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

Non-confidential

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1. Ofcom should delay the auction

Hutchison 3G UK Limited (“Three”) sets out below its response to Ofcom’s consultation on Notice of Ofcom’s proposal to make regulations in connection with the award of 2.3 GHz and 3.4 GHz spectrum (the “Consultation”).

An auction soon after the European Commission’s decision on the Three/O2 acquisition will maximise the long-term efficiency of spectrum use

Para 2.9 of the Consultation notes that the date on which the regulations will come into force has yet to be determined and will depend on a number of factors, including responses to the Consultation. Three considers that the regulations should not come into force, and the auction should not be conducted, before the European Commission has announced its Phase II decision on the pending Three/O2 merger.¹ This is for the reasons set out in Three’s response to Ofcom’s May 2015 Consultation² and in the letter before action sent to Ofcom on 20 November 2015. Three also considers that Ofcom should impose spectrum caps for the reasons provided in the same two documents.

In summary:

- Holding the auction without waiting for the Commission’s decision on the Three/O2 merger [X].
- Ofcom failed to consult properly on the option of a short delay and did not prepare the requisite impact assessment. Had it done so, it would have been apparent that a short delay was the best option.

Without prejudice to the above submissions, and reserving all Three’s rights in respect of the same, the remainder of this response is focused on comments relating to the drafting of the regulations. Three will not repeat the points made in its previous consultation responses about auction design though it continues to believe that they remain valid.

The auction regulations are not properly designed to cope with a situation where parties are bidding whilst awaiting the outcome of merger reviews

The regulations, as drafted, are likely [X]. We understand, from informal discussions with Ofcom officials, that this was not a result that was specifically intended.

Equally, however, Ofcom cannot simply remove the offending prohibition because at least in some circumstances [X].

If Ofcom decides to try to amend the draft regulations to deal with this issue, it will need to cater for a lot of different situations including [X].

[X].

¹ The intended acquisition of Telefónica Europe plc by CK Hutchison Holdings Ltd, European Commission merger case reference M.7612 Hutchison 3G UK/ Telefónica UK.

² Three’s response to Ofcom’s consultation on Public Sector Spectrum Release: Award of the 2.3 and 3.4 GHz spectrum bands dated 3 July 2015.

Ofcom should delay the auction *continued*

The dilemmas that arise in relation to the definitions of applicant and bidder groups in the regulations are wholly of Ofcom's own making. They will not exist if the auction is delayed a mere four months or so. Any attempt to try to find a different solution is bound to give rise to complexity and is likely to require further consultation. It is not obvious to Three how Ofcom could deal with the issues through drafting but even if it were able to do so it would still create significant uncertainty for Three.

The obvious solution is to simply delay the auction until the merger reviews are complete.

There otherwise appear to be few significant issues with the drafting of the regulations

We have identified a few minor errors set out later in this response but nothing material beyond the issues around the scope for the potentially merging entities to bid separately (discussed above).

2. Issues arising in relation to the mergers

As currently drafted, the regulations do not allow both Three and O2 UK to bid in the auction even though they remain competitors unless and until the merger is cleared by the European Commission. This is for the following reasons:

- (a) The draft regulations indicate that “*an applicant which has a member of its bidder group which is also a member of the bidder group of another applicant... shall not be qualified to participate in the award process*” (emphasis added).³
- (b) The “*bidder group*” consists of all members of the “*applicant group*” as may be varied pursuant to Regulation 7(1).⁴
- (c) The “*applicant group*” includes each “*associate*” of the applicant.⁵
- (d) An “*associate*” means any person with a “*material interest*” in the applicant or bidder, as appropriate.⁶
- (e) “*Material interest*” is said to mean “*any interest (construed in accordance with sections 820 to 825 of the Companies Act 2006)*” in shares carrying more than 25% of votes.⁷
- (f) Section 820(4) of the Companies Act 2006 indicates that a person is to be treated as having an interest in shares if the person “*enters into a contract to acquire them*”. This is so even if the interest is conditional (Section 820(5), Companies Act 2006).
- (g) Hutchison 3G UK Investments Ltd has entered into a contract to acquire all the shares in O2 UK and is therefore an “*associate*” of O2 UK (as well as already being an “*associate*” of Three). As such, it and its parents in the Hutchison group would form part of the “*bidder groups*” of both of Three and O2 UK. In circumstances where both Three and O2 UK decide to submit applications independently, the result of Regulation 7(3) would be that both Three and O2 UK would be disqualified.

Three notes that it has no power to control how O2 UK or its associates choose to involve themselves in the auction, if at all. It also has no power to avoid the issue by bidding through an associated company (since there will continue to be companies in the Hutchison group that are associates of both that entity and O2 UK) [X].

[X].

Even without the specific provisions referred to above, [X].

We understand from informal discussions with one of Ofcom’s officials that the above result was not specifically intended. This might suggest that Ofcom may

³ Regulation 10(2).

⁴ Regulation 7(3).

⁵ Regulation 2(1) (definition of “*applicant group*”).

⁶ Regulation 2(1) (definition of “*associate*”).

⁷ Regulation 2(1) (definition of “*material interest*”).

Issues arising in relation to the mergers continued

be minded to revise the regulations to try to address the issue. This in itself, though, causes Three some serious concerns.

In particular, the concerns arise because the Three/O2 and BT/EE merger processes are at quite different stages. The BT/EE merger has already been provisionally cleared unconditionally.⁸ The extended statutory deadline for the CMA's final decision is 18 January 2016 (no further extensions are possible). The final clearance decision may well come before the auction even if the auction is not delayed.⁹ By contrast, no decision on the Three/O2 merger is likely to be taken before 12 May 2016.

We note that the intended definition of an "associate" has been a feature of Ofcom auction rules for many years. [REDACTED].¹⁰

[REDACTED].

Taking account of the current transactions in the auction rules is not straightforward:

- If the current rule is retained, [REDACTED].
- If Ofcom removes the standard rule entirely [REDACTED].
- To avoid either of the unpalatable extreme positions [REDACTED].

Three cannot see how Ofcom will be able to resolve this issue simply through drafting. It is simply too complex a problem. Even if it could, though, it is liable to leave a range of thorny issues for the parties. [REDACTED].

These issues only arise because of Ofcom's decision to go ahead with the auction whilst the merger reviews are still pending. The obvious solution would be to simply delay the auction until the merger reviews are complete (as Three has advocated for other reasons anyway).

⁸ CMA *Summary of Provisional Findings* on the anticipated acquisition by BT Group plc of EE Limited published on 28 October 2015.

⁹ A final decision now being due by 18 January 2016, as a result of the CMA decision to avail itself of the statutory extension available under section 39(3) of the Enterprise Act 2002: *Notice of extension of the inquiry statutory period pursuant to section 107(2)(c) of the Enterprise Act 2002* published on 28 October 2015.

¹⁰ [REDACTED].

3. Minor drafting issues

Three has spotted three minor drafting points in addition to the more substantive issue discussed in Section 2 of this response, as follows:

- (a) Regulation 14(2), typographical error: “*who*” should be deleted.
- (b) Regulation 17(10), typographical error: should be “*19 to 34*” rather than “*19 to 33*”.
- (c) Schedule 2, paragraph 4 refers to the “*Wireless Telegraphy (Licence Award) Regulations 2012*” when it should presumably refer to the “*Wireless Telegraphy (Licence Awards) Regulations 2015*”.