

**Ministerial Order issued by the Minister of Economic Affairs and Climate Policy WJZ/43374524, establishing the application and auction procedures for licences for radio spectrum in the 3.5 GHz band for mobile communication applications and amending the Capping Regulation for mobile communication frequencies 2020 and the Dutch Authority for Digital Infrastructure’s Remuneration Regulations 2024 (Regulation on the application and auction procedures for 3.5 GHz band licences 2024)**

The Minister of Economic Affairs and Climate Policy

In view of Section 3.11 of the Telecommunications Act, Articles 8, 9 and 10 of the Frequency Decree, and Article 5 of the BES Islands’ Telecommunications Act (Remuneration) Decree and Telecommunications Act;

Hereby decrees as follows:

Chapter 1. General provisions

**Article 1 Definitions**

These regulations use the following definitions:

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

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

*notification*: Notification of the auction of licences 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 primary phase, as referred to in Article 15, paragraph 4;

*exit bid*: an exit bid as referred to in Articles 25, paragraph 6, and 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;

*qualified electronic signature*: signature as referred to in Article 3, paragraph 12, of Regulation (EU) No. 910/2014 (OJ EU L 257/73);

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

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

*interest*: interest calculated according to the Actual/360 method based on the Euro Short-Term Rate set by the European Central Bank, minus 100 basis points, with 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 primary phase, as referred to in Article 15, paragraph 5;

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

*licence*: a licence for the use of the 3.5 GHz radio spectrum for mobile communications, as set out in Annexes 1 and 2 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 licences**

1. Pursuant to the notification, the following are available for allocation through an auction:

- a. three 60 MHz licences, and
- b. twelve 10 MHz licences.

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 licences referred to in paragraph 1, subsection (a), has not been allocated;
- b. twenty-four, in the event that two of the licences referred to in paragraph 1, subsection (a), have not been allocated;
- c. thirty, in the event that none of the licences referred to in paragraph 1, subsection (a), have been allocated.

### Chapter 2. The application

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

## **Article 3 Submission of the application**

1. A party wishing to qualify for the award of a licence must submit an application to the Minister.

2. An application is received before 14:00 o'clock on the last day of a four week period after this regulation is entered into force, on which article 1, paragraph 1, of the General termslaw (Algemene termijnenwet) correspondingly applies. :

a. by encrypted email or email to the following email address:

Veiling3.5GHz@rdi.nl or:

b. by registered mail or in person at the following address, and addressed as follows:

Rijksinspectie Digitale Infrastructuur  
Ter attentie van: veilingteam 3,5 GHz-band  
Emmasingel 1  
9726 AH Groningen.

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.

4. For applications submitted in the manner referred to in paragraph 2 subsection (a), the time of receipt is the time at which the application is received by the e-mail server of the National Digital Infrastructure Inspectorate.

## **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 bankruptcy or liquidation, the applicant has not filed for bankruptcy, and no petition for bankruptcy has been filed, and
  - 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 has independent authority 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.
8. An application submitted in the manner referred to in Article 3, paragraph 2, subsection (a) must:
  - a. include the applicant's qualified electronic signature; and
  - b. include the public key of the applicant.
9. If the notary's statement as referred to in part A of Annex 1 is provided in the manner referred to in Article 3, paragraph 2, subsection (a), the notary's statement must be provided with a qualified electronic signature.

#### **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 or email of any change in the information and documents referred to in Article 6, paragraphs 3-5.

§ 2. Provision of security

#### **Article 8 Provision of security 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. € 19,610,000 if the applicant wishes to participate in either the first part of the primary phase or both parts of the primary phase;
  - b. € 2,180,000 if the applicant wishes to participate only in the second part of the primary phase.
2. The deposit shall be provided for the period up to and including:
  - a. if the application is withdrawn or rejected, the date of withdrawal or rejection;
  - b. if the application is not considered, the date of the decision not to consider the application, and
  - c. if the application is successful, the date on which the amount due in accordance with Article 46, paragraph 2 is paid in full or, if deferment of payment is granted, the date on which the first instalment is paid in the manner set out in the licence.
3. By no later than the time referred to in Article 3, paragraph 2, applicants must ensure that:
  - a. the deposit has been received in bank account number NL41 INGB 0705 0011 99, in the name of: Ministry of Economic Affairs and Climate Policy, the Dutch Authority for Digital Infrastructure, quoting 'Veiling vergunningen 3,5 GHz-band' (3.5 GHz band licences auction), or
  - b. the bank guarantee, issued in accordance with the model referred to in Annex 2, has been received at the address referred to in Article 3, paragraph 2, subsections (a) or (b).
4. A bank guarantee that is provided in the manner referred to in Article 3, paragraph 2, subsection (a) must be provided with a qualified electronic signature.

#### **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 they 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, 3, 4 and 6 to 9, or Article 8, paragraphs 1, 3 and 4, the minister shall notify the applicant accordingly and give the applicant the opportunity to rectify the omission.

2. Omissions must be rectified before 5.00 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. Article 3, paragraph 4, shall apply accordingly.
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, or 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**

1. 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.
2. The minister may reject an application if either of the following are not complied with:
  - a. Article 7, or
  - b. an order on the part of the minister under Section 18.7, paragraph 1 of the Act, which is required for the fulfilment of their tasks in the context of these regulations.

#### 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 the day on which the application is submitted.
3. In the period from the day on which the application is submitted up to and including the date on which it is awarded a licence 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**

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 software required for the auction;
- c. the telephone number and email address (including the associated public security key) at which the minister can be reached;
- d. the combination of username and password of the participant;
- e. 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 licences 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 licences 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 (c).

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

1. The Minister may suspend the auction in the event of exceptional circumstances that, in their 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 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 them.
4. In the event that the auction is suspended, the Minister may decide in respect of the bidding round or extended 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 licences, and expected or desired prices, or prices to be paid, in the auction until the notification referred to in Article 44 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 44, 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 they consider or have 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 licences)

### **Article 24 Auctioning of the 60 MHz licences**

This paragraph applies to the licences 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 licences 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 licence will be €39,220,000.
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 licence as set by the Minister in respect of the preceding bidding round; and
  - 2<sup>o</sup>. is below the price per licence 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:
  - 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. the number of licences bid for in total in the previous bidding round;
- c. its bid and its exit bids in the previous bidding round, and
- d. 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 licences demanded is equal to or lower than the number of licences referred to in Article 2, paragraph 1, subsection (a).
2. When the total demand for licences is equal to the number of licences 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 licences is lower than the number of licences 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 licences 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 or exit 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 licences)

### **Article 30 Auctioning of the 10 MHz licences**

This paragraph applies to the licences 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 licences referred to in Article 2, paragraph 1, subsection (b);
- b. the date, 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 licences the participant wishes to acquire for the price set in respect of the bidding round.
3. In the first bidding round, the price per licence will be €4,360,000.
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 licences 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 licences that cannot exceed the number of licences by which the participant has reduced its bid in relation to the preceding bidding round; and
  - b. an amount per licence in whole euros which:
    - 1<sup>o</sup>. is equal to or higher than the price per licence as set by the Minister in respect of the preceding bidding round; and
    - 2<sup>o</sup>. is below the price per licence 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 licence as referred to in paragraph 9, subsection (b), cannot be lower than the amount per licence in an exit bid submitted in the same round for a lower number of licences.
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. the number of licences bid for in total in the previous bidding round;
- c. its bid and its exit bids in the previous bidding round, and
- d. 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 licences demanded is equal to or lower than total the number of licences referred to in Article 2, paragraph 1, subsection (b).
2. When the total demand for licences is equal to the number of licences 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 licences is lower than the number of licences 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 licences remaining unallocated.
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 licences 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 each participant in the second part of the primary phase individually as to which of their bids or exit bids were designated winning bids;

b. inform each successful participant in the second part of the primary phase individually of the amount referred to in Article 46, paragraph 2, subsection (b).

#### §. 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 licences 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 licences won by that participant;
  - b. the radio spectrum of each successful participant must constitute a block; and
  - c. the radio spectrum of unallocated licences must be a block adjacent to the upper limit of the 3.5 GHz band.

#### **Article 38 No auction in the allocation phase 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 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 37.
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. has 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 Determining 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 licences 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, 36 and 43 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 licences and rejection of applications after the auction phase

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

#### **Article 45 Award of licences to successful participants and rejection of the applications by unsuccessful participants**

1. The Minister will award successful participants the licences 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 licence, in the manner specified in its licence.
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 additional price for the relevant participant, as referred to in Article 42, paragraph 2.

#### **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 licence or licences, on the understanding that:
  - a. where the winning participant's deposit is lower than the amount due, the participant must pay the remainder of the amount due; and
  - b. where the winning participant's deposit is higher than the amount owed, the portion of the deposit remaining after payment of the amount owed or, where deferment of payment has been granted, of the amount of the first instalment, will be refunded to that participant no later than two weeks after the award of the licence.
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 mutatis mutandis from:
  - a. the point in time at which the amount due has been paid; or
  - b. the point in time when half of the amount due has been paid in the manner specified in the licence, if the winning participant has been granted deferment of payment.

#### § 3. Unsuccessful participants and excluded participants

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

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

#### Part 6: Final 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 is 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.
  - c. in subsection 3 of the definition of "use of radio spectrum", "for own electronic communication services" is inserted after "use".
2. Article 3 is amended as follows:
  - a. Subsection (a) will be amended as follows:
    - 1<sup>o</sup>. In subsection iii), "or" is replaced by a semicolon.
    - 2<sup>o</sup>. The semicolon at the end of subsection iv) is to be replaced by "or".

- 3<sup>o</sup>. After subsection iv) a subsection is added, reading:
- v) has one or more shares with a special statutory right of control.
  - b. In subsection (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 radio spectrum in the Netherlands, in which".
  - c. In subsection (e), the wording "that directly or indirectly uses radio spectrum in the Netherlands" is inserted after "a legal entity" and a semicolon is inserted at the end of the clause.
  - d. In subsection (g), "with a legal entity such as those referred to in (a) to (c) inclusive" is inserted after "jointly".
3. Article 4 is amended as follows:
- a. In paragraph 1, "264 MHz" is replaced by "384 MHz".
  - b. A new paragraph is added, reading:
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.

#### **Article 50 Amendments to the Dutch Authority for Digital Infrastructure's Remuneration Regulations**

In Table I, subsection (A), point 5, of Annex 1 to the Dutch Authority for Digital Infrastructure's Remuneration Regulations 2024, "€4,893" is replaced by "€4,300".

#### **Article 51 Entry into force**

These regulations will take effect on the day after the publication date of the Government Gazette in which they are published, with the exception of article 50, which will take effect from 1 July 2024.

#### **Article 52 Citation title**

This Regulation shall be cited as: Regulations on the application and auction procedures for 3.5 GHz band licences 2024.

This Regulation shall be published with its explanatory notes in the Government Gazette.

The Hague, February 2th 2024

The Minister of 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 during the auction (Article 19)**

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 [Veiling3.5GHz@rdi.nl](mailto:Veiling3.5GHz@rdi.nl)

###### **A.1.3. Declaration regarding the receipt of electronic communications during the application procedure and awarding of licences**

Mark with a cross if applicable:

- Applicants who submit their application by registered mail or delivery in person declare that they can be contacted by email during the application procedure and awarding of licences. (Applicants who submit their application by email are deemed to have indicated already that they can be reached by email.)

###### **A.1.4. 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 in applicant organisation:

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 in applicant organisation:

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 in applicant organisation:

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 in applicant organisation:

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**

#### A.3.2.1 Current situation

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 an application.

#### A.3.2.2 Future situation

The [applicant/parent company or companies of the applicant\*] hereby also declares/declare that none of the applicant's associated legal entities as referred

<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.

to in Article 3 of the Capping Regulation for mobile communication frequencies 2020 will also be submitting an application under this regulation.

#### A.3.2.3 Holders/users of mobile communication licences

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 licence for the use of radio spectrum for mobile communication as referred to in Article 1 of the Capping Regulation:

...  
...  
...

(State the names of the legal entities associated with the applicant that are holders or users of licences 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 21, paragraph 2.

For applicants who are subject to such an obligation, please indicate the basis of 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 21, 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 21, paragraph 2.

Where information listed in Article 21, 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 them and has been found to be complete and accurate;

(ii) the information provided in this application under A.3.1, A.3.2.1, A.3.2.3, A.4.4, A.4.5, A.4.7 and A.4.8 has been verified by them to the best of their ability and in their opinion is complete and accurate;

(iii) the persons named under A.2 have been identified in person by them 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 their presence.

Name: .....

Place: .....

Date: .....

(Qualified electronic) signature\*

.....

The declaration by the notary may be provided by means of an attachment, in unchanged text, if required.

