PROPOSALS FOR THE TRADING OF WIRELESS SPECTRUM LICENCES

RESPONSE OF VODAFONE LIMITED

1. Executive summary

1.1 Vodafone Limited ("Vodafone") welcomes the opportunity to comment on Ofcom's proposals to make public wireless spectrum in the 900, 1800 and 2100 MHz bands tradable. This will be in effect the first time that mobile spectrum will be tradable. Accordingly, clear guidance from Ofcom about the analytical and procedural framework that it will adopt for the trading of spectrum will be of assistance to stakeholders contemplating entering into spectrum-related transactions.

1.2 Our submission focuses on three important issues that we would invite Ofcom to consider more closely before adopting a final course of action. These are (i) the range of transactions falling within the ambit of the proposed Trading Regulations; (ii) justification for an ex ante assessment of spectrum trades; (iii) the need for considerably greater clarity in the analytical framework and procedure to be adopted if an *ex ante* assessment is to be carried out.

1.3 Vodafone recognises that the trading of mobile spectrum could, in some circumstances, adversely affect competition in downstream mobile markets. However, the adoption of an *ex ante* approach should be considered carefully given: (i) the range of *ex post* competition law enforcement powers already available to Ofcom; and (ii) the scope for an *ex ante* approach to inhibit rather than encourage spectrum trading.

1.4 To the extent that Ofcom ultimately determines that the introduction of an *ex ante* competition assessment is necessary, considerably greater clarity will be required – in terms of the legal standard of review and the procedural framework that will be adopted for the assessment of proposed trades – than is apparent in the consultation document. Further action in respect of these issues is necessary to ensure that the legal and regulatory certainty that is critical to industry stakeholders considering investment decisions is not undermined.

2. Scope of the proposed Trading Regulations

2.1 In its consultation on simplifying spectrum trading[1] Ofcom enthused about the potential benefits of spectrum leasing i.e., spectrum trading that would be put into effect by a contract between the parties without the grant of a new licence to the party gaining access to the spectrum. Vodafone agrees that spectrum leasing can bring benefits to both parties involved in the 'trade'. In its later statement Ofcom announces a clear intention to introduce spectrum leasing once the new Framework Directive is in place[2].

2.2 Vodafone supports the introduction of spectrum leasing and we urge Ofcom to consider its introduction for mobile spectrum alongside other spectrum

[1] Simplifying spectrum trading: Regulatory reform of the spectrum trading process and the introduction of spectrum leasing, 22nd September 2009

[2] See paragraph 1.10 in the Simplifying Spectrum Trading statement, 15 April 2010

types once the legislation permits. As Ofcom notes, longer term leases (greater than say 24 months) could carry a notification requirement and be subject to the same degree of regulatory oversight as trades of mobile spectrum (adjusted to cater for the concerns that we express below) we express below.

3. Justification for an ex ante competition assessment

3.1 Ofcom rightly notes that it is required, pursuant to the provisions of the pan-European regulatory framework governing the communications sector, to ensure that transfers of spectrum do not lead to distortions in competition. Equally, Ofcom has a duty to promote competition and efficiency in mobile markets and so should not place unnecessary or disproportionate obstacles in the face of trading, which will increase the efficiency of spectrum use. The central issue is how Ofcom is to discharge its duty in this respect. Ofcom now considers that, in the case of mobile spectrum, this competition assessment is to be undertaken on an *ex ante* basis.

3.2 The stated justification for this approach is that spectrum is: (i) a key input to the provision of mobile services and; (ii) a scarce resource. Concentrations of spectrum may therefore have a deleterious effect on competition in downstream mobile markets. Furthermore, Ofcom now finds that the threat of *ex post* enforcement action under competition law is an insufficient deterrent to anti-competitive spectrum trades.

3.3 Vodafone considers that, as a general principle, wherever possible, Ofcom should be seeking to reduce the amount of regulatory intervention that it undertakes on *ex ante* basis where there is no compelling need for such an approach. This is a view to which Ofcom previously subscribed:

> *"It* [an ex ante competition assessment] *would suggest that Ofcom believes that we understand the market better than market forces which would be at odds with the principles of light touch regulation."*[3]

Such an approach is consistent with the broad thrust and objectives of the pan-European regulatory framework (the Common Regulatory Framework or "CRF"):

> *"It is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and <u>where national and Community competition law remedies are not sufficient to address the problem.</u>* [emphasis added]*"*[4]

3.4 In the first instance, the UK mobile market has been found to be competitive on a number of occasions recently. Furthermore, it is by no means axiomatic that *ex post* competition law remedies (which are available to Ofcom under the concurrency regime) will be ineffective. Indeed, Ofcom was confident in

[3] Ofcom, *Ensuring effective competition following the introduction of spectrum trading,* 29 September 2004, Paragraph 3.19

[4] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, Recital 27

2004 that the risk of fines for anti-competitive agreements in relation to spectrum, coupled with the scope for the imposition of interim measures in appropriate cases, would act as an effective deterrent to anti-competitive conduct.[5]

