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Notice of proposals to make 900MHz, 1800MHz and 2100MHz public wireless network licences tradable

Telefónica O2 UK Limited (“O2”) welcomes this opportunity to comment on proposals to make licences in the 900MHz, 1800MHz and 2100MHz bands tradable through the making of the proposed Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011.

A set of draft Regulations are provided at Annex 6 to the consultation. O2 has no comments to make on the drafting of the Regulations themselves. O2 does have some comments to make on the standard of the competition test and the proposed treatment by Ofcom of the divestment by Everything Everywhere Limited (EEL), in accordance with the relevant EC merger decision (“the Commission Decision”).

Inclusion of a competition test in the Regulations

Under draft regulation 8(e), Ofcom shall take into account whether competition is likely to be distorted as a result of a transfer. Ofcom explains that it will consider on a case by case basis whether to undertake a detailed assessment of whether a trade is likely to distort competition, the extent of the assessment will depend on the context and that its assessment will factor in any appropriate competition analysis undertaken and conclusions reached in the context of any relevant auction, including the forthcoming 800MHz and 2.6GHz auction to ensure there is no distortion of competition (§3.18).

O2 believes that this is a pragmatic approach to take, especially in circumstances where Ofcom may have recently reviewed a particular market or where a series of transactions are undertaken for technical reasons (such as reshuffling of a band to increase contiguity and efficient use of the spectrum, or to move guard channels). However, it would be useful if Ofcom could clarify the factors that will be taken into account in deciding whether or not to carry out a (detailed) competition assessment in the first instance and provide further guidance as to the nature of and legal standard to be applied in any competition assessment/test, together with an outline of procedures and timescales.

The standard of the competition test where no merger control assessment has been undertaken

O2 welcomes Ofcom’s approach whereby it will not undertake a separate ex ante competition assessment where a proposed trade forms part of a transaction reviewed under EU or UK merger control because this would appear to safeguard against multiple examinations of the same transaction and “double jeopardy”. However, the use of the term “likely to distort competition” at draft regulation 8(e) provides little clarity as to the nature and legal standard of the test envisaged.¹ It would be helpful if Ofcom could clarify what is meant by draft regulation 8(e) on making its statement and in particular confirm (and elaborate on) its proposed test for determining whether a competition distortion is likely (theory of harm, evidence, counterfactual).

¹ In contrast, there are EU and UK merger control precedents and guidance on the SIEC and SLC tests.

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Where there has been a merger review, it would also be useful if Ofcom could clarify the circumstances in which it envisages it would or would not expect to follow merger control review findings, and/or in particular, whether it means that should a merger review not deal specifically with a spectrum trade/divestment, it intends to follow merger review findings of fact, such as market definition, etc.

In addition, it would be helpful if Ofcom could provide some guidance as to the nature and form of information it currently envisages it might require in order for the purposes of a competition assessment, the extent it envisages consulting with third parties in relation to such an assessment and the timeframes within which it would expect to carry out its assessment.

The Competition Act 1998 section 3(1)(b) and Schedule 2 exclude certain agreements which may be subject to competition scrutiny under other legislation from the scope of the Chapter 1 prohibition. It also excludes mergers.² It would be useful if Ofcom could clarify whether it may be appropriate for spectrum trades subject to an ex ante competition assessment under the Mobile Spectrum Trading Regulations to also be excluded with a view to avoiding “double jeopardy”.

It is our understanding that any assessment undertaken by Ofcom would be one taken with regard to its statutory duties, including *inter alia* the duty to “*further the interests of consumers in relevant markets, where appropriate by promoting competition.*”³ It is O2’s understanding that, consequently, any such decision would not fall within the class of decisions within Schedule 8 of the 2003 Act and therefore that its decision to carry out a competition assessment (or otherwise) and its decision to grant consent (or otherwise) to a trade would both be reviewable decisions.

Treatment of the divestment by Everything Everywhere

As mentioned above, Ofcom states⁴ that should a trade result from a transaction reviewed by the European Commission under the ECMR, then Ofcom would not undertake a separate *ex ante* competition assessment.

The Commitments included in the Commission Decision⁵ require (at §18) that the purchaser of the divestment spectrum (whether by way of private sale or in the Ofcom Auction) must:

“... neither be likely to create, in the light of the information available to the Commission, prima facie competition concerns... .”

Explicitly, therefore, in examining whether the purchaser of the Divestment Spectrum satisfies the Commitments, Ofcom (and the Commission) will *inter alia* be satisfying themselves that the divestment to a particular purchaser does not of itself create a competition problem. We agree, therefore, that in discharging its responsibilities under the Commitments, Ofcom will have already undertaken a competition assessment with regard to the purchaser and future use to which the divestment spectrum is to be put.

² S3(1)(a) and Schedule 1, Competition Act 1998.

³ s3(1) Communications Act 2003

⁴ §3.19

⁵ http://ec.europa.eu/competition/mergers/cases/decisions/M5650_20100301_20212_247214_EN.pdf



O2 believes, therefore, that Ofcom's decision to consent to any transaction which is proposed by Everything Everywhere in order to comply with the Commitments, must also be a regulatory decision by Ofcom under regulation 8(e) taken with regard to s3(1) of the 2003 Act. We would highlight, however, that any such decision by Ofcom would have to be wholly consistent with any decision or policy position it puts forward in its forthcoming competition assessment of the mobile market and the 800/2600MHz auction.

Yours sincerely

Telefónica O2 UK Limited