If the notary's statement does not include a qualified electronic signature, the original written notary's statement must be provided by registered post or delivered in person in the manner referred to in Article 3, paragraph 2, subsection (b).

### **Part B**

Application

I wish to apply for one or more licences 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 3 of the Capping Regulation.

In doing so, I am/am not\* requesting deferral of payment under Section 4:94 of the General Administrative Law Act for half of the total amount payable referred to in Article 46, paragraph 2 for a period of one year from the date on which the licence 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 46, paragraph 1, up to and including the day on which payment is made.

\* delete as appropriate.

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.

\* If you are not authorised and/or empowered to sign this application independently, the other directors or authorised parties must also sign this application.

Name: .....

Place: .....

Date: .....

(Qualified electronic) signature: .....

Name: .....

Place: .....

Date: .....

(Qualified electronic) signature: .....

Name: .....

Place: .....

Date: .....

(Qualified electronic) signature: .....

Name: .....

Place: .....

Date: .....

(Qualified electronic) signature: .....

Non-binding translation

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

### **Part A**

#### **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, amongst 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 band licences 2024;

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 €19,610,000 (in words: nineteen million and six hundred and ten thousand euros) for participation in the first part or both parts of the primary phase of the auction, or €2,180,000 (in words: two million and one hundred and eighty thousand euros) for participation in the second part of the primary phase of the auction\*, 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.

\* delete as appropriate

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 a successive new period 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.

Place: .....

Date: .....

Name of Bank and (qualified electronic) signature\*\*

.....

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

\*\* If the bank guarantee does not include a qualified electronic signature, the original written notary's statement must be provided by registered post or delivered in person in the manner referred to in Article 3, paragraph 2, subsection (b).

## **Part 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, amongst 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 € 19,610,000 (in words: nineteen million and six hundred and ten thousand euros) for participation in the first part or both parts of the primary phase of the auction, or € 2,180,000 (in words: two million and one hundred and eighty thousand euros) for participation in the second part of the primary phase of the auction\*, 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.

\*Cross out the amount that is not applicable

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 (qualified electronic) signature\*\*

.....

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

\*\* If the bank guarantee does not include a qualified electronic signature, the original written bank guarantee must be submitted by registered mail or by delivery by hand in the manner referred to in Article 3, second paragraph, and part b.

Non-binding translation

## Appendix 3 as referred to in Article 42, paragraph 2, subsection b

### Calculation of additional prices

The application of Article 42 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  $wb_1, wb_2, wb_3, \dots, wb_n$  is equal to  $T$ , or

$$\sum_{i=1}^n p_i$$

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

$$\sum_{i=1}^n eb_i$$

of the additional prices 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

$Z_i$  represents the total proceeds of the final combination of winning bids established in accordance with Section 42, if participant  $w_i$  had bid 0.00 for all possible combinations of bids.

## EXPLANATORY NOTES

### GENERAL PROVISIONS

#### 1. Introduction

These regulations set rules regarding the allocation of licences in the 3450–3750 MHz frequency band (unpaired, hereinafter: “the 3.5 GHz band”). These licences 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 licences in the radio spectrum 3450–3750 MHz frequency band. The remaining radio spectrum, being the 3400–3450 MHz and 3750–3800 MHz bands, was in use for local applications and has become that once more since 1 December 2023. The allocation of this radio spectrum is expressly outside of the scope of the present regulations.

##### 1.1 Background:

###### 1.1.1 Background

This regulation covers the radio spectrum between 3450 and 3750 MHz. Pursuant to Article 54, paragraph 1 of the Telecommunications Code<sup>2</sup>, EU Member States are – in summary – required to reorganise the 3.5 GHz band and to allocate sufficiently large blocks for use by terrestrial wireless broadband services in a timely manner (in principle, no later than 31 December 2020). This is to facilitate the roll-out of 5G.

In this context, on 26 April 2021, the then State Secretary for Economic Affairs and Climate Policy decided to amend the 2014 National Frequency Plan (hereinafter: revised NFP 2021). The revised NFP 2021 provided for a restructuring of the 3.5 GHz band, with the aim of allocating a total of 300 MHz of contiguous spectrum for national mobile communications, and a total of 100 MHz (two times 50 MHz) for local applications.

Before the revised NFP 2021 entered into force, a portion of the 3.5 GHz band was allocated to fixed satellite links (space to earth). In this context, prior to the revised NFP 2021, the NFP also provided for a specific measure (national footnote HOL008) to protect security and defence operations based in Burum (Friesland). On the basis of the national footnote HOL008 – to summarise – no other use of frequency was permitted in the 3.5 GHz band north of a line between Amsterdam and Zwolle. South of the line between Amsterdam and Zwolle, use of the 3.5 GHz band was permitted, but only with strict capacity restrictions in order to prevent the disruption to the Ministry of Defence’s satellite earth station in Burum due to national security considerations.

As part of preparations for the implementation of the revised NFP 2021, the Ministry of Economic Affairs and Climate Policy has commissioned an investigation into whether it is possible for satellite use to coexist with mobile communication, such as 4G or 5G. On the basis of that investigation, it was concluded at the time that permanent coexistence would lead to unacceptable restrictions on the use of the 3.5 GHz band for mobile communication. Subsequently, in the revised NFP

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<sup>2</sup> Directive (EU) 2018/1972 of the European Parliament and the Council of 11 December 2018 establishing the European Electronic Communications Code (revised) (OJ EU 2018, L 321).

2021, it was decided to discontinue the allocation of fixed satellite connections in favour of mobile communication. National footnote HOL008 would lapse with effect from 1 September 2022.

Various parties subsequently appealed against the revised NFP 2021 for various reasons. One of these parties was Inmarsat, a company which provides various satellite communication services for the maritime and aviation sector (including by means of a satellite earth station in Burum). At the request of the International Maritime Organisation and in compliance with the Convention on the International Maritime Satellite Organisation (the IMSO Convention), Inmarsat also provides international communication services for distress and safety communications for shipping and aviation (hereinafter to be referred to as: distress and safety communications). Inmarsat is required to guarantee an availability of at least 99.9% for the handling of these distress and safety communications. In annual terms, this means a maximum of 8.8 hours of non-availability. In addition to lodging an appeal, Inmarsat also submitted a request to the relevant lawcourt for a preliminary opinion.

The preliminary relief judge of the Rotterdam District Court suspended the 2021 NFP decision on 30 June 2021.<sup>3</sup> In the opinion of the preliminary relief judge, the then State Secretary for Economic Affairs and Climate Policy had – in summary – taken insufficient account of the interests of Inmarsat and, more specifically, the importance of safeguarding distress and safety communications. The preliminary relief judge ruled that although it does not follow from the international treaties invoked by Inmarsat that Inmarsat's use of the 3.5 GHz band in Burum may never be restricted or withdrawn, any such restriction or withdrawal must take place in a way that does not disrupt distress and safety communications. In this context, the preliminary relief judge deemed it expedient for the then Secretary of State to consult Inmarsat and the other parties as soon as possible in order to find a solution that would safeguard distress and safety communications.

With due observance of the ruling of the preliminary relief judge, the Minister of Economic Affairs and Climate Policy (hereinafter: the Minister) established the Advisory Committee on the allocation of the 3.5 GHz band and NSV communication (hereinafter: the Advisory Committee) on 17 December 2021.<sup>4</sup>

The task of the Advisory Committee was to provide guidance on how and when the 3.5 GHz band could be made available for mobile communications across the Netherlands in a responsible manner that would safeguard the distress and safety communications currently facilitated by Inmarsat. This request for guidance was divided into a number of secondary questions that the Advisory Committee was asked to answer on the basis of a number of (policy) principles.<sup>5</sup> The Minister asked the Advisory Committee to recommend a solution that would have the widest possible support and to consult: Inmarsat, the current providers of national mobile communications (hereinafter: the mobile network operators, or MNOs), and local licence holders until 1 September 2026.

The Advisory Committee presented its advice on 9 May 2022. The Minister then presented those recommendations to the House of Representatives on 12 May

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<sup>3</sup> Court of Law, Rotterdam, 30 June 2021, ECLI:NL:RBROT:2021:6106.

<sup>4</sup> Decision of the Minister of Economic Affairs and Climate Policy of 17 December 2021, no. WJZ/21207879, establishing the Advisory Committee on the allocation of the 3.5 GHz band and the safeguarding of distress and safety communications (Decision establishing the Advisory Committee for the Allocation of the 3.5 GHz band and safeguarding distress and safety communications) (Government Gazette 2021, 49880).

<sup>5</sup> See Article 2, paragraphs 4 and 5, of the Decree establishing the Advisory Committee on the Allocation of the 3.5 GHz band and distress and safety communications.

2022.<sup>6</sup> On 8 July 2022, the Minister presented a considered response to the advice to the House of Representatives.

The Advisory Committee first identified a number of potential scenarios for a solution, focusing on technical, legal and economic aspects. The Advisory Committee used these potential scenarios as the basis for (the start of) talks with representatives from various ministries, Inmarsat, the three MNOs, and two local users with licences until 1 September 2026. At a later stage, the Advisory Committee also gave other local users with licences until 1 September 2026 the opportunity to provide input. Before, during or after these talks, the Committee continuously used the information provided to it, both confidential and non-confidential, to modify the potential scenarios identified. The Committee then discussed these modified scenarios with (some of) the aforementioned authorities and companies.

As a result of this process, the Advisory Committee identified two types of scenario that could lead to a solution: either Inmarsat could retain its position in the 3.5 GHz band in the Netherlands (coexistence with mobile communications), or Inmarsat could relocate its activities in the 3.5 GHz band outside the Netherlands.

The Advisory Committee ultimately advised the Minister to opt for the second of these scenarios, whereby Inmarsat would (ultimately) relocate its activities for distress and safety communications outside the Netherlands. Under this scenario, according to the advice, the Minister would be able to allocate 300 MHz of contiguous spectrum in the 3.5 GHz band for (national) mobile communication with effect from 1 December 2023 by rapidly phasing out the use of the 3.5 GHz band by Inmarsat on Dutch territory. One important factor, according to the advice, was that Inmarsat does not oppose this relocation, but only relocation within such a short period of time that Inmarsat would no longer be able to meet its obligations with respect to distress and safety communications<sup>7</sup>. Inmarsat has already sought to relocate these to Greece as soon as possible. This scenario would thus have the (conditional) support of both Inmarsat and the MNOs.<sup>8</sup>

After the Advisory Committee had issued its advice, the Minister held talks with Inmarsat, the MNOs and other stakeholders such as existing local licence holders. In accordance with Article 3:9 of the General Administrative Law Act, which instructs the administrative body to ascertain that the relevant investigation had been carried out with due care, the Minister gave the various parties the opportunity to reflect on the advice and how it had been arrived at. The resulting discussions showed that the advice enjoyed broad support. In addition, the Minister investigated how the recommendations of the advisory report could be implemented and how they relate to the policy frameworks for mobile communications.

The Minister concluded that the Advisory Committee's investigation had indeed been conducted with due care, that the advice was comprehensible, that the Advisory Committee had answered the Minister's questions adequately and taken account of the various interests, and that its conclusions match the findings. The Minister therefore decided to adopt the recommendations of the Advisory Committee. This has led, first of all, to a number of measures that – in summary – serve to protect the distress and safety services provided by Inmarsat. These measures are temporary in nature and have been incorporated in an amendment

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<sup>6</sup> "Een band scheppen", appendix to Parliamentary Papers II, 2021/22, 24095, No. 563.

<sup>7</sup> Ibid, pp. 20, second paragraph.

<sup>8</sup> Ibid, pp. 23, second paragraph.

decision on distress and safety communications dated 28 February 2023<sup>9</sup> (hereinafter to be referred to as: revised NFP 2023).

In parallel with this process, the Minister consulted with local licence holders (with licences expiring in 2026) regarding the options for an alternative allocation of radio spectrum intended for local use. With regard to the 3.5 GHz band, the revised NFP 2023 provides for the allocation of 300 MHz for national use and – in total – 100 MHz for local use. Last of all, the revised NFP 2021 was withdrawn by means of the same NFP Amendment Decision.

A number of parties, including Inmarsat, subsequently appealed against the revised NFP 2023. In the run-up to the hearing, Inmarsat and the minister reached agreement on the conditions under which Inmarsat would move distress and safety communications to Thermopylae in Greece<sup>10</sup>. Further to this agreement, Inmarsat withdrew its appeal against the revised NFP 2023 and on 15 December 2023, the minister took the decision to revise the NFP by which, put briefly, the temporary measures to protect distress and safety communications are to be lifted with effect from 1 February 2024 (hereafter: NFP-amendment 2024<sup>11</sup>).

