

Notice of Proposals to make 900 MHz, 1800 MHz and 2100 MHz Public Wireless Network Licences

Tradable

Everything Everywhere welcomes the opportunity to respond to Ofcom's consultation on 'Notice of Proposals to make 900 MHz, 1800 MHz and 2100 MHz Public Wireless Network Licences Tradable' ('the consultation').

Executive Summary

Everything Everywhere broadly welcomes Ofcom's proposals. Its only material objection is in relation to the competition test which Ofcom intends to adopt. It notes that Ofcom intends to give to itself the power to decide whether competition is likely to be distorted in determining whether or not to consent to a trade, or to consent to a trade subject to certain conditions. Whilst it does not consider that it is necessary for Ofcom to give itself such powers, in addition to the powers Ofcom already has under the Communications Act 2003 and the additional powers it will be given under the changes to the common regulatory framework, EE would also suggest that if it is to have such powers Ofcom does need to take into account the general exceptions to what would otherwise be a prohibited agreement under competition law and other matters, such as the need to limit spectrum defragmentation, which it would see as part of Ofcom's general duties to ensure efficient use of spectrum.

There also seems no good reason why mobile spectrum should be dealt with in any way differently to other spectrum as far as the application of competition law is concerned particularly as other spectrum can be used for mobile telephony. For these reasons we query why Ofcom is limiting the application of its possibly enhanced powers in relation to spectrum to mobile spectrum and not generally changing the Trading Regulations.

Ofcom notes that there is a material risk that concentration of mobile spectrum holdings could affect downstream competition because mobile spectrum is relatively scarce and spectrum is a necessary input to the provision of mobile services. The forthcoming auction of 800 MHz and 2.6 GHz spectrum is likely to be the last significant opportunity to acquire new spectrum suitable for the provision of

mobile services. However, as Ofcom notes under the Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 it is required to undertake a competitive assessment of the mobile market for 3G and services beyond 3G and to make the auction rules with this in mind, and so has an opportunity to set rules relating to possible concentration of mobile spectrum. This provides the best opportunity to do so given it is unlikely that there will be significant trading of mobile spectrum in the absence of mergers and acquisitions activity. At the time of this response that assessment has not been published and EE is concerned that it will effectively set a baseline for future competition assessments and reserves the right to respond further once it has seen the assessment.

One point which is not addressed in the consultation is the effect of conditions which might be included in agreements for the sale or leasing of spectrum. EE considers it would be helpful to provide that Ofcom will not seek to interfere with such conditions unless they conflict with its competition assessment or other statutory duties. There is no good reason why contracts relating to spectrum should be any different to other commercial agreements.

Ofcom also says that where a proposed trade forms part of a transaction reviewed by the EU and/or the UK merger control authorities it would propose not to undertake a separate *ex-ante* competition assessment but would expect to follow the findings of the merger control review in deciding whether or not to consent to that proposed trade. Everything Everywhere feels strongly that Ofcom is obliged to follow the findings of the merger control review and not make subsequent changes which could be viewed as a further remedy in relation to such a review. An illustration of this possible double jeopardy is Ofcom's conclusions in its Advice to Government on the consumer and competition issues relating to liberalisation of 900 MHz and 1800 MHz spectrum for UMTS, published by it on 25 October 2010, in effect imposing an additional remedy in relation to the clearance of the merger creating Everything Everywhere. We would also expect Ofcom to give effect to the reasoning of the merger clearance. For example, the EE merger clearance requires EE to divest certain 1800 MHz spectrum to a single purchaser. We would expect Ofcom would ensure that an initial sale to a single purchaser is not then followed by a subsequent trade of part of that spectrum, thus undermining the reason for the initial requirement. In the case of this particular spectrum we would not expect that the spectrum

divested would be able to be so traded until well after the time when the spectrum is actually made available for use by the purchaser.

In addition, if spectrum is reserved for a new entrant, either to the mobile market or to part of it, we would expect that the competition assessment of subsequent trading would take that reservation into account. Similarly, in relation to any trading of 800 MHz and 900 MHz spectrum we would expect the fact that the UK decided not to redistribute 900 MHz spectrum, unlike other European national regulatory authorities, would be a relevant consideration in any Ofcom competitive assessment.

We do however welcome Ofcom's acknowledgement that any trade of the spectrum which Everything Everywhere is required to make pursuant to its merger control clearance will not be the subject of an *ex-ante* competition check. For the record, we also note that there is a market review clause in that commitment and it is open to Deutsche Telekom AG and France Telecom SA to seek a review of that commitment so it relates only to 2 x 10 MHz of 1800 MHz spectrum.

In answer to Ofcom's specific questions:

Do you have any comments on the proposals to enable spectrum trades in respect of the 900 MHz, 1800 MHz and 2.1 GHz bands?

No

Do you have any comments on the proposal regarding an ex ante competition check?

Everything Everywhere's general comments on the competition check are set out above. We note that the wording in the draft SI.Paragraph 8(e):

'competition is likely to be distorted as a result of the transfer;...'

comes from the amended Authorisation Directive. Article 5(6) of the Authorisation Directive now provides that National Regulatory Authorities should

'ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies'.

This obviously applies to trading, but also applies more generally to Ofcom's activities and we query why it is just to be applied in the context of trading.

As mentioned above, we note that the chapter 1 prohibition in the Competition Act 1998 applies to agreements which

'have as their object or effect the prevention, restriction or distortion of competition...'

Whilst it is arguable that the additional words are not needed if there is to be a competition test for spectrum trading we believe it is better if the wording used tracks general competition law as applied in the UK. In addition, that chapter 1 prohibition and the provisions of Article 101 of TFEU also do not apply if the relevant agreement is exempt under other provisions of the Competition Act or Article 101(3). We would expect this to also apply to spectrum trading, particularly the possibility of promotion of technical and economic progress if consumers benefitted from the agreement. If this is not done it would be possible to argue that both the test in the Trading Regulations and that under general competition law would be applicable and that would create uncertainty and inhibit the trading of spectrum.

Do you have any comments on the proposed statutory instruments set out in this notice?

Under the proposed regulations¹ Ofcom proposes that transfers are not authorised where the licence holder has opted to pay Ofcom its licence fee by instalments. Ofcom is effectively saying that the licensee is required to bring forward payment prior to approaching Ofcom with a proposed transfer. There seems to be no reason in principle why the transfer of spectrum should not enable transferors to impose on transferees any outstanding obligation, as is the case with most transfers of property. It would also wish it to be clear that if there is a partial trade the sum payable referred to draft paragraph 6(b) is the sum attributable to that part.

¹ Paragraphs 6(c) (b) and (c).

For reasons of certainty Everything Everywhere considers it would be helpful to provide that Ofcom will not seek to interfere with such conditions unless they conflict with its competition assessment or other statutory duties and that any such conditions will apply as part of the relevant trade.

7th March 2011