

TELEFONICA UK LIMITED RESPONSE TO:

**“Notice of Ofcom’s proposal to make regulations for the award of
700 MHz and 3.6 GHz -3.8 GHz spectrum
Proposals to make the Auction Regulations”**

9 December 2019

I. INTRODUCTION

1. Telefonica UK Limited (“Telefonica”) welcomes the opportunity to respond to Ofcom’s consultation on its proposal to make regulations for the award of 700 MHz and 3.6-3.8 GHz spectrum.¹ This is the second of two consultations published on 28 October 2019 concerning this award. Our comments here should be considered together with our response to the first consultation on its revised proposal on auction design.²
2. As set out in our separate response on Ofcom’s revised proposals for auction design, Telefonica strongly supports Ofcom’s proposal to proceed with this award using a simultaneous multiple round ascending bid (SMRA) auction format. However, the change of format is not sufficient by itself to ensure an efficient outcome that will best support the availability of the highest quality 5G services for all UK consumers. To achieve this, Ofcom must also act to ensure the entire 3.4-3.8 GHz is reconfigured into contiguous blocks of spectrum suitable for 5G and impose a cap of 140 MHz on each operator’s maximum holdings in this key band.
3. Telefonica has reviewed the regulations proposed for this award and compared them to the regulations for the PSSR award, which used the same auction format. We observe that almost all changes for this award relate to the revisions in the rules proposed by Ofcom in the consultation (i.e. elimination of withdrawals, minimum spectrum requirements and bid limits, and the introduction of a negotiated assignment phase), or can be explained by differences in the available spectrum. In addition, we noted that some of the cross-references applied in the PSSR award have been stripped out, but our interpretation is that these references were redundant.
4. Based on this analysis, we have not identified any major concerns with Ofcom’s *implementation* of its revised rules. This, together with the fact we are starting from an auction format that worked as intended for the PSSR award, gives us a high degree of confidence in the regulations. We do have some specific

¹ <https://www.ofcom.org.uk/consultations-and-statements/category-2/auction-regulations-award-700-mhz-3.6-3.8-ghz-spectrum>

² <https://www.ofcom.org.uk/consultations-and-statements/category-2/award-700-mhz-3.6-3.8-ghz-spectrum-revised-proposals>

observations concerning the implementation of the regulations for the assignment round negotiation phase.

5. Our further comments below fall into three types:
 - a) Requests for clarification on certain aspects of the regulations.
 - b) Identification of issues where the regulations grant Ofcom wide discretion, but where bidders would benefit from guidance in advance of the auction.
 - c) Changes to the regulations that will be required to implement the changes to the auction rules that we propose in our separate response to the consultation on the auction design.

6. Consistent with the two consultation questions, our response is divided into two parts:
 - Section II sets out our general comments on the regulations, in response to *“Question 1: Do you have any comments on our proposals to make Wireless Telegraphy (Licence Award) Regulations 2020, which are set out in draft form in Annex 5?”*
 - Section III sets out our specific comments related to the introduction of a negotiation phase in the assignment round, in response to *“Question 2: In particular, do you have any comments on the procedure set out in Part 7 (and described above under ‘Assignment of 3.6 GHz lots following a negotiation’) regarding implementation of the proposed negotiation period for winning 3.6 GHz bidders?”*

II. GENERAL COMMENTS ON DRAFT REGULATIONS

7. We request changes to the regulations in lines with our proposed revisions to the auction rules, as set out in our separate consultation response on the rules. The main changes are as follows:
 - **Full-band reconfiguration:**
 - Revisions to Part 6 of the regulations concerning the assignment stage will be required to allow for inclusion of existing holdings in a broad defragmentation exercise at 3.4-3.8 GHz.

- We recommend maintaining provision for negotiations, as a potential alternative to assignment stage bidding, as a way to determine the post-auction band plan.
- **Determination of bid constraints:**
 - Amend Regulation 18(4) on the overall bid constraint to implement a tighter constraint. At a minimum, 416 MHz should be reduced to 413.25 MHz, to properly implement Ofcom's 37% cap. A better approach would be to reduce this number to 390.92 MHz, consistent with a 35% cap.
 - Add a second bid constraint of 140 MHz on spectrum holdings in the 3410-3800 MHz band, so as to implement our proposed cap on immediately useable 5G spectrum.
 - Update Regulation 37 to incorporate the second bid constraint alongside the overall bid constraint.
- **Lot size:**
 - Revise Schedule 1 to allow for 10 MHz lots in the 3.6 GHz band and the 700 MHz individual frequency lot band.
 - Amend Regulations 16, 36, 37, 42, 46 and 47 to take account of the changes to the lot size.
- **Eligibility points:**
 - Revisions to Regulation 16 on calculating a bidder's initial eligibility to take account of any revisions to eligibility points per lot and lot size.
 - Revisions to Regulation 42 on calculating a bidder's eligibility based on their activity in a round.
- **Pricing rule**
 - Revise Regulation 34, so that base prices in each band are set equal to the lowest winning bid in that band rather than the amount of the bidder's own bid.
- **Information released after each round:**
 - Amend Regulation 46 (1) (g)(h) and (i) so that full information about aggregate demand is revealed in every round, instead of obscured information

Regulations where further guidance is requested

8. With respect to the parameters used to run the auction and the bid submission process, the regulations grant Ofcom wide discretion. This is acceptable given our expectation that (a) Ofcom will adopt an approach consistent with its obligations to run an efficient and effective award process; and (b) Ofcom will publish a document for bidders that provides guidance on its expected approach, as it did for the PSSR award.
9. For governance purposes, we request that:
 - Ofcom provide detailed non-binding guidance regarding how it expects to set **bid increments** during the auction. We refer Ofcom to our proposals set out in response to the sister consultation on the auction design.
 - Ofcom provide detailed non-binding guidance regarding the expected number and duration of bidding rounds to be scheduled on each bidding day, and on the minimum time gap between rounds, and between announcement of round results and the start of the next round.
 - Ofcom publish detailed instructions for applicants and for bidders regarding the processes they should follow, including (but not limited to):
 - i. The process for accessing the electronic auction system, submitting bids and using other functionality;
 - ii. The format of download files from the electronic auction system;
 - iii. The process for back-up bids submission; and
 - iv. The process for submitting questions to Ofcom and the format for receiving responses, both before and during the auction.

