managers, costs are calculated in accordance with the Handbook of Rules, this brings the total estimated costs arising from regulatory requirements to a maximum of 8 (applicants) x 3 (employees) x 40 (hours in a working week) x €77 (standard hourly rate) = €73,920 (on a one-off basis) for all parties jointly. The file has been submitted to the Regulatory Burden Supervision Advisory Board, but has not been selected for formal advice.

Non-binding transparency



## **II. Explanatory notes on individual articles**

### **Article 25. Auction regulations for the first part of the primary phase**

Article 25 provides the key auction rules for the first part of the primary phase.

#### *Paragraph 1*

Article 25, paragraph 1 stipulates that a participant must submit a bid in each bidding round in which it takes part. A participant who, in view of the price set for the bidding round or for other reasons, no longer wishes to take part in the auction, is expected to submit a bid for 0 licenses. For completeness' sake, it is noted that a participant who has submitted a bid for 0 licenses in a bidding round will no longer take part in subsequent bidding rounds and will no longer be required to submit bids. Paragraph 8 will apply in the event that a participant does not submit a bid.

#### *Paragraph 2*

Article 25, paragraph 2 stipulates that a participant's bid must comprise a number of licenses at a price determined by the Minister.

#### *Paragraph 3*

Article 25, paragraph 3 stipulates that, in the first part of the primary phase, participants may bid for a maximum of one license. Please see paragraph X in the general section of these explanatory notes for details on the reasons for this.

#### *Paragraph 4*

Under Article 25, paragraph 4, the price for the first bidding round of the first part of the primary phase will be [amount]. This amount is the same as the reserve price. Please see paragraph X in the general section of these explanatory notes for details on the manner in which the reserve price is set.

#### *Paragraph 5*

Article 25, paragraph 5 stipulates that the prices for the second and subsequent bidding rounds will be set by the Minister.

#### *Paragraph 6*

Article 25, paragraph 6 stipulates that if a participant reduces its demand in relation to the preceding bidding round (i.e. from 1 license to 0 licenses), it also has the option to submit an exit bid. These exit bids will be used to distribute any remaining licenses in the event that the total demand in the final bidding round is lower than the supply. Please refer to the article-by-article notes for Article 27, paragraphs 3–6. It is not mandatory to submit an exit bid. Please see paragraph X in the general section of these explanatory notes for a detailed explanation regarding the submission of exit bids.

#### *Paragraph 7*

Article 25, paragraph 7 sets out the requirements for the submission of an exit bid in the first part of the primary phase. In light of the fact that only a single exit bid

can be submitted and that this exit bid can only be for a single license, an exit bid in the first part of the primary phase must consist of an amount expressed in whole euros. This amount must be between the price set by the Minister for the preceding bidding round and that set by the Minister for the bidding round in which the participant submits the exit bid.

#### *Paragraph 8*

Article 25, paragraph 1 stipulates that a participant must submit a bid in each bidding round in which it takes part. Nonetheless, if a participant allows a bidding round that has been extended for its benefit to expire without submitting a bid, Article 25, paragraph 8 stipulates that it will be deemed to have submitted a bid for 0 licenses (subsection (a)) and cannot submit bids in bidding rounds subsequent to that bidding round (subsection (b)).

### **Article 28. Final bidding round and designation of winning bids for the first part of the primary phase**

Article 28 deals with the first part of the primary auction phase, stipulates which will be the final bidding round and describes which bids and exit bids, as relevant, will be designated the winning bids.

#### *Paragraph 1*

Article 28, paragraph 1 determines which is the final bidding round and will also mark the end of the first part of the primary auction phase. The final bidding round will be the round in which the total demand of the various participants is equal to or lower than the 3 licenses offered. In any event, exit bids (if any) will not be taken into account when calculating the total demand.