The District Court of Rotterdam delivered judgment in respect of the other appeals on 29 November 2023.<sup>12</sup> The Court found that the minister had prepared the revised NFP 2023 carefully, drawing on appropriate expert recommendations in doing so, while making comprehensible choices, and sufficiently explaining the considerations made. For this reason, the court declared the appeals against the revised NFP 2023 unfounded.<sup>13</sup> That means that the revised NFP 2023 remained in effect. Subsequently, the minister made a decision of notification as referred to under Section 3.10, paragraph 4 of the Act, and laid down these regulations, by way of which the radio spectrum of 3450-3750 MHz may be allocated via the auction procedure set out in these regulations.

#### 1.1.2. The importance of digital connectivity

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>14</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.

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<sup>9</sup> Decision of the Minister of Economic Affairs and Climate Policy of 23 February 2023, no. ED/DE 26348713 repealing the decision of the State Secretary for Economic Affairs and Climate Policy of 26 April 2021, no. BI/20299360, amending the National Frequency Plan 2014 with respect to the allocation of the 3.5 GHz band for mobile communications (NFP amendment 3.5 GHz band), and amending the National Frequency Plan 2014 with respect to the introduction of a new allocation of the 3.5 GHz band with safeguards for distress and safety communications provided by Inmarsat, Government Gazette 2023, 5604

<sup>10</sup> Parliamentary Papers II, 2023/24, 24 095, 583.

<sup>11</sup> Decision of the Minister of Economic Affairs and Climate of 15 December 2023 with number DGED/DE 41647714 amending the National Frequency Plan 2014 in relation with the annulation of the designation of the frequency space of 3550 - 3680 MHz for fixed satellite connections for emergency purposes -, emergency and safety communication and the additional temporary measures to protect this communication, Stcrt. 2024, 839.

<sup>12</sup> District Court of Rotterdam, 29 November 2023, CLI:NL:RBROT:2023:10986.

<sup>13</sup> Ibid.

<sup>14</sup> Parliamentary Papers II 2017/18, 26643, no. 547.

### *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>15</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.

### *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 advice on the spectrum auctions*

The Netherlands Authority for Consumers and Markets (ACM) provided an advice 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 her advice 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 of acquiring 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

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<sup>15</sup> Parliamentary Papers II, 2015/16, 24095, no. 409.

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 bandspecific 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 of acquiring radio spectrum in the 3.5 GHz band, as this is required for a fully-fledged offering of 5G services and to ensure effective competition.

The key elements of this advice 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 advice has been adopted in the Memorandum on Mobile Communication<sup>16</sup> and in this regulation. 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 European framework

A final aspect is that the 3.5 GHz band is one of the 5G pioneer frequency bands designated by the European Commission. In this context, Article 54, paragraph 1, subsection (a) of Directive (EU) 2018/1972<sup>17</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 at the latest. 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 provision 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 2019/235<sup>18</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-

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<sup>16</sup> Parliamentary Papers II 2018/2019, 24095, no. 478.

<sup>17</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>18</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, OJ EU 2019, L 37.

exclusive basis, the 3,400–3,800 MHz frequency band for terrestrial electronic communications networks, they must do so in compliance with the parameters set out in the Annex to the Implementing Decision. This regulation provides for that.

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

### 2.1 Decision to hold an auction

In the Notification of the auction of licences for radio spectrum in the 3.5 GHz band 2024 (Besluit bekendmaking veiling vergunningen 3,5 GHz-band 2024), it was announced that the licences 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 allocation 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 licences 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 obviously 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 licences of 60 MHz and 12 licences of 10 MHz*

The auction of the 3.5 GHz band will involve the auctioning of a total of 300 MHz in 3 licences of 60 MHz each, ranging from 3450 to 3750 MHz.

The reasoning behind this can be found in the study conducted by Dialogic<sup>19</sup> into the logical size for the licences 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

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<sup>19</sup> Dialogic, *Onderzoek grootte veiling 3,5 GHz-vergunningen* [Study into size of auction of 3.5 MHz licences], Utrecht, 25 March 2020

suboptimal potential outcomes. This is because, aside from 15 MHz and 25 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 allocations. Dialogic distinguishes between even allocation, whereby all licences are the same size, and irregular allocation, whereby there is a range of different lot sizes. If licences are kept the same, the most obvious choices would be 100 MHz (3 licences) and 10 MHz (30 licences). However, offering 3x100 MHz does not offer the option of obtaining the maximum of 120 MHz or achieve differentiation between mobile network operators. It could prevent the strategic acquisition of spectrum though, 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. Division into equal-sized licences 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 licences of 60 MHz and subsequently organise a round in which (in principle) twelve licences of 10 MHz will be auctioned (see paragraph 5.1.1, Primary phase). That way, each participant still has the opportunity to tune their 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 licence holders are set out in the explanatory notes to the licences, which are attached as an annex to the Notification of the auction of licences for radio spectrum in the 3.5 GHz band 2024. 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. Licencing period*

The Memorandum on Mobile Communications stated that the 3.5 GHz licences 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 is expected that it will be possible to use the licences from 1 August 2024, meaning the maximum licencing period is set at sixteen years and five 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 licences to be auctioned. A frequency usage requirement imposes an obligation on a licence holder to offer a public electronic communications service and combines this with the obligation to provide this service in at least 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 licencing requirements without any

changes. The frequency usage requirement per licence of 10 MHz is 54 km<sup>2</sup> after two years and 536 km<sup>2</sup> after five years. For a licence 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, subsection 1, of the Telecommunications Act provides that a licence for the use of radio spectrum must be obtained from the minister. An application needs to be submitted to obtain a licence. 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 licence 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 licence 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 3.

Only one application may be submitted per applicant (Article 6, 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 licences, 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 greater risks for the implementation of the auction regulations. 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 licence for the use of radio spectrum for mobile communications as referred to in Article 1 of the Capping Regulation. 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 Telecommunications 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, including for the implementation of these regulations. 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 6, paragraph 2, of these regulations 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 11 that the applications submitted by these applicants will not be considered because the applicants have acted contrary to Article 6, 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.

Where the notarial declaration is concerned, this must be submitted completed and in correct form. Should this not be the case because, for example, it transpires that there has been unauthorised affiliation with other legal entities, rectification of the omission may be demanded. However, if this only emerges once the omission has been rectified, the application may be rejected, or the licences granted may be withdrawn, because under Section 3.18 of the Telecommunications Act, granting of the licence is contrary to the requirements set under these regulations and under Section 3.19 of the Telecommunications Act, the requirements set under these regulations are no longer being met.

The application and the information and documents that must be provided with it should, in principle, be drafted in Dutch. The only possible exception to this requirement applies to market players that are established and have their 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 (see Article 6 (5) and (7)). The data and documents referred to in Annex 1 may be drawn up in the language of those 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.

#### *Applications and correspondence using encrypted e-mail*

Applicants can choose whether to submit their application by encrypted email, regular email, registered post or in person. The public key for sending an encrypted email can be found on the webpage regarding the 3,5 GHz auction on [www.rdi.nl](http://www.rdi.nl). It is highly preferable that all confidential email communications between the applicant and the RDI are encrypted to ensure that the content remains confidential. It is therefore important that applicants create a pair of keys and add the public key to their application. A list of software packages that can be used for this can be found at, for example, <https://www.openpgp.org/software/>.

#### *Qualified electronic signature*

When sending the application or other documents that require a signature by e-mail, these documents must include a qualified electronic signature. Other such documents include, for example, the notarial statement, bank guarantee and (where applicable) any rectification of omissions. For this, the applicant or participant must have a means of signing the documents using a qualified electronic signature. This can be done by, for example, using the PDF format (PADES standard) for electronic signatures. A qualified electronic signature can be generated using a qualified tool and is based on a qualified certificate. Applicants or participants can obtain the tool and certificate from an EU-qualified provider of their choice. A recent overview of providers can be found at: <https://esignature.ec.europa.eu/efda/tl-browser/#/screen/home>. The identity of the signatory is guaranteed through the use of a qualified electronic signature based on a personal certificate. The authenticity of the signature is checked by the RDI.

Pursuant to Article 2:16 of the General Administrative Law Act, the electronic signature is valid in digital communications, provided that it is considered sufficiently reliable, given the nature and content of the message. Article 3:15a of

the Dutch Civil Code adds that the advanced electronic signature and qualified electronic signature can have the same legal standing as a wet-ink signature, provided the signature is sufficiently reliable in view of its purpose and all other circumstances. Major commercial interests are at stake in this auction. An electronic signature with a high level of confidence is therefore appropriate. For this reason, a qualified electronic signature as referred to in Article 3, paragraph 12 of Directive (EU) No. 910/2014 (eIDAS Regulation) has been chosen.

#### *Communications by electronic means*

Applicants who submit their application by (encrypted) e-mail are deemed to indicate that they can also be contacted by electronic means in the context of that application. Parties who choose to submit their application on paper may indicate in section A.1.3 of the application form that they can be contacted by electronic means and provide their public key for encrypted e-mail (section A.1.2).

#### *Omissions and rectifying omissions*

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 11 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 them in this section. Major commercial interests are at stake with any spectrum allocation. It is important that future licence 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.

#### *Security*

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 parts of the primary phase must pay a deposit of 19.61 million euros. The deposit for participating in only the second part of the primary phase is set at 2.18 million euros. The use of these deposits is to prevent non-serious bidders from participating in the auction. In addition, Article 5, 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.

#### *Scarcity*

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, subsection 2, of the Telecommunications Act, 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 licences 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 of the auction, 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<sup>20</sup> 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>21</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 based on a benchmark of auctions in Europe that have already taken place and on information from market parties regarding the spectrum's value.

##### **4.2. Auction model**

The level of the reserve price for the various lots is highly dependent upon the auction model. When preparing its recommendation, SEO was made aware of the DotEcon<sup>22</sup> 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 licences of 60 MHz will be offered and bidders will not be able to acquire more than one licences. The remaining spectrum (120 MHz, or more if not all of the licences are distributed in the first part) will be offered in the second part, in licences of one 10 MHz licence each. This not allows tenders to acquire additional spectrum but also provides tenders who require less spectrum with an opportunity to acquire spectrum (Chapter 5 provides more details regarding the auction model). 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 licences are set at a higher average price than the reserve price for each of the 10 MHz licences. This serves to implement the objective of achieving a realistic revenue during the auction.

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<sup>20</sup> SEO, *Actualisatie reserveprijs veiling 3,5 GHz* [Updating of 3.5 GHz auction reserve price], Amsterdam, the Netherlands, November 2022

<sup>21</sup> Parliamentary Papers II 2007/08, 31412, no. 3.

<sup>22</sup> DotEcon, *Advice on the auction model for the 3500 MHz band award*, London, December 2020

#### 4.3. Valuation method

The reserve price is set as a percentage of the expected value of the spectrum. SEO calculated the value of the spectrum to be auctioned using the benchmark method. The benchmark comprises the results of the 3.5 GHz auctions in 21 European countries: Germany, France, Spain, the United Kingdom, Finland, Ireland, Luxembourg, Austria, Hungary, the Czech Republic, Greece, Sweden, Slovenia, Croatia, Norway, Portugal, Slovakia and Belgium. Auction results from Italy(2017) and Bulgaria(2021) were omitted from this study as a result of exceptional market conditions and auction structures that impacted on the setting of prices during these auctions. The results of foreign auctions have been corrected for currency differences, differences in the licencing periods and price levels (CPI and PPP)<sup>23</sup>.

Results of auctions 2017 - 2020		
Country	Date	€/MHz/pop
Ireland	Mar 17	0.061
Czech Republic	Mar 17	0.042
Italy	Jun 17	0.479
United Kingdom	Apr 18	0.24
Spain	July 18	0.064
Finland	Oct 18	0.044
Germany	Nov 18	0.211
Austria	Mar 19	0.074
Hungary	Mar 20	0.116
Luxembourg	Jul 20	0.14
France	Oct 20	0.19
Czech Republic 2	Nov 20	0.07
Greece	Dec 20	0.042

Results of auctions 2021 - 2022		
Country	Date	€/MHz/pop
Sweden	Jan 21	0.048
Spain 2	Feb 21	0.058
Bulgaria	Apr 21	0.005
Slovenia	Apr 21	0.102
United Kingdom 2	Apr 21	0.045
Croatia	Aug 21	0.034
Norway	Sep 21	0.099

<sup>23</sup> These values are slightly higher for most countries, because the price level in the Netherlands is slightly higher than in most benchmark countries.

<b>Portugal</b>	Oct 21	0.11
<b>Slovakia</b>	May 22	0.041
<b>Belgium</b>	Jun 22	0.049

<b>Average</b>		0.103
<b>Median</b>		0.064

The average for the updated benchmark is €0.103 MHz/pop and the median is €0.0639 MHz/pop.

