



Vodafone input to Ofcom Consultation:

Notice of Ofcom's proposal to
make regulations in connection
with the award of 2.3GHz and
3.4GHz spectrum



1 Introduction

Vodafone welcomes the opportunity to comment on Ofcom's draft regulations relating to the award of 2.3GHz and 3.4GHz spectrum. Our response is divided into two parts, namely feedback on Ofcom's reversal of policy in removing the proposed cap on overall spectrum holdings, and detailed comments on the text of the regulations.

2 Removal of spectrum caps

In Vodafone's response to Ofcom's Call For Inputs on the 2.3/3.4GHz auction, we concluded that with the market structure as it stood at the time, there seemed little need for constraints on the auction, such as a cap on overall holdings. By the time of Ofcom's more detailed consultation in the spring of 2015, however, it had become clear that there was significant industry consolidation under way, with the proposed acquisition of EE by BT and of O₂ by Three's parent company. This consolidation threatened to take an existing asymmetry of spectrum holdings and transform the issue into one which could have competitive impact. Therefore, Vodafone supported the Ofcom approach of imposing an overall cap on spectrum holdings, even though it could theoretically limit our own bidding behaviour.

It is our understanding that only one stakeholder consortium opposed the cap in the most recent consultation responses. Since that consultation, the only change to market structure has been that the Competition and Markets Authority (CMA) has provisionally approved the acquisition of EE by BT; there has been no change to the number of national wholesalers. Therefore, Vodafone is somewhat mystified why Ofcom has seen fit to reverse its position on spectrum caps for the 2.3/3.4GHz award, given no change to industry structure and a clear majority of stakeholders supporting the cap.

Ofcom repeats the assertion voiced elsewhere that there is nothing special about spectrum, and mobile operators essentially have a "build/buy" decision to make, choosing between acquiring spectrum and building a denser mast network. Whilst superficially true, at best this position is naïve, and at worst disingenuous. As Ofcom is fully aware, the environment for deploying mobile mast networks in the UK is broken. Mobile operators are hamstrung by an outdated Electronic Communications Code (ECC) and planning legislation where there is a *de facto* presumption against mast deployment. This is reflective of a cultural state of affairs where UK citizens demand ubiquitous coverage, but dislike the presence of mobile masts. When mobile operators took on a commitment to achieve 90% geographic coverage for voice, that



required additional masts, this was only based upon reform of the ECC, which has not yet occurred. Absent reform which allows timely deployment of mast networks, the idea of substitutability of spectrum and mast networks is quite simply a myth. Further, even with that reform, an operator with large spectrum holdings is able to act with greater fleet of foot than one with less spectrum that's reliant on mast rollout: it is inevitable that the operator with more spectrum will gain competitive advantage.

Therefore, for the record, Vodafone considers that Ofcom's reversal of position with respect to caps is flawed and it expressly reserves its position in this regard. Notwithstanding this reservation, in the next section Vodafone offers some detailed comments on Ofcom's draft rules.

3 Comments on draft regulations

Vodafone has reviewed the draft regulations in detail. We have identified a series of issues, some of which are where we believe Ofcom's intent has not been adequately reflected in the draft wording, others where we believe the wording reflects Ofcom's intent, but reconsideration is needed. We do not believe any of the issues identified below are difficult or contentious to resolve.

Regulations 27 to 29

Regulation 27(1) starts with these words:

27.—(1) For each lot type separately, OFCOM will...

However, the qualifier "for each lot type separately" needs to apply throughout regulations 27-29, not just to paragraph 27(1). So these regulations should all be structured like this:

- 2x. For each lot type separately—
- (1) OFCOM shall ...
 - (2) ...
- etc.



Regulations 28 and 29

28.—(1) Ofcom shall identify valid principal stage bids for each bidder in the overall ranking list.

(2) The valid principal stage bids to be identified (the “identified bids”) are—

(a) for each of the bidders in the first category list, the valid principal stage bids made at the round price of the most recent round, but, where the bidder made valid principal stage bids at the round price of the most recent round in more than one principal stage round, the valid principal stage bids which were made in the principal stage round in which the bidder made the highest number of principal stage bids at the round price of the most recent round.

(b) for each of the bidders in the second category list and the bidder in the third category, each valid principal stage bid which was a standing high bid immediately prior to the most recent round.

(3) Ofcom shall then create an overall list of valid principal stage bids which ranks all of the identified bids (the “overall identified bid list”) such that—

(a) all of the bids made by a bidder which is placed higher in the overall bidder ranking list prevail over those of a bidder which is ranked lower on that list; and

(b) all bids made by a bidder are ranked in random order on that list.

(4) Ofcom shall then create a list of valid principal stage bids for that principal stage round which are to be assigned standing high bid status.