#### *Paragraph 2*

Article 28, paragraph 2 specifies which bids will be designated the winning bids in the first part of the primary auction phase in the event that the total demand in the final bidding round is exactly equal to the 3 licenses offered. In that case, Article 28, paragraph 2 provides that all bids submitted in the final bidding round will be designated winning bids. All participants who still actively took part in the final bidding round will therefore win a license at the round price determined for that bidding round.

#### *Paragraph 3*

Article 28, paragraph 3 specifies which bids will be designated the winning bids in the event that the total demand in the final bidding round is lower than the number of licenses offered. In that case, the total demand could amount to 0, 1 or 2 licenses. First, all bids submitted in the final bidding round will be designated winning bids on the basis of Article 28, paragraph 3, opening lines and subsection (a). After this, there will be 1, 2 or 3 licenses undistributed in view of the fact that the total demand in the final bidding round was lower than the number of licenses offered. The remaining licenses will be distributed on the basis of the exit bids.

Article 28, paragraph 3, opening lines and subsection (b) stipulate that the highest exit bids will then be designated the winning bids in relation to the number of licenses that remain.

### **Article 32. Auction regulations for the second part of the primary phase**

Article 32 provides the key auction rules for the second part of the primary phase.

*Paragraph 1*

Article 32, paragraph 1 stipulates that a participant must submit a bid in each bidding round in which it takes part. A participant who, in view of the price set for the bidding round or for other reasons, no longer wishes to take part in the auction, is expected to submit a bid for 0 licenses. For completeness' sake, it is noted that a participant who has submitted a bid for 0 licenses in a bidding round will no longer take part in subsequent bidding rounds and will no longer be required to submit bids. Paragraph 12 will apply in the event that a participant does not submit a bid.

*Paragraph 2*

Article 32, paragraph 2 stipulates that a participant's bid must comprise a number of licenses at a price determined by the Minister.

*Paragraph 3*

Under Article 32, paragraph 3, the price for the first bidding round of the second part of the primary phase will be [amount]. This amount is the same as the reserve price. Please see paragraph X in the general section of these explanatory notes for details on the manner in which the reserve price is set.

*Paragraph 4*

Article 32, paragraph 4 stipulates that the prices for the second and subsequent bidding rounds will be determined by the Minister.

*Paragraph 5*

Under Article 32, paragraph 5, participants who did not submit a bid in the first part of the primary phase will be able to acquire a maximum of five licenses in the second part of the primary phase. Please see paragraph X in the general section of these explanatory notes for a detailed explanation of this stipulation.

*Paragraph 6*

Article 32, paragraph 6 stipulates that the participants' bids for the first bidding round are not permitted to exceed the maximum number of MHz that they are able to acquire in the second part of the primary phase. As set out in the explanation for paragraph 5, for some participants this maximum will be 50 MHz. In light of the overall spectrum cap of 120 MHz, a maximum of 60 MHz will apply to participants who won a 60 MHz license in the first part of the primary phase. A maximum of 120 MHz will apply to participants who submitted a bid in the first part of the primary auction phase but who were unsuccessful in acquiring a (60 MHz) license. Prior to the start of the second part of the primary auction phase, participants will be notified of the maximum number of MHz they will be able to acquire in this part of the primary phase.

*Paragraph 7*

Under Article 32, paragraph 7, a participant's bid for the second and subsequent bidding rounds must always be equal to or lower than the bid submitted by the participant in the preceding bidding round. This means a participant is not permitted to increase its bid in relation to the preceding bidding round. This is due to the nature of a clock auction, which aims to align the total demand with supply by means of a stepwise increase in the round prices.

#### *Paragraph 8*

Article 32, paragraph 8 stipulates that if a participant reduces its demand in relation to the preceding bidding round, it also has the option to submit one or more exit bids. These exit bids will be used to distribute any remaining licenses in the event that the total demand in the final bidding round is lower than the supply. Please refer to the article-by-article notes for Article 35, paragraphs 3–6. It is not mandatory to submit an exit bid. Please see paragraph X in the general section of these explanatory notes for a detailed explanation regarding the submission of exit bids.