Since the median is, by definition, less sensitive to outliers and also because it is conceivable that differences in purchasing power between countries are relevant in the valuation of the frequency spectrum, the PPP-corrected median value of €0.0639/MHz/pop is used as the most plausible point estimate for the value of the spectrum in the Netherlands, in case of a licence to take effect on 1 December 2023. The sensitivity analysis demonstrates that the benchmark values calculated are sufficiently robust.

The advice regarding the reserve prices to be used took into account the delayed availability of 30 percent of the spectrum that resulted from a potentially later departure of Inmarsat from the 3.5 GHz-band than 1 December 2023. This is no longer the case, as a consequence of which the point estimate referred to of €0.0639 comprises the basis of the reserve price. The minister is also taking into account the later date of commencement of usage of the licences of 1 August 2024 instead of 1 December 2023. Therefore, an adjustment (determined linearly) of -3.9% is applied in the reserve price<sup>24</sup>.

#### 4.4. Amount of the 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 phase** of the auction, on the basis of SEO's recommendation, a rounded reserve price of €39.22m (based on 60% of €0.0639 per MHz/pop, 17.74m inhabitants and adjustment by -3.9%) applies for each 60 MHz licence. This reserve price ensures that the chances of a new entrant in this part of the auction are maintained to the greatest extent possible. SEO also

<sup>24</sup> Original licencing period from 1/12/23 to 31/12/40 inclusive was a total of 205 months. From 1/8/24, that is 8 months later. In percentage terms, that is 3.9%.

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 twelve (or more) smaller licences are on offer during the second part. There is greater scope for competition in this phase of the auction. Setting the reserve price too high would create barrier for parties to participate in this part of the auction. Therefore, in relation to the **second part of the primary phase** of the auction, on the basis of SEO's recommendation, a relatively lower rounded reserve price of €4.36m (based on 40% of €0.0639 per MHz/pop, 17.74m inhabitants and adjustment by -3.9%) applies for each 10 MHz licence.

## 5. Auction model

The model used for the current auction consists of two phases – a primary phase to distribute the available quantity 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 licences of 60 MHz in a 'simple' multiple-round clock auction including 'exit bids', whereas the second part will be used to auction (in principle) 12 single 10 MHz licences, 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>25</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 amongst participants. However, Peter Cramton (see Section 5.1.4 above) 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 allocation 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 allocation 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 deviation from its advice in this regard (that is, organising the first phase 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. DotEcon reaffirmed this in supplementary advice that was issued in February 2023, regarding the additions to the auction model as a result of the temporary protections for Inmarsat.<sup>26</sup> Though this temporary protection is no longer at issue, this affirmation remains relevant. DotEcon also stated that in its note regarding the assessment of the responses submitted during the consultation in respect of the auction regulations.

### 5.1 Reasons for choosing this model

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<sup>25</sup> <https://www.government.nl/documents/reports/2020/12/17/advice-on-the-auction-model-for-the-3500-mhz-band-award>.

<sup>26</sup> DotEcon, *3.5 GHz spectrum award design – update*, London, February 2023.

The auction model should guarantee the auction objectives. These state that the auction should result in the efficient allocation of spectrum, with the spectrum being assigned to the parties able to generate the most value from it. The auction should offer a realistic chance 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 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. This advice is adopted as-is with the exception of one element regarding sealed bids (as described in the previous section, these are not being used). DotEcon is also an expert in auction software and will therefore also develop the software that will be used for the auction. Peter Cramton, a renowned auctions expert, has provided an expert opinion and largely endorses the advice provided. He argues that although the use of a sealed-bid element in the first part of the primary phase would appear to be the appropriate model in theory, this could work 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 estimates the risk of strategic bidding by operators to prevent newcomers from acquiring spectrum in a multi-round auction to be lower than DotEcon does. DotEcon recognises 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. Given 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 use a multi-round clock auction with exit bids in the first part of the primary phase, too.

DotEcon prepared its recommendation 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>27</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 an allocation 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 the objective of a realistic chance of success for all participants and the objective of a realistic revenue, despite the fact it could be an effective allocation 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, impede the efficient allocation of the spectrum. This also impacts the information policy implemented for the same reason.

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<sup>27</sup> <https://www.acm.nl/sites/default/files/documents/frequentieverveiling-advies-2019.pdf>.

### *5.1.1 Primary phase*

DotEcon's advice is to split the available spectrum into two parts during the primary phase and offer three licences of 60 MHz during the first part and (in principle) 12 licences 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.

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 reason behind the different levels of the reserve prices during the auction. Were the spectrum to be offered all at once using small licences, 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 allocation of the spectrum, since the participants are not expressing their actual demand. It also undermines the objective of realistic returns.

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. In the second part of the primary phase, they are still able to bid for 10 MHz licences (including additional ones). 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 of participating only in the second part of the primary phase.

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

In the first part of the primary phase, three licences 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 a licence size of 60 MHz also ensures that in extreme cases, a participant that takes part in the primary phase but does not acquire a licence will still have the (theoretical) opportunity to acquire 120 MHz during the second part (which is the maximum amount that can be acquired due to the Capping Regulation of 40%). During the first part, participants are restricted to acquiring one licence only. This prevents strategic bidding for multiple licences, 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 licences in the first part, since it could mean that another participant with a high spectrum requirement would have to acquire all its licences in the second part. A multiple-round auction would also enable any newcomers to acquire spectrum. In this first part, the three participants assigning the highest value to a 60 MHz licence will win the spectrum. This first part of the auction will be subject to a restricted information policy (see

Section 5.1.3) in order to prevent strategic bidding. Participants who reduce their demand (in this case to zero) will have the option of submitting an exit bid. This ensures that spectrum will not remain unsold and contributes to an efficient allocation of the spectrum. An explanation of how to make exit bids is provided in the subsection 'Exit Bids' in section 5.2.1.1 First and second parts of the primary phase.

#### *Second part of the primary phase*

A simple multiple-round clock auction is also suitable for the second part of the primary phase. Since a large number of small licences are on offer, participants in the second part of the primary phase need relatively small amounts of spectrum and the risk of aggregation is restricted by the fact that no provisional winning bids are selected. In the second part, each licence consists of 10 MHz. The licences available are those that remain unallocated after the first part of the primary phase (but divided into licences of 10 MHz), as well as twelve 10 MHz licences. Participants who only take part in the second part of the primary phase (where they will be obliged to make a bid), will not be able to acquire more than five 10 MHz licences (a total of 50 MHz) during that 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 licences, 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. This 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 a specific place in the frequency band by means of an auction model combining a second-price sealed bid and a single auction round. This model 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 2020 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 or 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. Only the aggregate demand is revealed after each bidding round in the first and second parts of the primary phase, whereby any exit

bids are obviously not included. 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 them 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 is described in paragraph 5.1 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 licences of 60 MHz and the second of which relates to (in principle) twelve licences of 10 MHz, all to be auctioned by way of a simple multiple-round clock auction. The allocation phase is restricted to the participants that have acquired licences 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 allocate the licences amongst the participants in the auction.

###### *5.2.1.1 First and second parts 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 licences. Each participant may bid for a maximum of one licence in the first part.

The second part of the primary phase will also consist of a simple multiple-round clock auction. A minimum of twelve licences for the use of 10 MHz will be auctioned. If any of the licences from the first part of the primary phase remain unallocated, 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 impede efficient allocation. Participants who did bid for a licence during the first part will be able to acquire the maximum amount of spectrum possible within the band-specific spectrum cap. This means that a participant who acquired a licence 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

licences (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 on the 10 MHz licences 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 licences 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 licences. 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 licences, the round price will increase. Participants must submit a bid in each round. In the second part of the primary phase, the number of licences 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 licences 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 licences 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 licences over and above the licences it wishes to acquire at the applicable round price. An exit bid cannot exceed the number of licences 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. It should be noted that the making of exit bids is not obligatory.

### *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 licence. In this case, the bid must be equal to zero licences and the exit bid must comply with the price rules set out earlier. If the demand in the last round has fallen to two licences 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 licences by participants will be subject to individual restrictions Which depend on the spectrum cap, potential participation in the first part of the primary phase and any spectrum acquired in the first part of the primary phase.

For example: suppose, during the second part, a bidder wishes to acquire nine licences at a price of 100 and in that particular round, the total demand outstrips the number of licences on offer. The round price increases in the next round to 110 and the bidder reduces its demand to seven licences. The bidder could simply leave things at this but also has the option to submit one or two exit bids for one or two licences. For example, the bidder could submit an exit bid for two licences at a price of 103 and an exit bid for one licence 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 licences at a price of 110 along with an eighth licence at a price of 106, or a total of nine licences, consisting of seven licences at the round price of 110 and two licences 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 licences that is equal to the number of licences 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 the second part of the primary phase) in which they are still able to submit a (standard) bid.

#### *Evaluation of winning exit bids*

Let us suppose that twelve identical licences are being auctioned in the second part of the primary phase and the price per licence is 100 in the first round. In the example shown in Table 1, there are four bidders: bidder A, bidder B, bidder C and bidder D. Here, CB ('clock bid') indicates the bid made by a bidder in the bidding round in question, and EB ('exit bid') indicates an exit bid. The aggregate demand in the first round is 21 licences, while twelve licences are available. Since the demand outstrips the 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 licences and at the same time submits a number of exit bids. This bidder thereby signals that if this part of the auction concludes, it wishes to acquire:

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

In this case, Bidder B cannot acquire only three, two or a number of licences for the exit bid price; exit bids are always additional to the bid for the round price, which in this case is equivalent to three licences. In the event that bidder C had reduced its bid to zero licences in round 2 and bidder A had reduced its bid to three, bidders A and D would each win three licences at the round price of 110 per licence, and bidder B would win three licences at the round price of 110 per licence and three licences at a price of 100.

Table 1

<b>Round</b>	<b>Round price</b>	<b>Bidder A</b>	<b>Bidder B</b>	<b>Bidder C</b>	<b>Bidder D</b>
<b>1</b>	100	CB: 6	CB: 6	CB: 6	CB: 3
<b>2</b>	110	CB: 6	CB: 3 EB: 3 +3@100 EB: 3 +2@102 EB: 3 +1@105	CB: 6	CB: 3
<b>3</b>	120	CB: 6	CB: 1 EB: 1 +2@110	CB: 4 EB: 4 +1@115	CB: 3
<b>4</b>	130	CB: 4	CB: 1	CB: 4	CB: 0 EB: 0 +3@125

In round 4, aggregate demand for the round price has fallen to nine licences so there is now an excess supply of three licences. 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 licences at a price of 130, bidder B wins one licence at a price of 130, bidder C wins four licences at a price of 130 and bidder D wins three licences at a price of 125. This leaves no licences remain unsold. In this example, bidder D only wins its exit bids but these still constitute winning exits bids in addition to the bid for the round price. This is because bidder D bid for zero licences at the applicable round price.

Let us assume the following bids, as in Table 2: Bidder B considers the round price for round 3 too high and indicates it only wishes to acquire three licences at a price of 110. Bidder C reduced its demand to five licences in round 2 and submits an exit bid for one licence at a price of 109. Bidder D equally considers the round price too high and also submits an exit bid for three licences, however its exit bid is priced at 118.

This brings the aggregate demand for the round price in round 3 to ten licences and the oversupply to two licences. In this scenario, bidder A and bidder C win six and four licences respectively at the round price of 120.

This leaves two licences. In order to determine the winning exit bids, consideration is first given to the exit bids from the last round. In the third round, Bidders B and C only submitted an exit bid for three licences. These exit bids cannot qualify as a winning bid therefore. However, Bidder C submitted an exit bid for one additional licence in case it were to win four licences. This exit bid is therefore designated a single winning bid. This means bidder C has now acquired five licences. Next, the exit bids from the second last round are considered. In round 2, Bidder C submitted an exit bid for five licences plus one licence. As a result of having been allocated five licences due to the designation of its round 3 exit bid, the exit bid for round 2 can now also be designated a winning bid. In this example, bidder C acquires four licences at a round price of 120, one licence at the price of 115 and one licence at the price of 109. In this way, no licences remain unsold and the spectrum is acquired by the bidder who values it most.

Bidder C acquires the fifth licence at a lower price than the price that Bidder B and Bidder D were prepared to pay for one licence in round 3, but Bidders B and D only submitted exit bids on a package of three licences. Therefore, these exit bids

cannot be considered for the allocation of one or two licences. In the event bidder D acquires only one out of three licences 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 licences. If bidder C had not submitted an exit bid in round 2, one licence would have remained unsold. In the event that bidder B had submitted exit bids in round 3 of, for example, +2 @ 115 and +1 @ 116, bidder B would have acquired one licence at a price of 116 and bidder C would have acquired a fifth licence at a price of 115.