29.—(1) OFCOM shall assign standing high bid status to valid principal stage bids in the overall identified bid list, starting from the top of the list, by giving such status to bids in the order established in the list, such that bids placed higher in the list prevail over bids placed lower in the list.

(2) OFCOM shall assign standing high bid status to valid principal stage bids until there are no more bids or until the number of principal stage bids to which OFCOM has assigned standing high bid status equates to the number of lots of that type which are available in the award process.

Regulations 28 and 29 are intended to set out how Ofcom will rank valid bids during the principal stage rounds. They take an ordered list from Regulation 27, which in turn is created from three categories. However, the regulations as set out are open to misinterpretation and are overly complex to the point of being virtually unreadable; in particular there appears to be no real purpose served by constructing the “overall identified bid list”.



Vodafone suggests the following simplification to the regulations:

28. For each lot type separately—

(1) OFCOM shall calculate the number of valid principal stage bids made by each bidder in the overall bidder ranking list.

(2) The number of valid principal stage bids made by each bidder are—

(a) for each of the bidders in the first category list, the highest number of principal stage bids made at the round price of the most recent round.

(b) for each of the bidders in the second category list and the bidder in the third category, the number of standing high bids immediately prior to the most recent round.

29. For each lot type separately—

(1) OFCOM shall assign standing high bid status to bids placed by bidders in the overall bidder ranking list, starting from the top of the list, in the order established in the list, such that bids placed by bidders higher in the list prevail over bids placed lower in the list.

(2) For each bidder in turn, OFCOM shall assign standing high bid status to the minimum of: the full number of valid principal stage bids made by that bidder; the difference between the number of lots of that type which are available in the award process and the number of principal stage bids to which OFCOM has already assigned standing high bid status.

(3) If the difference calculated in (2) is zero, then standing high bid status will not be granted to any of the bids from the bidder concerned, nor will standing high bid status be granted to any of the bids from any bidders lower in the list.

Regulation 39(2)(b)

(2) A bidder may not withdraw standing high bids for a type of lot if—

...

(b) the bidder has withdrawn standing high bids for lots of either type in five prior principal stage rounds; and

This text relates to the rules allowing bidders to withdraw standing high bids. The intent of 39(2)(b) is to limit this to five occasions during the auction process, but the text is open to misinterpretation that a bidder is only barred from doing so if they've withdrawn bids in the five previous rounds, i.e. a bidder that had withdrawn five times, but these withdrawals had occurred e.g. ten rounds ago, would not be constrained from withdrawing again. To avoid this possible misinterpretation, given Regulation 39(4) is more precisely worded, we would suggest that 39(2)(b) be reworded to read;

The bidder has zero remaining rounds in which withdrawal is permitted, as calculated in paragraph (4).



Regulations 41(3)(b) and 42(3)(b)

(b) one or more 2.3 GHz frequency lots were not assigned standing high bid status after any principal stage round following the principal stage round in which the bidder withdrew standing high bids for 2.3 GHz frequency lots;

This text relates to potential liabilities should withdrawals be made. We are clear of Ofcom's intent from other material, for example paragraph 2.59 of the notice reads:

"...if Ofcom was unable to assign standing high bids to lots of the type withdrawn by the bidder, that bidder may be liable to pay for those lots."

And para 4.32 of the statement of 26th May states:

"Bidders might withdraw standing high bids in any round (e.g. to transfer eligibility to another category) but would be liable to pay the total value of any standing high bids that are withdrawn, unless all lots in that category were assigned a standing high bid in that or any subsequent round"

and 4.55

"When a bidder withdraws its standing high bids from one band and later bids again in the same band, then the bidder will not be liable for the withdrawn bids on lots for which it has bid again. It would be unfair to force a bidder to pay twice for the spectrum it won."

However, the wording of 41(3)(b) and 42(3)(b) is far from clear, e.g. whether the "not" is intended to bind inside or outside the scope of the "any". Additionally, the text makes it difficult to decide if a bidder has an interim withdrawal penalty immediately after the round when a withdrawal is made, because at that stage there have been no subsequent rounds so clause 2(b) cannot yield a positive.

Vodafone suggests a better wording for 41(3)(b) would therefore be:

(b) at the end of every principal stage round including or following the round in which the bidder withdrew standing high bids for 2.3 GHz frequency lots, there has been at least one 2.3 GHz frequency lot without standing high bid status;

and similarly for 42(3)(b) in regard to the 3.4 GHz lots.



Regulations 45(2)(f) and 46(b)

(f) for each lot type separately, the amount in MHz which is the smallest strictly positive multiple of 20 which is greater than the excess demand as determined in accordance with paragraph (3) or (5) of this regulation, each as applicable;

(b) for each lot type separately, the amount in MHz which is the smallest strictly positive multiple of 20 which is greater than the excess demand as determined in accordance with regulation 45.

