

A *Telefonica* company

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Dear Paula

O2's Response on Ofcom's Digital Dividend Review

O2 (UK) Limited, "O2", welcomes this opportunity to comment on Ofcom's Digital Dividend Review (DDR). [X....]

At Annex A we enclose our responses to some of the questions raised by Ofcom in the consultation.

Yours sincerely

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O2 (UK) Limited

ANNEX A Response to Ofcom's consultation questions

Question 2 : Do you have any comments on our analysis of the essential constraints that will apply to the available UHF spectrum?

O2 agrees with Ofcom's general approach to spectrum release, which aims to minimise the constraints associated with any release but recognises the importance of both international obligations and the protection of existing users in neighbouring spectrum bands. Regarding international obligations, we note that the Geneva 2006 Agreement and associated Digital Plan have secured the rights of protection for up to 8 DTT multiplexes within the UHF spectrum, but we also note that the UK has co-signed a declaration stating that our Plan entries may be used for applications with characteristics that may differ from those appearing in the Plan, on the condition that any different use would remain within the envelope of our Plan entries. The additional flexibility that this declaration introduces has been debated by the Radio Spectrum Policy Group, amongst others, most recently in developing their Opinion on "EU spectrum policy implications of the digital dividend". In relation to the 2006 RSPG consultation on this Opinion, O2 (as part of the Telefónica Group) argued for:

- a common sub-band to be identified for the provision of broadcast (downlink only) multimedia services to mobile devices, including good indoor coverage.
 - We argued that use of this sub-band should not rely solely on high power transmitters, but should allow high field strengths to be achieved both indoors and outdoors through the use of lower power, more distributed networks.
 - Additionally, the sub-band should, in our view, enable a range of interactive services to be offered, including those that are supported by the 900MHz band for the return channel.
- every effort to be made to secure the possibility for Member States (MS) to allow the provision of fixed and mobile services in the digital dividend.
 - This would be facilitated by an additional allocation at WRC-07.
 - In our view, European regulators should develop appropriate measures to allow these services.

We believe that the flexibility introduced by the declaration signed at the time of the Regional Radio Conference 2006, as identified by the RSPG¹, should be explored by Ofcom to the fullest extent possible, in order that Ofcom can release the spectrum "with as few constraints as possible" [§3.1, 3.53].

O2 believes that it is imperative that NRAs do not try and pre-empt Commission Decisions² or try to create a *force majeure* position whereby the EC finds it hard to adopt a Decision in light of pre-emptive action by an NRA. O2 therefore welcomes the position adopted by Ofcom at §3.29.

¹ Particularly in sections 5.11/12, which state the Opinion of the RSPG relating to the available UHF spectrum:
"5.11.2 A common (but not dedicated) sub-band of the UHF band for high field strength downlink services could permit improved terminal performance/reduced network costs and improved compatibility with fixed reception broadcasting, and facilitate interactive services using the 900MHz band for the return channel."
"5.12.1 Seeking an additional allocation to the fixed/mobile service in the entire UHF band at WRC-07 or WRC-11, under conditions which ensure that the broadcasting service is not adversely impacted.
5.12.2 In parallel, without further delay and irrespective of any WRC-07 decisions, pursue within CEPT the studies required to consider and possibly identify sub-band(s)".

² In relation to this or any other spectrum bands.

Question 5 : Do you have any comments on our analysis of the choice between a market-led and an interventionist approach to the release of this spectrum? Do you agree with the analysis of different mechanisms for intervening to remedy potential market failures?

O2 is in broad agreement with the thrust of Ofcom's argument here. We believe that:

- By assigning spectrum for specific uses or users (favoured users) there is an opportunity cost to society. Furthermore, as the amount of contestable spectrum at any competitive award would be reduced it is likely that much of this opportunity cost will be expressed as higher prices for other licensees, in the circumstance where demand outstrips supply.
- Ofcom should ensure that more broadly, regulation between competitors in rapidly converging markets should also be equalised in order to remove distortions that arise through other legacy legal or regulatory measures³.

We agree with Ofcom⁴ that if it were to assign spectrum to a specific favoured use or user, that it would have to *"impose conditions requiring the spectrum to be used in that way as it would be inconsistent to do otherwise. But these conditions will seriously constrain the use of the spectrum and will create a major barrier to changes in how the spectrum is used if circumstances change.....the regulator may even be unable to make some types of change, given the need to treat fairly all those who could have acquired the spectrum at the outset"*.

Gifting or ring-fencing spectrum for specific uses or users creates many competition problems, in O2's view, irrespective of any restrictions that Ofcom may place on the use of that spectrum.

Parties wishing to converge into the market space occupied by the favoured spectrum user are presented with two additional barriers to entry:

- A restricted supply of substitute spectrum, by virtue of the spectrum taken out of circulation by its reservation for a specific user; and
- That the free or discount spectrum provided to the favoured party contributes to the cost lead against which the entrant would have to compete.

Furthermore, there is clear evidence that whatever the restrictions placed on favoured licensees, they can be undone if it is expedient for the regulator to do so or the regulator is pursuing a market interventionist agenda further down the line. Ofcom/DCMS' own behaviour in the recent easing of restrictions in the DAB multiplex licences is a good case in point.

O2 made the above points in both Ofcom's recent consultation⁵ and DCMS' consultation⁶ on the amendment of DAB multiplex licences, indeed the points made at §6.46 in the DDR reflect many of the concerns expressed by O2 in relation to the changes brought forward to the DAB multiplex licences:

³ In particular, O2 would like to draw Ofcom's attention to the preferential treatment afforded to cable TV companies by virtue of the Copyright, Designs and Patents Act 1988 which explicitly protects both their transmissions from being copied and allows them to simulcast broadcast transmissions without infringing the underlying copyright of the material in the original broadcast. If Ofcom wishes to further intermodal competition it should work with the DTI to ensure that simulcasting of scheduled broadcast transmissions, on whatever platform, are subject to the same copyright regime. This work must be completed by the time of the first award of spectrum covered within this consultation.