Table 2

<b>Round</b>	<b>Round price</b>	<b>Bidder A</b>	<b>Bidder B</b>	<b>Bidder C</b>	<b>Bidder D</b>
<b>1</b>	100	CB: 6	CB: 6	CB: 6	CB: 3
<b>2</b>	110	CB: 6	CB: 3 EB: 3 +3 @100 EB: 3 +2 @102 EB: 3 +1 @105	CB: 5 EB: 5 +1 @109	CB: 3
<b>3</b>	120	CB: 6	CB: 0 EB: 0 +3 @110	CB: 4 EB: 4 +1 @115	CB: 0 EB: 0 +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 licences without submitting exit bids for one or two licences. Bidders also have the option of submitting a partial exit bid. In round 3, bidder C reduces its demand from six to four licences and submits an exit bid to indicate that, in addition to these four licences, it would like to acquire one further licence at a price of 115. This means it is now only able to acquire a total of five licences, 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 39.22 million euros for a licence and at the start of the first bidding round in the second part of the primary phase, the initial round price will be 4.36 million euros for a licence. This minimum amount is the reserve price. The reserve prices are explained in Chapter 4. If the demand across all bids (with the exception of exit bids, of course) in a round exceeds the number of available licences, 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 licences (3 licences). The second part of the primary phase also comes to an end when the demand is equal to or lower than the number of available licences (in principle, 12 licences).

### *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 licences (and therefore how much spectrum) they themselves have won, and the corresponding amount owed. However, the position of those licences within the spectrum is as yet unknown. What is certain is that the spectrum will be in contiguous blocks and that any unsold licences will also form a contiguous spectrum located at the top of the frequency band. The reason for this choice is that this will either enable unsold licences to be auctioned again or enable unsold licences to be allocated for local use later, and thus added to the local part of the spectrum at the top end of the 3.5 GHz band (i.e. 3750–3800 MHz). This is consistent with the minister's decision to allocate the frequency bands 3400 MHz–3450 MHz and 3750 MHz–3800 MHz for local use. In a few years, a decision will be made on whether this band allocation can be maintained over the longer term or whether a band allocation will be chosen whereby an 80 MHz block of contiguous spectrum is made available for local use at the top of the band. In addition, this choice limits the number of possible results of the auction, which will increase the efficiency of the auction.

The allocation bidding round allows participants to submit a bid to indicate their preferred position within the 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 37). This list will show each participant the specific spectrum for which it may potentially be awarded consecutive licences. 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 41 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 licences 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 their preferred place in the band. This price rule was also applied in the multi-band auction of 2020.

#### *5.2.3 Determining the amount payable*

After the allocation bidding round, the amount payable by the participants will be determined on the basis of article 46. This amount consists of the round price or exit bid if the participant has won one licence 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 participant has won licences 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, which can be equal to zero, will be added to the total amount.

### 5.3 End of the auction

Once the additional prices have been determined and thus also the total amounts payable, the minister will inform the participants as soon as possible that the auction has concluded and notify them of the names of the successful participants, which licences they have won and the total amounts payable determined, while also providing an overview of the prices and additional prices (Article 43). The minister will publish this information no later than the first working day after the allocation bidding round. 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 participants. After the auction has concluded, the minister will proceed to award the licences in accordance with Article 45. The licences specify that the total amounts payable can be paid in two equal instalments. The first instalment is due two weeks after the award of the licences and the second instalment one year later. When applying, 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 mainly concerns situations of *force majeure*, such as a situation in which a participant's computer or internet connection fails or is not functioning adequately. The minister may then suspend the auction under Article 20. 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 bid, in so far as it has not done so during the standard duration 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. If 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 21.

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 21 of the auction regulations until they have submitted an application, although they are subject to general competition law.

Article 21, 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 provide other (potential) participants with information that may be used to modify their own conduct prior to and during the auction. Article 21, 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 licences, 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 a maximum 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>28</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 22, 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 impede the fair and efficient conduct of the auction, it will be necessary to exclude the shareholder from (further) participation. This is necessary in order to safeguard the fair and efficient conduct of the auction. In order to ensure this, the application form asks applicants to state whether they have shared the information listed in Article 21, paragraph 2, 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 21 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 relating to other topics, for example the conclusion of procedural arrangements regarding the installation of licence-free antennas or shared use of installation sites, can go ahead as normal, provided the topics listed in Article 21, 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 the topics listed in Article 21,

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<sup>28</sup> The documents providing evidence of these obligations must be submitted as part of the application.

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 21, 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. In this way, the situation is avoided wherein this information is known only to a small number of participants, which may lead to collusion and/or disadvantageous consequences where competition is concerned.

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 21, 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 22. The appropriate intervention will be determined on an individual basis, depending on the circumstances of the case. In these situations, Article 21, paragraph 4 authorises the minister to suspend the auction temporarily, for example in order to conduct further investigations. Under Article 22, 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 licences would have been different if the participant that acted contrary to Article 21 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 21. In accordance with Article 21, paragraph 4, the Minister may, as mentioned, exercise this authority in the event of what they consider to be conduct contrary to Article 21, paragraph 1, 2 or 3. In addition, the Minister may suspend the auction in accordance with Article 20, paragraph 1, in the event the Minister considers that the auction temporarily cannot continue due to special circumstances beyond the control of the Minister or the participants. In accordance with paragraph 4 of Article 20, 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 thus be necessary to order that one or more bidding rounds be repeated. since the omission of a participant may have an impact on the development of the price of the licences. 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 4 and 5. 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 13, 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 application is submitted. 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 licences or requests to change the name on a licence 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 licences. 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. The latter is necessary and proportional in order to avoid situations in which the Dutch Authority for Digital Infrastructure is obliged to monitor the application procedure continually, or changes occur in respect of affiliation between applicants.

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**

### **6.1. General**

The design of the auction regulations may be freely consulted via [www.internetconsultatie.nl](http://www.internetconsultatie.nl). From 31 March 2023 until 11 May 2023, interested parties, users and consumers were able to submit responses to a draft version of this regulation. A number of the responses did not concern the auction regulations themselves, but the revised NFP 2023, including the choice of band allocations, the interim evaluation thereof, and the desire to concretely specify areas of major economic importance. Coherence with (future) frequency awards, such as the allocation of lot-bound licences, and the potentialities of the 3800–4200 MHz band, was also a recurring theme. Responses focusing on these subjects will be incorporated where possible or necessary. Many respondents mentioned that it is important that the auction of the 3.5 GHz-band be prepared carefully, that uncertainties be removed in advance of the auction, and that the auction take place as quickly as possible. Moreover, agreement has since been reached between Inmarsat and the minister, and the NFP has been revised accordingly, as a result of which it is no longer necessary to provide instructions for temporary allocation. The following sections are therefore primarily a response to the feedback received, where this applied specifically to the design of the auction regulations.

### **6.2. Auction: model and regulations**

#### *6.2.1 Choice of auction model*

For this auction the minister commissioned external advisors to create a tailored auction design that can withstand scientific assessment (peer review). In contrast to previous auctions, in which several frequency bands were auctioned

simultaneously (multiband auctions), this auction concerns only one frequency band. This fact, along with the objectives formulated for the auction, determined the auction design that has been selected. The objectives for the auction were: (1) the efficient allocation of licences; (2) realistic opportunities for all participants, whether existing parties or potential newcomers; and (3) realistic proceeds from the auction. The auction model selected is a clock auction with exit bids, in which the spectrum is auctioned in two phases with two different lot sizes. The auction will conclude with an allocation bidding round. None of the respondents commented on these aspects.

The respondents had differing opinions regarding the auction model. One respondent has general concerns regarding the accessibility of the auction for smaller players. The minister does not share these concerns. A deliberate decision was made to enable bidding on 10 MHz licences in the second phase of the primary bidding round. By adopting this design, the minister is providing smaller players with an opportunity. It means that participants in the auction are not obliged to exclusively acquire large blocks of spectrum.

Some of the respondents express support for the auction model. Other respondents point out the risk of unsold lots. To prevent this, according to one respondent (1), a different auction model would be preferable – more specifically, a simultaneous multi-round hybrid clock auction (SMRA – as used in the previous auction). Other respondents suggest changes to the auction model. These adjustments relate to (2) the risk of unsold lots, (3) solutions for aggregation risks, (4) the relaxation of the exit bidding rules, (5) price differences, (6) the transparency rules and (7) the bid increment rules. In addition, one respondent requested (8) clarification of the process for determining winning exit bids. Other responses from the consultation refer to, amongst other things, special circumstances, the period prior to the allocation phase and the position of any spectrum remaining unsold; these responses are covered in a separate section on the auction process (6.2.2). And finally, many questions were asked about the rules for the temporary allocation of 220 MHz instead of 300 MHz. Because this temporary allocation is no longer relevant and comprises no part of these regulations, the questions received on this matter during the consultation process will be set aside.

- (1) *Alternative auction model*
- (2) *Risk of unsold lots*
- (3) *Aggregation risks*
- (4) *Rules for exit bids*

Because these four points are interrelated, they will be addressed together.

With respect to one respondent's preference for an SMR hybrid clock auction, the minister notes that each auction has its own characteristics and the design must therefore be tailored. The choice for this auction model – a clock auction with exit bids – was in this case motivated by the objective of providing realistic chances to others, including smaller bidders, who may be interested in bandwidths of more than 10 MHz but less than 60 MHz whilst supporting granular outcomes through the use of 10 MHz blocks in the second stage. The SMR hybrid clock auction model would have exposed such bidders to aggregation risks that are removed in the clock auction design.

The changes to the auction model proposed by one respondent are as follows:

- To prevent lots from being left unsold even though they were subject to bids in previous bidding rounds, bidders could be required to purchase a proportion of the licences from the bids made in the penultimate bidding round;
- As this would create aggregation risks, an additional change is required, whereby parties are given the opportunity to indicate a minimum number of frequencies in advance of the auction. This would obviate the need to require parties to purchase following earlier bids if they were below the minimum indicated. This would mitigate aggregation risks;
- The unpurchased lots would then be auctioned for the reserve price amongst the parties that had already acquired frequencies in the primary bidding phase (specifically the second part thereof). This would potentially create a de facto third stage in the primary bidding phase;
- A final change suggested concerns the possibility of reducing exit bids submitted earlier in the auction.

In their responses to the consultation, a number of respondents illustrated their positions with examples. These examples cannot be discussed in detail since this may compromise the identities of those respondents.

The minister has submitted these comments, suggestions and examples to auction advisor DotEcon<sup>29</sup>. The latter states that it is not possible to completely prevent some lots from remaining unsold and at the same time ensure that bidders run no aggregation risks whatsoever. By focusing exclusively on the risk of unsold lots, insufficient account is taken of the fact that a balance needs to be found between this factor and other auction objectives. The most important of these is the prevention of aggregation risks to auction bidders (and in particular, the smaller parties amongst them). Clock auctions (including the SMRA) in which bidders are exposed to the risk of winning only some of the lots for which they have bid may leave bidders with a quantity of unusable spectrum. In any case, the use of exit bids will to a great extent mitigate the risk of inefficient unsold lots. If, at a certain point, the price becomes too high for a bidder, it may indicate an exit price (a price between the current round price and the final round price) above which it no longer wishes to acquire the lot. Bidders themselves may determine whether they wish to make use of the option of an exit bid, and at what price point. This reduces the risk of unsold lots without introducing aggregation risks.

In assessing the responses received in the consultation, DotEcon reviewed the examples provided and concluded that they, too, would not be without risks and complications of their own. For the reasons outlined above, their specific analysis is not shared. A general notion is that conflicts with the objectives of the auction may arise in these examples. This could lead to situations in which lots would be sold at a price below the reserve price, which may give bidders an incentive to try to create a surplus supply at final round prices. This would undermine the objectives of efficient allocation and realistic returns. Situations could also arise where, in order to prevent unsold lots, one bidder could acquire a package of licences at a lower overall price than two or more bidders with smaller packages combined would be prepared to pay in combination. This would also conflict with the objectives of efficient allocation and realistic returns.

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<sup>29</sup> DotEcon, *Comments on responses second consultation*, October 2023

For these reasons, DotEcon sees no reason to change the auction model and the minister agrees with this position. The minister takes the view that the chosen auction model best satisfies all the objectives for the auction, and that the model should not be modified.

#### *(5) Price differences*

Another point raised by respondents is the undesirability of potentially paying different prices for each 10MHz block in the auction. This situation could arise firstly because in the first stage of the primary bidding phase a higher reserve price per 10 MHz block applies than in the second stage. The second route by which it could arise is through differentiated price formation in the second stage through the use of exit bids in the winning combination of bids. Some respondents argue that the price for all winners should be set at the lowest level of a winning lot.