3.5 Ofcom's previous emphasis on the significance of *ex post* competition law enforcement reflects the prevailing trend over the past decade in which parties have been expected by competition authorities to self-assess the competition law implications of their commercial collaborations. Instead of requiring agreements to be subject to a formal notification process, competition authorities have issued guidance, such as the European Commission's Vertical Agreements or Horizontal Collaboration Guidelines[6], to enable undertakings to understand the circumstances in which proposed commercial agreements and practices may raise competition concerns. An alternative to an *ex ante* approach that Ofcom may wish to consider in this case is the publication of similar guidance. This would have the effect of enabling parties to determine when to enter into trades, whilst leaving Ofcom with the discretion to investigate trades where appropriate. Even if Ofcom ultimately proceeds to adopt an *ex ante* approach, as we discuss in section 4 below, additional guidance on: (i) the approach to the legal framework governing the Ofcom's substantive competition assessment; and (ii) the process to be adopted will, in any event, be necessary.

3.6 Vodafone is aware that Ofcom did not make mobile spectrum tradable in 2004 when it last considered how it might discharge its duty to ensure that spectrum transfers do not result in distortions to competition. However, the reasons that Ofcom now cites in the consultation document for the adoption of an *ex ante* competition assessment are not new. Spectrum has been and continues to be a key input to the operation of a mobile network and the provision of downstream mobile services. Similarly, spectrum has been and remains a scarce resource. These arguments could apply equally to the classes of spectrum that were made tradable in 2004.[7] As far as we have been able to discern, no *ex ante* competition assessment is to apply to trades in these classes of spectrum. We would therefore invite Ofcom to consider carefully why a different approach is necessary for mobile spectrum.

3.7 Another relevant consideration that requires further exploration is the possibility that an *ex ante* approach might act as a disincentive to trading activity and ultimately dampen competition. Indeed, Ofcom previously recognised the scope for such an outcome:

"Ofcom is committed to introducing trading through the least administratively burdensome process and with maximum flexibly [sic]…Ofcom is concerned that imposing excessive regulation may deter take-up of trading by slowing down the trading process, making it less transparent and raising uncertainty…The threat of such ex ante check and the complexity it would

[5] Ofcom, *Ensuring effective competition following the introduction of spectrum trading,* 29 September 2004, Paragraphs 1.4 and 1.9

[6] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

[7] Ofcom, *A Statement on Spectrum Trading*, 6 August 2004

add to the trading process may deter genuine trades which would otherwise result in increased efficiency and/or promote competition and innovation."[8]

To the extent that Ofcom now concludes that recent developments in the UK mobile market are of such a nature that an *ex ante* assessment for spectrum trades is critical, we would urge Ofcom to heed its own previously expressed concerns. Specifically, we invite Ofcom to ensure that the process does not act as a disincentive to trading activity. We consider this matter in further detail below.

4. Need for a clear legal and procedural framework

A clearly defined threshold is required

4.1 One of the reasons why Ofcom previously eschewed an *ex ante* competition assessment in 2004 was because of the risk that any assessment could result in uncertainty for parties contemplating entering into spectrum-related transactions. This was because:

"Such an assessment would…be subjective and would reduce transparency which risks reducing the benefits of trading."[9]

4.2 Vodafone would endorse the concerns expressed in this statement. Where there is a lack of clarity about the analytical framework and the legal threshold that will be applied, there is an obvious risk that incentives to contemplate spectrum transactions will be diminished.

4.3 In this case, whilst Ofcom has indicated its intention to introduce an *ex ante* competition assessment of proposed spectrum trades in some cases, it has provided no further explanation of the legal framework that it intends to apply both in terms of the legal standard review to be used in any substantive assessment and the procedure. The statement at paragraph 3.18 that Ofcom will consider *"on a case by case basis <u>whether</u>* [emphasis added] *to undertake a detailed assessment of whether a proposed trade is likely to distort competition"* currently provides little insight into: (i) the jurisdictional criteria that will be used to determine when an *ex ante* assessment is deemed to be appropriate; and (ii) the substantive analytical framework governing Ofcom's approach where an assessment is undertaken.

4.4 By contrast, parties contemplating entering into mergers or acquisitions are fully aware of: (i) the jurisdictional thresholds determining the need for a merger notification; and (ii) the substantive tests that will be applied when such notifiable transactions are assessed by competition authorities. This is also true of parties considering entering into commercial agreements.[10]

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[8] Ofcom, *Ensuring effective competition following the introduction of spectrum trading,* 29 September 2004, Paragraph 3.6

[9] Ofcom, *Ensuring effective competition following the introduction of spectrum trading,* 29 September 2004, Paragraph 3.19

[10] For instance, a party considering a commercial collaboration will be aware from the decisional practice of the European Commission and the European Courts how Article 101(1) of the EC Treaty governing anti-competitive agreements and practices will apply. Similarly parties contemplating a merger or acquisition will be aware that under the EC Merger

4.5 This outcome is the result of clearly defined legal frameworks whose practical application has been further elaborated by the EU or national courts over a number of years. Parties are accordingly able to assess at an early stage whether their proposed commercial collaboration or merger is likely to be prohibited under competition law and merger control regimes. Similarly, undertakings operating in the communications sector are familiar with the criteria – the finding that one or more undertakings has Significant Market Power (a concept equivalent to dominance in competition law) – that must be fulfilled in an *ex ante* market review before regulatory obligations may be imposed.