⁴ §6.46 of the DDR

⁵ <http://www.ofcom.org.uk/consult/condocs/dab/>

⁶ http://www.culture.gov.uk/Reference_library/Consultations/2006_closed_consultations/radio_services.htm

- **Loss of flexibility in the use of spectrum**

The use of the DAB spectrum was restricted (by statute) to the provision of DAB digital radio (a minimum of 90% of capacity), plus additional data services (up to 10% of capacity) in the Broadcasting Act 1996⁷. The Communications Act 2003⁸ subsequently amended this split to 80%/20%. Finally, following public consultation DCMS introduced “*The Radio Multiplex Services (Required Percentage of Digital Capacity) Order 2006*”⁹ to further change the split to 70%/30%.

The net effect was to allow broadcast mobile TV services to be provided by BT Wholesale, on spectrum that had previously been allocated for public policy reasons to DAB digital radio.

Ofcom seeks to justify its decision in its DAB statement¹⁰ and we have appended some commentary in response to Ofcom’s statement:

“Ofcom considers that allocation of the spectrum for a further national radio multiplex via the Broadcasting Act 1996 is a proportionate step to promote specific [DAB] services where this is justified as set out in Recital 18 [of the Framework Directive]. ... Ofcom considers that its ability to allow a radio multiplex operator to include data services on its platform, [ie not the services subject to the public policy consideration] up to a limit deemed appropriate by Ofcom and subject to a statutory ceiling contributes to these public policy considerations. [how? No justification or evidence is provided] Ofcom also considers that such services, including mobile television, will extend choice to consumers; will meet demand from consumers¹¹ and from the suppliers of services, such as BT, and will promote further investment in the DAB platform” [O2’s inserts appended]

Therefore, O2 must conclude that whatever undertakings Ofcom makes in any award of spectrum for favoured uses or favoured users, such undertakings are, effectively, meaningless.

- **Adverse effects on competition**

These services provided by BT Movio and Virgin Mobile (on the DAB mux) are in direct competition with services provided by the 3G licensees on spectrum they acquired at the market rate in 2000. Furthermore, these services will compete with any mobile TV services offered in spectrum released following the DDR.

In the footnotes to the statement quoted above Ofcom highlights that both DCMS¹² and Ofcom¹³ recognise that competition could be impacted by differing modes of spectrum access and that AIP might act to re-balance this. Ofcom’s discussion in the DDR further develops these views.

⁷ s54(1)(h) refers.

⁸ s259(5) refers.

⁹ <http://www.opsi.gov.uk/si/si2006/20062130.htm>

¹⁰ §3.58 “The future licensing of DAB Digital Radio”

¹¹ O2 notes that this evidence is contrary to both the market research conducted by Ofcom (§4.14 of the DDR) and the results in the market (see The Guardian 17th January 2007, p.24). There would appear to be a different evidential standard for the DAB decision when compared to the evidential standard achieved so far in the DDR process.

¹² “DCMS noted recently in its consultation on increasing the data limit of radio multiplexes from 20% to 30% that this could have a potential impact on other existing or potential mobile TV operators insofar as this service proves to be attractive for customers but considered that on balance, increased choice will lead to better services for consumers.”

¹³ “Ofcom sets out in its statement.....that it does not rule out the possibility that differences in spectrum allocation mechanisms could distort competition but that if implemented, AIP for broadcast spectrum could mitigate any distortion that might arise.”

Again, in O2's view, Ofcom and DCMS failed to sufficiently analyse these effects on mobile TV competition (in the long term) and consequently, O2 believes, Ofcom's previously less than robust decisional practice in this area further undermines any comfort that competitive licensees might draw from competition based restrictions on favoured users of spectrum.

Question 8 : Do you consider that additional spectrum from the digital dividend should be reserved for low power applications?

O2 agrees that there would not be a high incremental value to society, when compared to alternative uses, from use of digital dividend spectrum by low power applications.

Question 9 : Do you consider that it would be desirable to hold back some spectrum from award with a view to its potential use for future innovation?

O2 does not consider that it would be desirable to hold back spectrum for future innovation.

Question 11 : Do you agree with our proposal to package the spectrum in a way which does not preclude mobile broadband use, but to take no further action in relation to this use?

O2 agrees that the DDR should avoid putting unnecessary constraints on use of the spectrum for mobile broadband. If there is a binding EC decision in relation to the availability of DDR spectrum for mobile spectrum, Ofcom would need to carefully consider the implications of such a decision in relation to 2G liberalisation.

Question.12 : Do you agree with our proposal that we should not intervene in the award of this spectrum to reserve spectrum for DTT? Do you agree that we should package the spectrum in a way which is suitable for DTT use?

Please see our response to Question 5 above. Irrespective of the arguments that parties might make to HMG, O2 has no confidence that Ofcom can sufficiently guarantee that spectrum reserved for DTT use would remain solely for DTT use, or would not, at some point, be used by the favoured parties in direct competition with service providers which had paid the market rate for their spectrum in the same award process.

Question 19 : Do you agree with Ofcom's proposals for the non-technical terms of the licences to be awarded for use of the UHF spectrum?

Ofcom will be aware of O2's view that *all* licences should have the minimum terms necessary to avoid harmful interference and that such terms must be, and remain, objectively justifiable, proportionate, non-discriminatory and transparent. As a matter of law, this applies at the time of assignment and is an on-going requirement.