For details on the reasons for the different reserve prices in the first and second stages of the primary bidding phase, see further paragraph 6.3. Where the possibility of differentiated pricing is concerned, DotEcon notes that price differences (albeit limited) are inherent to the use of exit bids. Neither is it a given that a uniform price for every licence and winner will lead to an efficient outcome and/or minimise the number of unsold licences. DotEcon therefore suggests that no attempt be made to set a uniform price per lot. Moreover, some of the proposals made in relation to the relaxation of exit bidding may lead to even greater price differences (whereby some lots may potentially be acquired at prices below the reserve prices).

The minister agrees with this position and points out that price differences can also occur with other auction models. For example, the 2020 multi-band auction, which was based on a different model, also resulted in limited price differences between the eventual winners.

#### *(6) Transparency rules*

Respondents indicate that the proposed level of transparency during the auction is completely inadequate to achieve an efficient spectrum distribution. The respondents rightly indicate that the minister has failed to adopt DotEcon's recommendation on disclosing the aggregate demand (after the first phase and after each bidding round in the second phase). One respondent adds that it is not only the aggregate demand that is needed for the auction to be carried out efficiently, but also information regarding the quantity and identity of the participants as well as the bids that they make. This would enable bidders to arrive at a proper valuation of the spectrum. In addition to indicating that more transparency leads to a more efficient auction, respondents indicate that the assumed risk of strategic bidding in a transparent auction has been overestimated.

They also indicate that the policy of restricted information gives an unnecessary advantage to prospective anonymous newcomers because a newcomer will have more information about the number of participants. Respondents also believe that anonymous participation in this auction, which is crucial for 5G, is counter to the national interest. Furthermore, respondents indicate that transparent spectrum

auctions are common in other European countries and that during previous auctions in the Netherlands, such as the multi-band auction in 2020, information on demand was provided and that the auction objectives that could be undermined by this have already been assured by the tailored design for this auction.

In response to these comments, the minister will amend the information policy in line with the revised recommendation from DotEcon and the position of Professor Cramton. Aggregate demand will therefore be announced after each bidding round. Disclosing the aggregate demand may give participants an idea of how much demand there is for spectrum at that price.

For the sake of completeness, the minister notes that the fact that aggregate demand was also announced in the 2020 multi-band auction (and other European auctions) has not played a role in this decision. Every auction is designed differently, and this applies not only to the auction model, but also to the information regime. The information regime is a component of the auction design as a whole, and decisions made regarding other frequency auctions do not affect decisions made with respect to this auction or future auctions.

The identities of the participants and the individual bids made in each bidding round will not be disclosed, however. Information about individual bids is typically not disclosed in an auction (with the notable exception of German frequency auctions), since this information is not necessary for the auction to proceed efficiently or to achieve an efficient distribution. It may be true that the value that individual participants place on different quantities of spectrum may depend on the identities of other winners and the amounts of spectrum they acquire. However, this is exactly the type of bidding behaviour that needs to be prevented. The auction is designed to result in an efficient distribution across the market rather than the outcome that is most efficient for individual participants. Participants must in fact concentrate on their own spectrum needs and not on their needs in light of the allocation of spectrum amongst the various other participants.

#### *(7) Bid increments*

One respondent requests that the bid increments be set at 2% at the start of the auction. Another respondent suggests adding a provision to the regulations that the price is a maximum of 5% compared to the price of the preceding round. DotEcon, by contrast, indicates that the bid increment can be set at 10%.

The minister has not acted on these suggestions. The auctioneer's flexibility in setting price increments in the context of how the auction develops will not be restricted in advance, because the auctioneer needs to be able to respond to current circumstances. The price increases for the first day of the auction will be made known in the letter sent to participants to inform them that they have been admitted as participants in the auction. Prior to each subsequent auction day, the auctioneer will announce the maximum price increase for that day. In order to ensure that the auctioneer can respond to circumstances during the auction, the price increases for the day can be adjusted downwards if the auctioneer deems this necessary.

#### *(8) The winning combinations of exit bids*

One respondent requests clarification of the system used to determine the winning combinations of exit bids.

If, following a bidding round, the total demand (at the price in that round) is lower than the supply, the exit bids will be considered in order to allocate the remaining lots and prevent unsold lots (insofar as possible). An exit bid will only be considered if the bidder has already been allocated the number of lots specified in the bidding round in which the exit bid was placed (i.e. each winning exit bid needs to be additional to the number of lots that have already been allocated to a bidder).

As set out in Article 35, in principle, the winning exit bids are chosen by selecting those bids that minimise the number of non-allocated lots. Where a number of such combinations exists, the combination of exit bids with the highest value is chosen. Should there be several combinations with an identical highest value, one of these will be selected randomly.

Imagine, for example, that 12 licences such as are shown in the table are bid for, whereby CB ('clock bid') indicates the bid made by a bidder in the bidding round in question, and EB ('exit bid') indicates an exit bid:

Round	Price	Bidder A	Bidder B	Bidder C	Total demand
1	100	CB: 6	CB: 6	CB: 6	18
2	110	CB: 4 EB: 4 + 2@105	CB: 6	CB: 6	16
3	120	CB: 4	CB: 6	CB: 3 EB: 3 + 3@119	13
4	130	CB: 3 EB: 3 + 1@126	CB: 3 EB: 3 + 3@120 EB: 3 + 2@125 EB: 3 + 1@128	CB: 3	9

In round 4, total demand falls below supply and three of the licences that do not fall under the final clock demand may be allocated via exit bids. There are different exit bid combinations possible for these three lots:

- Bidder A's exit bid from round 4 together with its exit bid from round 2, with a total value of  $1 \cdot 126 + 2 \cdot 105 = 336$ ;
- Bidder B's exit bid on three licences from round 4, with a total value of  $3 \cdot 120 = 360$ ;
- Bidder C's exit bid on three licences from round 3, with a total value of  $3 \cdot 119 = 357$ ;
- Bidder A's exit bid on one licence from round 4, in combination with Bidder B's exit bid for two licences from round 4, with a total value of  $126 + 2 \cdot 125 = 376$ .

Of these combinations, the last has the highest value and will be selected.

### 6.2.2 Aspects of the auction process

#### *Trial auction*

One respondent would like to know when the trial auction will take place.

The trial auction will take place some time prior to the actual auction. The exact schedule and date of the trial auction are as of yet unknown. There will be further communication with the auction participants in this regard.

#### *Primary phase of auction*

One respondent requests that one working day be scheduled between the first and second stages of the primary phase.

The second stage will in any case not start earlier than the working day following the completion of the first stage. The scheduling of the start of the second stage depends on several factors, such as the exact time on the day on which the first stage is completed and whether there are participants who are only participating in the second stage. With a view to the possibility of being able to respond to the actual circumstances of that moment, a decision will be made at the end of the first stage as to when the second stage of the primary phase will start.

#### *Special circumstances*

One respondent suggests allowing more time to report special circumstances during the auction. The current period of 10 minutes is too short in the view of this respondent, and they suggest allowing 30 minutes for this.

Participants must report special circumstances or technical issues to the minister promptly by telephone, and in any event within 10 minutes of the end of a bidding round or extended bidding round. During this period, the auctioneer will wait to see whether any bidders submit such a report. Extending the period for reporting special circumstances or technical problems to 30 minutes after each bidding round would make the auction unnecessarily long. This suggestion has therefore not been adopted. If a problem means that a bidder has not been able to submit their bid on time, this bidder will be granted the right to an extension (a maximum of three extension rights per bidder for both the first and second stages of the primary phase).

#### *Period prior to allocation phase*

One respondent requests that the number of working days between the end of the primary phase and the allocation phase be reduced to two.

Article 40, paragraph 2, of the auction regulations specifies that the allocation phase will not commence any sooner than three working days after the notification referred to in Article 36. During this period, the winners of the primary phase can decide how much they value a specific spot in the frequency band. The length of this period has not been changed. The minister takes the view that participants should have been able to form a view about the relative desirability of different placements in the band. The minister therefore sees a period of three days as reasonable for this purpose of determining how much value bidders place on specific placement in the frequency band.

#### *Position of unsold spectrum*

One respondent presents the view that it is undesirable that radio spectrum of unallocated licences must be bounded at the upper limit of the band, and sees a potential advantage in bounding any unallocated spectrum at both lower and upper limits. Were that to be the case, licence holders would be inconvenienced as

little as possible by network failures. In addition, according to this respondent, it appears that a shift is herewith being anticipated, or that this unallocated spectrum is being assigned in advance to lot-bound networks. Unallocated spectrum should never be the factor that determines where the remaining spectrum is positioned. If it is ultimately decided to set out the position of the unallocated radio spectrum, then this in fact will need to be contiguous to the lower limit of the national mobile spectrum. This will ensure that, in case of any shift, the lower limit of the national mobile spectrum will shift as little as possible below 3450 MHz.

The reason for this choice is that this will either enable unsold radio spectrum to be auctioned again as contiguous block or enable unsold radio spectrum to be allocated for local use and thus added to the local part of the spectrum at the top end of the 3.5 GHz band (i.e. 3750–3800 MHz). This is consistent with the minister's decision to allocate the frequency bands 3400 MHz–3450 MHz and 3750 MHz–3800 MHz for lot-bound networks. In a few years, a decision will be made on whether this band allocation can be maintained over the longer term or whether a band allocation will be chosen whereby an 80 MHz block of contiguous spectrum is made available for local use at the top of the band. See also section 6.10 in this regard. In addition, this choice limits the number of possible results of the auction, which will increase the efficiency of the auction. The proposal to bound unsold radio spectrum with the lower limit of the national mobile spectrum because, by doing so, the lower limit of the national mobile spectrum shifts as little as possible, is not accepted, because even where such unsold radio spectrum is placed on the upper side and added to the local part of the spectrum, the lower limit of the national mobile spectrum will not shift, or will shift as little as possible below 3450 MHz.

#### *Announcement of the results of the auction*

One respondent asks about the announcement of the results of the auction once it has been completed. This respondent asks how much time will elapse between the moment when the winning participants are informed and the moment when the results are announced publicly (Article 44). The respondent asks whether the bids of all the participants in the allocation phase can also be announced on the following working day.

The minister will announce the auction results publicly no later than the first working day after the end of the allocation phase. The same applies to information about the additional prices; this has been added to the relevant article in this final version of the regulations.

As is the case with the bids in the primary phase, the bids of all participants in the allocation phase will be announced within one week of the end of the auction, in accordance with Article 44, paragraph 2.

#### *Supervisory fees and the Dutch Authority for Digital Infrastructure's remuneration regulations.*

One respondent had a comment on the supervisory fees charged to the new licence holders following the auction under the Dutch Authority for Digital Infrastructure's remuneration regulations for 2024. Article 50 concerns a change to these Remuneration Regulations. The 3.5 GHz radio spectrum will be auctioned pursuant to these auction regulations. The 3.5 GHz licences are to be granted as

soon as possible after the auction. The quantity of auctionable radio spectrum to be issued via licencing is a maximum of 300 unpaired MHz in total. For the Dutch Authority for Digital Infrastructure, this would represent an increase in 2024 in the total proceeds from subcategory I.A.5, while the work involved would not increase by the same proportion. For that reason, the Remuneration Regulations are being changed by way of these regulations. Due to this change in the supervisory fees, the annual remuneration per unpaired MHz in that subcategory is reduced to the sum of € 4,300.00. Where the current, already effective licences in this subcategory are concerned, the present supervisory fees for the year 2024, which were set and published at the end of 2023, will be charged to the present holders of these licences at the start of 2024. The rates in this subcategory will be redetermined for the year 2025, whereby the multi-year perspective of this subcategory will be evaluated.

### 6.3. Reserve prices

A number of respondents made comments regarding reserve prices. These comments were submitted to SEO, whose recommendations lay at the basis of the reserve prices that were included in the auction regulations following the consultation phase. The minister gave due consideration to the SEO's opinion on the comments

The respondents indicated that the reserve prices must be set as low as possible, because a high reserve price increases the risk of unsold spectrum and thereby (in the opinion of these respondents), of an inefficient auction. The respondents also find the reserve price too high, because the price is determined on the basis of auction results of other countries instead of their respective reserve prices.

Avoidance of unsold spectrum is not the only objective of setting a reserve price. A well balanced reserve price ensures that the chance of tacit collusion is minimised, bidders who are not serious are excluded, the auction does not take too long, and a minimum return is realised. The reserve prices are set as a percentage of the estimated value of the spectrum and the estimated value is determined on the basis of the auction results from other (comparable) countries. All of these elements are considered in the determination of the percentage. In order to determine an adequate reserve price for realising the various objectives described above, an estimate of the value of the spectrum to be auctioned is firstly required. The reserve price is then determined as a percentage of the median estimated value of the spectrum. On the basis of thorough research on the part of SEO, the percentages 60% and 40% have been determined. The use of the auction results as a benchmark in estimating the value of the spectrum does not therefore have the effect of driving up the reserve price.