4.6 If Ofcom intends to introduce an ex ante assessment for spectrum trades, we would strongly urge that clear rules and guidance are established as to: (i) the circumstances in which a spectrum trade will qualify for an ex ante assessment; (ii) the legal standard of review to be applied by Ofcom when undertaking an *ex ante* competition assessment; and (iii) the conditions that will need to be satisfied for a proposed trade to be prohibited with illustrative examples of how Ofcom in practice would be likely to apply its legal test to proposed spectrum trades.

The need for a clear procedure and safeguards

4.7 Equally importantly, considerably greater guidance is required (than has been provided in the consultation document) in respect of the procedure that will be followed when such an *ex ante* assessment takes place. A process that simply mirrors the approach currently adopted for *ex ante* market reviews carried out under the sector specific regulatory framework or a Competition Act investigation would have the clear potential to disincentivise trading. This is because of the relatively lengthy duration of these reviews and investigations and the lack of any fixed deadlines for a decision.

4.8 Vodafone therefore proposes that Ofcom adopts a process with a clear timetable, for example, along the lines of the EC Merger Regulation.[11] This process might be divided into two phases:

Phase 1 comprising:

- the submission of a short notification by the parties (potentially for all proposed trades if Ofcom does not wish to stipulate jurisdictional criteria to determine those trades that will qualify for an ex ante review);

- review lasting no more than 4 weeks enabling Ofcom to assess the trade and take into account the views of third parties;

Regulation, *"A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."* Council Regulation 139/2004, Article 2(3).

[11] The timetable and process applicable to the resolution of disputes mandated by the CRF could also be a useful reference point for any process that Ofcom might adopt. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, Article 20(1)

- a decision to approve the proposed transfer or refer it for a second phase review where Ofcom has significant concerns about the impact of the trade on competition in an identified mobile market with that decision to be based on clear reasoning presented to the parties.

- Where no decision is issued by Ofcom at the end of the 4 week period, the trade will be deemed to be approved for the purposes of the *ex ante* assessment.[12]

Phase 2 (where applicable) comprising:

- More detailed review of the effects of the proposed trade;

- Ofcom to make the parties aware of its concerns and provide them with the opportunity to respond to these concerns;

- Review to take no longer than an additional two months[13] (extensions to the process should be limited to a finite number of days to reduce the scope for *ex ante* reviews to be prolonged on an open-ended basis).

- Decision approving the trade or prohibiting it (including clear reasons for any decision).

4.9 As can be seen above, the process would need to ensure that the rights of defence (and potentially of third parties) would need to be protected. In practice, this would mean that the parties to the transaction should have the ability, for example via access to the file, to understand and respond to concerns expressed by Ofcom or third parties about the proposed trade during the review process.

4.10 Ofcom would also need to confirm the existence of a right of appeal for affected parties against its decisions in respect of proposed trades. Given that a decision following an ex ante assessment is being made pursuant to Article 9(4) of the Framework Directive, any appeal against an Ofcom decision would need to be a merits-based one, as is required by Article 4(1) of the Framework Directive. Section 192 of the Communications Act 2003 (the "Act") now provides, by virtue of the Wireless Telegraphy Act 2006 (the "WTA"), for appeals against decisions of Ofcom under Parts 1 to 3 of the Wireless Telegraphy Act 2006. Section 195(2) of the Act, giving effect to

[12] Such an approach would essentially mirror that currently provided for by Article 10(6) of the EC Merger Regulation, which deems a concentration to be compatible with the common market where no decision has been issued by the Commission at the end of the Phase 1 review period.

[13] A two month timeframe would be in line with the process adopted by the European Commission when reviewing proposed decisions of national regulatory authorities pursuant to the provisions of the CRF. Where the Commission has doubts about an *ex ante* market review and proposed decision of a national regulatory authority in relation to a market definition or a finding of SMP, it may within a 2 month timeframe, issue a decision requiring the national regulatory authority to withdraw its proposed decision. See Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, Article 7(4).

Article 4(1) of the Framework Directive, confirms that appeals lodged under section 192 of the Act are to be decided "on the merits".[14]

Vodafone Limited
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[14] This is no different to the standard of review that would apply in the event that a decision adopted by Ofcom under its concurrent competition law enforcement powers were subject to an appeal. See paragraph 3(1) of Schedule 8 to the Competition Act 1998.