#### *Paragraph 9*

Article 32, paragraph 9 sets out the requirements for the submission of exit bids. An exit bid is a combination of a number of licenses and a price per license. Under Article 32, paragraph 9, subsection (a), the number of licenses specified in an exit bid cannot be higher than the number of licenses by which the participant reduced its bid in relation to the preceding bidding round. For example, if a participant reduces its bid from 5 to 3 licenses, this number cannot be more than 2. The fact that participants are able to submit multiple exit bids means that, in this case, it has the option to submit an exit bid for 2 licenses and an exit bid for 1 license.

Article 32, paragraph 9, subsection (b) subsequently stipulates that the price per license in an exit bid must be between the price set by the Minister for the preceding round and that set by the Minister for the bidding round in which the participant submits the exit bid.

#### *Paragraph 10*

Article 32, paragraph 10 introduces an additional requirement regarding the price per license in an exit bid in the event that a participant submits multiple exit bids in the same bidding round. A participant who does so must ensure the price per license in an exit bid is equal to or lower than the price it offers for a lower number of licenses in another exit bid. Let's assume that the participant reduces its bid from 5 to 3 licenses in a bidding round and decides to submit two exit bids – 1 exit bid for 2 licenses and 1 exit bid for 1 license. In this case, the price per license in the exit bid for 2 licenses can be the same as, but never higher than the price per license in the exit bid for 1 license.

#### *Paragraph 11*

Article 32, paragraph 11 permits participants to withdraw one or more exit bids that they submitted in one of the preceding bidding rounds.

#### *Paragraph 12*

Article 32, paragraph 1 stipulates that a participant must submit a bid in each bidding round in which it takes part. Nonetheless, if a participant allows a bidding

round that has been extended for its benefit to expire without submitting a bid, Article 32, paragraph 12 stipulates that it will be deemed to have submitted a bid for 0 licenses (subsection (a)) and cannot submit bids in bidding rounds subsequent to that bidding round (subsection (b)).

### **Article 35. Final bidding round and designation of winning bids for the second part of the primary phase**

Article 35 deals with the second part of the primary auction phase, stipulates which will be the final bidding round and describes which bids and exit bids, as relevant, will be designated the winning bids.

#### *Paragraph 1*

Article 35, paragraph 1 determines which is the final bidding round and will also mark the end of the second part of the primary auction phase. The final bidding round will be the round in which the total demand of the various participants is equal to or lower than the number of licenses offered. Exit bids will not be taken into account when calculating the total demand.

#### *Paragraph 2*

Article 35, paragraph 2 specifies which bids will be designated the winning bids in the second part of the primary auction phase in the event that the total demand in the final bidding round is exactly equal to the number of licenses offered. In that case, Article 35, paragraph 2 provides that all bids submitted in the final bidding round will be designated winning bids. All participants who still actively took part in the final bidding round will win the number of licenses they bid for in the final bidding round, at the round price determined for that bidding round.

#### *Paragraph 3*

Article 35, paragraph 3 specifies which bids will be designated the winning bids in the event that the total demand in the final bidding round is lower than the number of licenses offered. First, all bids submitted in the final bidding round will be designated winning bids on the basis of Article 35, paragraph 3, opening lines and subsection (a). After this, there will be one or more licenses undistributed in view of the fact that the total demand in the final bidding round was lower than the number of licenses offered. The remaining licenses will be distributed on the basis of previously submitted exit bids. As set out in paragraph X in the general section of these explanatory notes, these exit bids are not necessarily restricted to the exit bids submitted in the final bidding round.

Article 35, paragraph 3, opening lines and subsection (b) stipulate that, as the next step, the exit bids forming the combination of exit bids that results in the lowest number of licenses remaining undistributed will be designated the winning bids in relation to the number of licenses that remain. Article 35, paragraphs 4–6 set out how the Minister will arrive at that combination.