The respondents indicate that they see sense in the benchmarking method used, but they also find that the auctions in Germany, France and the United Kingdom are not representative of the Dutch situation, and should therefore be removed from the benchmark, also noting that, though indeed representative, Switzerland, Lithuania and Estonia are not included in the benchmark.

Though the auctions in Germany, France and the United Kingdom had less than 300 MHz to allocate between the market operators, this does not mean that the results of their auctions are not representative for the estimated value of the

spectrum. The average value of the spectrum is related not only to the quantity of spectrum available, but also to the number of bidders and winners in the auction. The results are therefore clearly relevant to the estimate. The auctions in Switzerland, Lithuania and Estonia took place after SEO's research period (March 2017 to June 2022) and were for this reason left out of the 2023 update. This in fact also applies to the Belgian auction, where the auction results turned out to be very high.

The respondents were also critical of the use of the relative price ratio between 700 and/or 2100 MHz and the 3.5 GHz frequencies. They argue that the reserve price for the 700 MHz frequencies was too high, as a result of which the spectrum was too expensive, and that therefore the relative price ratio does not present an accurate reflection of the estimated value.

The relative benchmark is only used to test the robustness of the results of the international benchmark. SEO is therefore not modifying the report on this basis. SEO also states that all of the 700 MHz spectrum has been sold, and that the fact that the auction results were not much higher than the reserve prices does not imply that the reserve price was set too high.

The respondents add that, in the determination of the reserve prices, account should be taken of the restrictions on use that are at present being proposed in connection with existing local use until 2026.

In the setting of the reserve prices, no reduction was made for price-reducing circumstances such as restrictions on use in connection with existing local use until 2026. This is due to the fact that these restrictions are known and not shrouded in uncertainty, and may therefore be taken for granted by auction participants in their individual valuations of the spectrum in general, and specifically of the range to which these restrictions apply. The allocation bidding round offers the possibility of doing so.

The minister is however adjusting the reserve price slightly downwards due to a delay in the scheduled commencement of the usage of the entire spectrum. In its report of February 2023, SEO was working on the assumption that the term of validity of the licences would commence from 1 December 2023. However, this is no longer realistic. The auctioning of the frequencies has now been rescheduled to Q2/start of Q3 2024. This means that commencement of use is now planned for 1 August 2024. The reserve price is to be adjusted downwards in proportion to the number of months' delay. The length of the licence was originally 17 years and 1 month, but for each month of delay, the reserve price is being adjusted downwards by 0.488% (or €0.0003/MHz/pop, on the basis of the value of the spectrum calculated, of €0.0639/MHz/pop). On the assumption that there will be a delay of 8 months, and on the basis of a population of 17.74 million inhabitants for the Netherlands, the reserve price for a 60 MHz lot is set to a rounded figure of €39.22 million euros and a lot of 10 MHz to a rounded figure of €4.36 million euros.

Number of months delay from 1-12-2023	% delay	Price MHz/pop	Reserve price 60 MHz lot	Reserve price 10 MHz lot
0	0	€0.0639	€40.7m	€4.53m
1	0.48%	€0.0636	€40.61m	€4.51m

2	0.97%	€0.0633	€40.41m	€4.49m
3	1.46%	€0.063	€40.21m	€4.47m
4	1.95%	€0.0627	€40.01m	€4.45m
5	2.39%	€0.0624	€39.81m	€4.42m
6	2.93%	€0.0621	€39.61m	€4.4m
7	3.41%	€0.0618	€39.42m	€4.38m
8	3.9%	€0.0615	€39.22m	€4.36m
9	4.39%	€0.0612	€39.02m	€4.34m
10	4.88%	€0.0609	€38.82m	€4.31m

The responses of respondents concerning the uncertainty regarding the departure of Inmarsat and the consequences thereof for the reserve price are not being considered, given the agreement the minister has reached with Inmarsat concerning its migration to Greece (see Section 6.7 in relation to this).

#### 6.4. Capping Regulation

A number of respondents made remarks concerning the changes to the Capping Regulation for mobile communication frequencies 2020 (hereinafter to be referred to as: the Capping Regulation) made in the draft regulations.

Firstly, a respondent drew attention to the possible consequences for active network sharing of Article 3, last dash, section 3, of the current Capping Regulation. More specifically, according to this respondent, this part of the definition of "uses of radio spectrum" may potentially hinder the future possibilities for providers to switch to active network sharing. This respondent has also made a suggestion for resolving this.

The minister emphasises that she has no intention of rendering active sharing, whereby licence holders make use of each others active network infrastructure (or a part thereof), impossible by means of the Capping Regulation. In order to remove any uncertainty in this regard, the minister has taken on this respondent's suggestion. For the further details of this change to the Capping Regulation, please refer to the explanatory notes to Article 49, paragraph 1, of these regulations.

In addition, one respondent stated that though they were strongly in favour of the change to Article 3, paragraph e of the Capping Regulation, the respondent asked themselves whether this change is sufficient to achieve the minister's intended objective, and suggested that similar changes be made in the other sections of Article 3. The minister studied this respondent's suggestion, evaluating that it was unnecessary.

#### 6.5. Payment system

A number of respondents provided a response with regard to the payment system. The current payment system consisting of two instalments, whereby half of the amount owed only has to be paid after a year, is supported by several respondents.

#### 6.6. Application procedure

#### *Method for application submission*

One respondent asks whether a hybrid form of application is also possible, i.e. an application that is submitted partly physically (by post or personal delivery) and partly digitally (by encrypted email).

Submission of the application in part by post or personal delivery and in part digitally (by encrypted email) is indeed permitted.

#### *Provision of security*

One respondent posed questions about the provision of security for participation in the auction in relation to the reserve price. This respondent suggested increasing the amount of the security to the reserve price of the spectrum that may be acquired in the first part of the primary bidding round.

Following further evaluation of the amount of the security deposit for the first and second parts of the primary phase, it was decided not to modify the security deposit but, where the applicant wishes to only participate in the second part of the primary phase, to reduce it, setting it at €2,180,000. This concerns half of the reserve price of a 10 MHz licence, in accordance with the system in place for setting the amount of the deposit for the first part of the primary phase in which the 60 MHz licences are issued. This ties in with the possibility of paying the winning bid in two instalments, including for any party that is to acquire only 10 MHz in the auction.

#### *Application form*

A respondent asks about the necessity of the declaration referred to in section A.4.8 of the application form, and asks for clarification thereof, because this appears to be a duplicate of the declaration in A.3.2 of the application form.

Section A.4.8 concerns the confidentiality of the information referred to in Article 21, paragraph 1, subsection (b) of the Regulations. Under Article 21, paragraph 2, of the Regulations, the applicant may depart from such confidentiality where they are obliged to do so. Where such an obligation exists, the applicant must describe the basis of this obligation under section A.4.8 or, where the obligation has not been set down in writing, must describe this obligation by means of a statement. This is something different to the declaration in section A.3.2 that concerns Article 3 of the Capping Regulation for mobile communication frequencies 2020. There is therefore no duplication.

#### *Declaration by civil-law notary*

One consultation response concerns section A.3.2, regarding the civil-law notary's having to declare, without reservation and to the best of their ability, to having verified that no legal entities whatsoever with any affiliation to the applicant will submit an application. For the civil-law notary, this would mean a declaration applicable to the future. Following further evaluation of this, it was decided to split section A.3.2 into a declaration in respect of the current situation and a declaration applicable to the future. In respect of the future, the civil-law notary is not obliged to make a declaration. This part has been removed from the summing up in the notarial declaration.

#### *Affiliation*

According to one respondent, the provision of affiliated legal entities in the direct line upwards should be considered sufficient instead of the provision of the

organisation chart referred to under A.3.1 of the application form, because the information regarding subsidiaries and sister companies is not necessary to establish whether applicants are affiliated with one another. Moreover, another respondent does not see the need for providing an organisation chart when applicants are also required to submit the declarations referred to under A.3.2. This would result in a considerable administrative burden.

The minister does not understand the logic of this view. It is incumbent on the minister to gain insight into the businesses that may possibly be granted licences. Moreover, it follows from the affiliation criterion described in the Capping Regulation for mobile communication frequencies 2020 that, apart from affiliation in the direct line upwards, affiliation between legal entities may also take other forms, e.g. via sister companies and subsidiaries. The minister therefore deems it relevant and not disproportionate that such companies also be included in the organisation chart. Experience teaches us that the parties that generally submit applications to participate in auctions for such licences are professional parties who often already have an overview of the company structure. The minister therefore does not understand why this should result in a heavy administrative burden.

One respondent also indicated that, through the introduction of the declaration in section A.3.2 of the application form, no further necessity exists for the notification of changes in the overview of the legal entities affiliated to the applicant under Article 7 of the Regulations, because it has already been declared under A.3.2 that, even after the application has been submitted, no unauthorised affiliation will another applicant will arise.

The minister also wishes to evaluate whether any unauthorised affiliations arise with other legal entities due to the changes. As described above, the declaration in A.3.2 is being split into a declaration for the current situation and a declaration applicable to the future. The civil-law notary will make a declaration regarding the present situation. This means that the civil-law notary will also have carried out an assessment in this regard. The civil-law notary will not make any declaration with regard to the future situation once potential changes have been made. The minister will make the assessment in question themselves. Moreover, the notification of changes under Article 7 of the Regulations involves more aspects than those mentioned here. It has become clear from other auctions that the notification of such changes is important.

#### 6.7. Position of Inmarsat

Several concerned responses requested that attention be given to the position of Inmarsat, including the moment at which Inmarsat would have to leave the 3.5 GHz band, the extent to which that date was realistic, whether the possibilities of co-existence had been sufficiently investigated, what the need for a right to return and the later departure of Inmarsat would mean for the reserve price, and whether account had been taken of a transitional period.

Since the consultation, the minister and Inmarsat have reached a settlement agreement, whereby it has been agreed that Inmarsat will migrate its activities to Greece by 1 February 2024. All uncertainties concerning the position of Inmarsat have been removed as a result of the agreement reached, so that the various responses concerning Inmarsat will not be dealt with any further. It is also noted

that, through the NFP Amendment 2024, the protection that Inmarsat can derive from the NFP ceases to apply from 1 February 2024.

#### 6.8. Migration of local licence holders

A number of respondents demanded that the migration of current local licence holders who possess frequency rights in the part of the 3.5 GHz frequency band that is to be designated national mobile communication from 1 December 2023 be carried out carefully and in a timely manner. They expect the minister to take an actively encouraging and facilitating stance, in order to ensure that any local licence holders to be migrated have completed their migration and/or synchronisation in a timely manner. Moreover, they ask the minister that auction participants be provided with all relevant – and continually updated – information regarding potential delays to migrations in a timely manner, so that they can make an optimal estimation of the potential impact on the licences on which they bid. They also find it necessary to be informed as well as possible of the technical parameters of the present local networks prior to the auction.

In advance of this auction, the Dutch Authority for Digital Infrastructure was continually and actively in discussion with all local licence holders, who were to have ceased using frequency in the section of the 3.5 GHz frequency band up for auction by 30 November 2023 at the latest. And indeed, the majority of these licence holders did in fact complete their migration on time. Three of the migrating licence holders informed the Dutch Authority for Digital Infrastructure of slight delays, but the minister expects, on the basis of the most recent information that they have provided, they will complete their migrations by the first quarter of 2024. The Dutch Authority for Digital Infrastructure will continue to monitor these parties for as long as is necessary. Should it transpire that the migration of these parties requires more time, and a potential effect looms at the moment use of the spectrum being auctioned commences, this will be actively and clearly communicated in a timely manner, so that auction participants can make allowance for it in their bidding behaviour.

#### 6.9. Tradeability

A number of respondents remark that the parties that acquire spectrum in the auction may set conditions for the rental of spectrum, as a result of which this can in practice lead to a situation in which only large (or commercially strong) parties are eligible for this. Because of this, these respondents want to see the possibilities for rental limited.

The minister has not adopted this suggestion. Section 3.20(a) of the Telecommunications Act sets the conditions and procedure for the rental of radio spectrum. The basic legal principle is that radio spectrum may be rented (provided the minister has given permission for this), unless – put briefly – it concerns licence categories granted free of charge pursuant to an order in council, or certain radio station licences. The licences for national mobile communication in the 3.5 GHz band will not be granted free of charge. That means that the rental of these licences in part or in their entirety cannot be categorically excluded. Moreover, the minister does not possess further instruments for the *advance* limitation of the possibility of rental. However, pursuant to Section 3.20(a) of the Telecommunications Act, licence holders do need the minister's permission to rent out their radio spectrum. The minister may refuse to give such permission on a

limited number of grounds. It is also worth noting that the minister sees no fundamental reason to limit the possibilities of rental.