These regulations are intended to provide limited information about excess demand. However, as written, zero excess demand would be reported as 20MHz, being the smallest strictly positive multiple of 20 which is greater than the excess demand (NB zero excess demand for a given lot type would not necessarily mean the primary rounds are completed, because there still could be excess demand on the other lot type).

Similarly, excess demand of 20MHz would be reported as 40MHz, 40MHz would be reported as 60 MHz etc.

This is highly confusing, and we do not believe the wording can reflect Ofcom's intent. In particular, we note that the reporting of zero excess demand as positive excess could cause bidders to needlessly increase their bids to the next round price; this would inflate auction revenue without improving the efficiency of allocation of the band, and may even jeopardise the efficient allocation of the other band (or of the assignment stage). Since such a pointless inflation of revenue would be contrary to Ofcom's statutory duties, we believe that zero excess demand must be correctly reported as zero.

We consider the text should be rephrased as follows:

(f) for each lot type separately, the amount in MHz which is the smallest strictly positive or zero multiple of 20 which is greater than or equal to the excess demand as determined in accordance with paragraph (3) or (5) of this regulation, each as applicable;

And

(b) for each lot type separately, the amount in MHz which is the smallest strictly positive or zero multiple of 20 which is greater than or equal to the excess demand as determined in accordance with regulation 45.

Finally, it is unclear to us whether the rounded excess demand would actually be reported as 20, 40 etc. or instead as 1, 2 etc. We therefore seek Ofcom's confirmation of which would be the case.



Regulation 53(3) and 54(1)

(3) The amount of the deposit requirement shall be calculated at the end of the last principal stage round to take place on each day, and any difference between the bidder's deposit and the amount of the deposit requirement must be paid into OFCOM's bank account, with accompanying information which identifies the bidder, by the end of the next working day.

(1) The bidder is required to pay the final principal stage deposit into OFCOM's bank account, with accompanying information which identifies the bidder, by 5 pm on the working day following the notification given by OFCOM in accordance with regulation 47.

These regulations relate to the requirement to top up deposits in-line with bidding behaviour. Vodafone is supportive of Ofcom taking measures to ensure that stakeholders do not place bids which they have no intention of fulfilling or no ability to do so. However, given the figures involved, we consider it onerous to demand payment by the next working day, and three working days would be more appropriate. This does, of course, mean that in the event of a standing high bidder failing to fulfill this deposit requirement, the auction could in principle need to be rewound, however:

- The likelihood of this occurring is minimal, because to do so would mean that the bidder would forfeit their existing deposit, which will not be a trivial sum of money, and
- The rules as they stand already result in this potential outcome, and with multiple auction rounds within a day there is already scope for a significant rewind.

Regulation 77(2)(c)

(2) The final assignment stage deposit shall be an amount such that the total amount that the bidder has on deposit is not less than the amount which is equal to the sum of—

...

(c) the amount which is the sum of—

- (i) the bidder's highest 2.3 GHz assignment stage bid for a 2.3 GHz assignment stage option; and
- (ii) the bidder's highest 3.4 GHz assignment stage bid for a 3.4 GHz assignment stage option.

This regulation relates to the deposit to be paid by winning bidders from the principal stage, in advance of the assignment stage. The effect of clause (c) is that the bidder will need to place a deposit which is equivalent to the maximum bid that they will place in the assignment phase. This is onerous and unwarranted, inherently meaning that all bidders will overpay and need to have some of their deposit returned (recalling that the winning bidder pays the second price bid). We would remind Ofcom that at this



point, the winning bidders from the principal stage will have already lodged deposits equating to their winning bids from that stage, meaning their financial exposure should they pull out at this stage or fail to fulfill their assignment stage bid is significant. We urge Ofcom to reconsider this point, making the amount payable under clause (c) a proportion of the bidder's assignment stage bids.

Regulation 83(1)(c)

83.—(1) Where, after completion of the assignment stage, the total amount a winning bidder has on deposit at that time is an amount that is greater than or equal to the amount determined in accordance with regulation 82 (2), OFCOM shall—

...

(c) refund to the winning bidder a sum in pounds calculated in accordance with paragraph (2).

This regulation relates to the refund of deposits, where these exceed the final amount payable. We note that, in contrast to regulations 53 and 54 above, there is no timescale placed on when Ofcom will reimburse overpaid deposits. Taken in combination with regulation 77, the effect of this text is to mandate that bidders make (undoubtedly substantial) deposits to Ofcom, with no payment of interest, knowing that a portion of these deposits will be returned but with no timescales for this happening. This cannot be acceptable and we suggest that the text is modified to make the period for reimbursement of overpaid deposits reciprocal with that for bidders paying the deposits.

Rounding

The draft regulations do not make mention of any rounding of bids in the principal stage. We note that in previous auctions, Ofcom's practice has been to round bids to the nearest £1000 in the principal stage and we would be grateful for confirmation of whether this will be the case on this occasion.