#### *Paragraph 4*

Article 35, paragraph 4 stipulates that, when determining the combination referred to in Article 35, paragraph 3, opening lines and subsection (b), the Minister will only consider the exit bids of participants who have already been awarded the number of licenses they bid for in the bidding round in which they submitted the relevant exit bid. This is due to the aggregation risk described in paragraph X, which participants would be exposed to if this provision was not in place.

#### *Paragraph 5*

Article 35, paragraph 5 makes provision for cases in which the application of Article 35, paragraph 4 by the Minister could result in multiple combinations of exit bids that would leave precisely the same number of licenses undistributed. In that event, the Minister will compare the total value of the relevant combinations and designate as the winning bids the exit bids of the combination generating the highest value.

#### *Paragraph 6*

There is a theoretical possibility that the application of Article 35, paragraph 4 by the Minister could result in multiple combinations of exit bids that would leave precisely the same number of licenses undistributed and which would, down to a euro, also generate precisely the same value. In such exceptional cases, Article 35, paragraph 5 stipulates that licenses will be drawn between the relevant combinations. The winning bids will then be the exit bids constituting the combination that was drawn by licenses. The licenses will be drawing using the auction system.

#### **Article 48. Refund of deposits and refund of bank guarantees to non-winning participants and excluded applicants**

Article 48 concerns the return of deposits and the return of bank guarantees to non-winning participants and excluded participants during or after the auction phase. To this end, Article 9 is applicable to the deposits and bank guarantees of non-winning participants and of participants who were excluded from participation or further participation in the auction. Article 9 stipulates how and when deposits and bank guarantees are refunded or returned during the application phase to applicants whose applications are not processed, have been rejected or have been refused.

For the corresponding application of Article 9 during or after the auction phase, in Article 9 the term "applicant" should be read "non-winning participant" or "applicants who were excluded from participation or further participation". Furthermore, the point in time referred to in Article 9, first paragraph, must be read as the point in time at which a participant's application was rejected, or at which an applicant was excluded.

#### **Article 49. Amendments to the Capping regulation for mobile communication frequencies 2020**

Article 49 of these regulations entails amendments to the Capping regulation for mobile communication frequencies 2020 (hereinafter: the "Capping regulation").

#### *Paragraphs 1 and 3*

Article 49, paragraphs 1 and 3 define spectrum caps for the allocation of the 3.5 GHz band. An explanation of the spectrum caps is provided in paragraph X in the general section of these explanatory notes.

#### *Paragraph 2*

Article 49, paragraph 2 introduces some improvements to article 3 of the Capping regulation. Article 3 of the Capping regulation determines the circumstances in which the spectrum used by other, associated legal entities is added to the spectrum used by the legal entity applying for the licenses or who otherwise wishes to acquire or use licenses. In summary, Article 3, subsection (e) of the Capping regulation relates to legal entities with whom the relevant legal entity can jointly exercise certain rights and powers over a third legal entity. Article 49,

paragraph 2 adds that this only pertains to joint rights and powers over “third legal entities” *who use radio spectrum in the Netherland, having acquired or requireds*. This is to emphasise that not all collaborations between different legal entities by way of a “joint” legal entity necessarily result in an affiliation and the adding together of the spectrum used by the legal entities that are working together.

*Paragraph 4*

Article 49, paragraph 4 entails an amendment to Article 5 of the Capping regulation. Article 5 of the Capping regulation originally stipulated that the regulation will expire on 31 December 2029. This date corresponds with the term of the licenses that were allocated in 2020 in the context of the ‘Multiband Auction’ (licenses in the 700, 1400 and 2100 MHz bands). The 3.5 GHz licenses, however, have a longer term. In light of this, it would be illogical to allow the Capping regulation to lapse in its entirety with effect from 31 December 2029, as this would also mean the expiry of the caps for the 3.5 GHz band. Nonetheless, it is obvious that the Capping regulation will require an amendment around that time, given the end date and reallocation of the licenses in the 700, 1400 and 2100 MHz bands.

Non-binding translation