#### 6.10. Other aspects

##### *Choice of band allocation*

A number of respondents remarked on the band allocation chosen. They found this insufficiently suited to the further development of private local networks. They ask that the band allocation be reconsidered. In addition, one respondent proposed designating 80 MHz primarily for the Inmarsat feeder links while reserving this radio spectrum secondarily for a national newcomer, under specific licencing conditions.

Reconsideration of the band allocation is not up for discussion at this juncture. That is because this subject is not related to the auction regulations, but was determined under the National Frequencyplan of 2014. In addition, in the explanatory notes to the revised NFP 2023, a detailed description is given as to why the proposal to primarily designate 80 MHz for the Inmarsat feeder links and secondarily reserve this radio spectrum for a national newcomer cannot be adopted. In essence, ACM concluded in 2019 that the situation in the market for mobile communication reflects effective competition, and that it is therefore not deemed necessary to reserve spectrum for new market players. Departure from this recommendation is only possible if there are valid, compelling reasons for this. However, there are no such reasons. There is therefore no basis for reserving spectrum for a national newcomer. Naturally, this respondent and other potentially interested parties also have the possibility of participating in the 3.5 GHz band auction.

##### *Future 'shift'*

A number of respondents made remarks concerning the possibility of a future 'shift' as a consequence of evaluation of the chosen band allocation and the uncertainty that this involves in respect of investment.

In the explanatory notes to the revised NFP 2023, the minister considered that, in a few years, a reassessment will be made as to whether the choice of the 2x50 MHz band allocation for local use (3400–3450 MHz and 3750–3800 MHz) on either side of the 300 MHz to be auctioned can be maintained in the long term. In that case, at that time in the future, the minister will pose the question of whether a change to the band allocation by means of a new decision to change the NFP is necessary and practically possible, and whether it serves any purpose. It is thereby of course also possible that the minister will conclude that a change to the band allocation is not appropriate, and that the band allocation will therefore remain unchanged. When an interim evaluation is made of the band allocation, the minister will once again weigh up the different interests of multinationals and local users. The potential modification of the band plan has very far-reaching consequences, and therefore, a new but above all careful weighing will be made of the social costs and benefits of the various interests of national mobile providers and those of (both existing and future) local licence holders. The explanatory notes to the revised NFP 2023 state that it would make sense to combine any analysis made thereof with the preparations for the subsequent (2030) multi-band auction, which will commence in around 2026. Should a shifting down of 30 MHz for the nationally allocated spectrum in the 3.5 GHz-band be decided upon in 2026, the obvious thing to do would be to effect this shift in 2030.

### *Radiation and health*

There were a large number of responses from private individuals who are concerned about the potential risks to health from the electromagnetic fields (EMFs) of antennas. Here, amongst other things, it was stated that the effects to health and on flora and fauna have not been sufficiently investigated.

Since the advent of mobile networks, much research has been carried out into the potential effects of electromagnetic fields on health. Scientific advisory bodies, such as the World Health Organisation (WHO) and the Health Council of the Netherlands (Gezondheidsraad) conclude that, in case of values lower than the ICNIRP exposure limits, no evidence has been found of negative effects to health resulting from exposure to EMFs. These exposure limits have been drawn up by the scientific institute, International Commission on Non-Ionising Radiation Protection (ICNIRP). ICNIRP is an international commission recognised by the WHO whose primary focus is protection against the potential health effects of non-ionising radiation, on the basis of all available scientific research into the widest number of potential health effects imaginable. The only demonstrated effect on health is the warming up of the body in case of exposure above the limits. The limits provide plenty of protection against such potential damage due to warming up of the body. The exposure limits are also applied in meeting the product safety requirements for equipment traded on the market<sup>30</sup>. The ICNIRP standards have been recommended by the Council of the European Union to its member states (recommendation 1999/519/EC). As is the case with many other EU member states, the Netherlands applies these exposure limits.

ICNIRP regularly evaluates the body of knowledge in the area of electromagnetic fields and health. The limits were confirmed and specified in March 2020 on the basis of the state of knowledge at that time<sup>31</sup>. ICNIRP's very extensive meta-analysis shows once again that there is no scientific basis for concluding that damage occurs to health as a result of exposure to electromagnetic fields with field strengths below the limits. In reaching this conclusion, ICNIRP took into account the scientific quality and uncertainty of the research it evaluated.

In accordance with the recommendations of the Health Council of the Netherlands' report of 2 September 2020,<sup>32</sup> the government will continue to pursue its efforts with regard to electromagnetic field research, and to monitor the latest scientific outcomes. In this way, 30 million euros has been made available via the European Commission's Horizon Europe programme for additional research into electromagnetic fields and health.

The Dutch Authority for Digital Infrastructure is responsible for monitoring the exposure limits, measuring magnetic field strength throughout the country in order to check whether these limits are being exceeded. There are different limits for the various frequencies used in telecommunication applications. The available

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<sup>30</sup> Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC (OJEU 2014, L 153).

<sup>31</sup> <https://www.icnirp.org/en/rf-faq/index.html>.

<sup>32</sup>

<https://www.gezondheidsraad.nl/documenten/adviezen/2020/09/02/5g-en-gezondheid>.

measurements are publicly accessible via the antenna register<sup>33</sup>. The measurements show that the ICNIRP exposure limits are not exceeded in the Netherlands. Information about electromagnetic fields is made accessible to citizens, employees and local governments via, inter alia, the Antenna Bureau (Antennebureau)<sup>34</sup> and the EMF and Health Knowledge Platform (Kennisplatform EMV en Gezondheid)<sup>35</sup>. RIVM, TNO, DNV GL, GGD GHOR Netherlands, the Dutch Authority for Digital Infrastructure and ZonMw collaborate in the Knowledge Platform. Those with questions can contact these institutions. A communication toolkit has also been developed for local governments<sup>36</sup>.

A number of responses concern electrosensitivity. The symptoms of those who are electrosensitive can be serious and may influence quality of life. The science around the cause of the symptoms is not clear. In 2005, the WHO established that no causal link has been demonstrated between the health problems specified in cases of electrosensitivity and exposure to electromagnetic fields in the living environment<sup>37</sup>.

## 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 licence 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;

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<sup>33</sup> <https://www.antenneregister.nl/>.

<sup>34</sup> <https://www.antennebureau.nl/>.

<sup>35</sup> <https://www.kennisplatform.nl/>.

<sup>36</sup> <https://www.overalsnelinternet.nl/>.

<sup>37</sup> <https://www.who.int/teams/environment-climate-change-and-health/radiation-and-health/non-ionizing/el-hsensitivity>.

- 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. This 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 unknown how many participants will acquire licences. 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 at a standard hourly rate of 77 euros per hour. 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.<sup>38</sup>

## **8. Entry into force**

These regulations – with the exception of Article 50 – will take effect on the day after the publication date of the Government Gazette in which they are published. This represents a deviation from the policy of fixed dates for changes and the minimum introduction date. This policy involves ministerial regulations taking effect on 1 January, 1 April, 1 July or 1 October, having been announced at least two months prior to their taking effect. This deviation from this policy is necessary in light of Article 54, paragraph 1, subsection (a) of the Telecommunications Code, on the basis of which the use of sufficiently large blocks in the band between 3.4 and 3.8 GHz had to be reorganised and permitted commencing on 31 December 2020 at the latest. These regulations are necessary for this, and the aforementioned date has now passed. Article 50 enters into force on 1 July 2024. The entry into force of Article 50 is thus in accordance with the aforementioned policy.

## **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*

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<sup>38</sup> The dossier was submitted to the Advisory Board on Regulatory Burden. The Board has decided not to issue any formal recommendations because these regulations entail only a small amount of regulatory burden, and because the regulatory burden that exists has been made relatively transparent.

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 licences. For completeness' sake, it is noted that a participant who has submitted a bid for 0 licences 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 licences 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 licence. Please see paragraph 5 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 39.22 million euros. This amount is the same as the reserve price. Please see paragraph 4 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 licence to 0 licences), it also has the option to submit an exit bid. These exit bids will be used to allocate any remaining licences 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 28, paragraphs 3–6. It is not mandatory to submit an exit bid. Please see paragraph 5 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 licence, 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 licences (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 licences 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 licences 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 actively took part in the final bidding round will therefore win a licence 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 licences offered. In that case, the total demand could amount to 0, 1 or 2 licences. 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 licences unallocated in view of the fact that the total demand in the final bidding round was lower than the number of licences offered. The remaining licences will be allocated 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 licences 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 licences. For completeness' sake, it is noted that a participant who has submitted a bid for 0 licences 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 licences 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 4.36 million euros. This amount is the same as the reserve price. Please see paragraph 4 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 licences in the second part of the primary phase. Please see paragraph 5 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 licence 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) licence. 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 allocate any remaining licences 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 5 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 licences and a price per licence. Under Article 32, paragraph 9, subsection (a), the number of licences specified in an exit bid cannot be higher than the number of licences 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 licences, 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 licences and an exit bid for 1 licence.

Article 32, paragraph 9, subsection (b) subsequently stipulates that the price per licence 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 licence 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 licence in an exit bid is equal to or lower than the price it offers for a lower number of licences in another exit bid. Let's assume that the participant reduces its bid from 5 to 3 licences in a bidding round and decides to submit two exit bids – 1 exit bid for 2 licences and 1 exit bid for 1 licence. In this case, the price per licence in the exit bid for 2 licences can be the same as, but never higher than the price per licence in the exit bid for 1 licence.

#### *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 licences (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 licences 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 licences 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 licences 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 licences 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 licences unallocated in view of the fact that the total demand in the final bidding round was lower than the number of licences offered. The remaining licences will be allocated on the basis of previously submitted exit bids. As set out in paragraph 5 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 licences remaining unallocated will be designated the winning bids in relation to the number of licences 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 licences 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 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 licences unallocated. 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 licences unallocated and which would, down to a euro, also generate precisely the same value. In such exceptional cases, Article 35, paragraph 6 stipulates that lots will be drawn between the relevant combinations. The winning bids will then be the exit bids constituting the combination that was drawn by lots. The lots will be drawing using the auction system.

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

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. Article 9 is applicable to the deposits and bank guarantees of non-winning participants and of participants who were excluded from participating (further) 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.

#### **Section 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 1 in the general section of these explanatory notes.

In addition, the first paragraph, subsection (c), contains an improvement of subsection 3 of the definition of 'use of radio spectrum'. Through this change, the minister intends to prevent this definition – in combination with Article 3 of the Capping Regulation – from hindering 'active network sharing' (see also Section 6.4 of the general part of these explanatory notes regarding this). Concretely, by way of the first paragraph, subsection (c), a phrase is added to the third subsection of this definition, as a result of which there will only be an 'authorisation acquired by other means to use radio spectrum' if this radio spectrum is used in this context for *its own* electronic communication services (i.e. those of the legal entity that, by using *its own* antenna or that of an affiliated legal entity, transmits the signal).

#### *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 whose total quantity of radio spectrum used is

calculated, e.g. for an application in the context of an allocation or to establish whether a legal entity is using excessive radio spectrum.

A fifth subsection is added to Article 3, subsection (a) of the Capping Regulation by means of paragraph 2, subsection (a) of these regulations. By means of this addition, in the calculation of the quantity of frequency used by a legal entity, the frequency use of legal entities in respect of which the legal entity of which the quantity of radio spectrum is calculated possessing one or more shares with special rights of control in relation to the legal person pursuant to its articles of association is also added. Examples of this include the right to make a binding proposal for the appointment of a director or member of the Supervisory Board, or having a veto right in respect of some of that legal entity's decisions.

The second paragraph, subsection (b) adds a phrase to subsection (d) of Article 3 of the Capping Regulation. Through this addition, only legal entities in the Netherlands have be accounted for in this context, as well as legal entities outside the Netherlands, to the extent to which such legal entities outside the Netherlands use radio spectrum directly or indirectly in the Netherlands.

Paragraph 2, subsection (c) entails an amendment to Article 3, subsection (e) of the Capping Regulation. In summary, Article 3, subsection (e) of the Capping Regulation relates to legal entities that, together with the legal entity the quantity of whose frequency use is calculated, jointly exercise certain rights and powers over a third legal entity (for example, a joint venture). Article 49, paragraph 2 adds that this only pertains to joint rights and powers over 'third legal entities' *that directly or indirectly use radio spectrum in the Netherlands*. 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 2, subsection (d) entails an improvement to Article 3, subsection (g) of the Capping Regulation. On the basis of Article 3, subsection (g) of the Capping Regulation, in the calculation of the frequency use of a legal entity, the frequency use of other legal entities over which the legal entity concerned directly or indirectly, alone or jointly, has control within the meaning of Article 3 of the Merger Regulation, is added. Through the change to Article 3, section (g), an emphasis is placed on there only being "joint" control as referred to in Article 3 of the Merger Regulation where such control is shared with *other legal entities as referred to in sections a to c inclusive*.

The Minister of Economic Affairs and Climate Policy