Bidding indications

10. At Regulation 123 and 129, concerning the rules for excluding bids made by an excluded bidder and rerunning rounds, the regulations introduce the term "*other bidding indications*". We assume this term refers to the information provided to bidders before and after the relevant rounds, as defined in Regulations 45 and 46. However, as the term is not defined in the regulations, we request clarification.

III. COMMENTS ON THE NEGOTIATION PHASE IN THE ASSIGNMENT STAGE

11. Telefonica believes that Ofcom should implement a process to ensure a reconfiguration of the entire 3.4-3.8 GHz band, including already allocated spectrum, so that every licensee will have contiguous holdings and is positioned to provide the best possible 5G service to UK consumers. As set out in our separate response on the auction design, we believe that in not proposing such a process, Ofcom is failing in its statutory duties to promote the efficient use of spectrum and promote the interests of UK citizen-consumers. If Ofcom was to implement full-band reconfiguration, then a negotiation phase within the assignment stage would no longer be essential, as reconfiguration would address wider concerns about fragmentation of spectrum holdings.
12. Without prejudice to our position, we recognise that having a negotiation phase for newly awarded 3.6 GHz only in the Assignment Stage is a second-best approach that, using Ofcom's own words, "*could potentially lead to reduced fragmentation of the wider 3.4-3.8 GHz band*" (Regulation 2.84). In this case, we consider that the measures that Ofcom proposes for 'full adjacency agreement' and 'partial adjacency agreement' are a significant enhancement to the auction design, and an essential component of the rules. The rationale for our position is set out at length in our other consultation response. Our further comments here focus on the regulations for implementing the negotiation phase.
13. At §2.81, Ofcom states that "*Only bidders that have paid their required assignment stage deposit will be allowed to enter into adjacency agreements during the negotiation period*". Telefonica requests that Ofcom drop this condition, as it may have an unintended detrimental impact on other winning bidders who have paid their deposit. The possibility that one bidder is excluded from negotiations would preclude a full adjacent agreement and would constrain options for other bidders to form partial agreements. The rule is unnecessary, as a bidder that failed to pay its additional assignment deposit would also be treated as having bid zero for all feasible assignment options, regardless of whether it is allowed to into an adjacency agreement or not.

14. Clause 84(3) of the regulations requires bidders to notify Ofcom that they want to engage in negotiation. Clause 85 states that the negotiations will proceed if two or more parties notify Ofcom that they wish to negotiate and, in this case, that all winning bidders can participate even if they did not notify Ofcom. Telefonica believes that the negotiations should proceed unless all relevant parties notify Ofcom that they do not want to participate. Even if only one bidder initially wants to engage in negotiation, it should be given its opportunity to make its pitch. Given the benefits to consumers associated with defragmenting the band, Ofcom should draft the regulations in a way that more positively promotes negotiation.

15. We are concerned that Regulations 86, 87 and 94, as presently drafted, may introduce a potential point of failure in the negotiation process. We propose changes or clarifications aimed at maximizing the likelihood that two or more bidders can find an agreement:

- Regulations 86 and 87 set out the procedures for bidders to submit separate forms setting out a negotiated adjacency agreement. We propose that Ofcom also allow bidders to submit a single common form (signed by the authorized representatives of the relevant parties). We also request clarification that it would be permissible for the parties to prepare a common form which is then duplicated and signed separately by each participant.
- Regulations 92 and 93 set out the procedures for submission of forms. We request clarification that it would be acceptable for parties to a negotiated agreement to submit all forms together in a common submission.
- Regulation 94 sets out the approach for dealing with incomplete or defective adjacency agreement forms. This is modelled on Ofcom's standard approach for bis submission during the Principle Stage. However, the situation is different as – unlike in the Principle Stage – the failure of any one party to submit a valid form would have a detrimental impact on other parties.

We propose the following changes to the rules to guard against mistakes or the possibility that a single party might act in bad faith and deliberately undermine an agreement:

- i. In the event of that a bidder submits a defective form, Ofcom will give that bidder a single 24-hour period to correct the form.

- ii. In the event that there is a difference in the proposed assignments in the forms submitted by bidders as part of the same adjacency agreement, Ofcom will inform all the relevant parties of the discrepancy and give them a single 24-hour period to align their forms.
 - iii. In the event that a proposed full band adjacency agreement is disqualified because (after taking steps (i) and (ii) above) Ofcom rejects one or more of the adjacency agreement forms, bidders will be given a further week to negotiate partial adjacency agreements.
 - iv. In the event that a proposed partial adjacency agreement is disqualified because one or more forms are rejected, any subset of those bidders that submitted valid forms with the same assignment will be given a single 24-hour period to submit a new partial adjacency agreement.
16. Regulation 97 provides an exhaustive description of the winning 3.6 GHz assignment stage bids where there are one or more valid partial adjacency agreement(s). Clauses (h) (iv) and (v), the subclauses (bb) determine the position of a bidder winning 20 MHz or less that is not part of a partial adjacency agreement. We note that one implication of this approach is that such a bidder must be placed closer to one of the edges of a band than any bidders within a partial adjacency agreement, even if all such members also won 20 MHz or less. Telefonica has no objection to the rule but we ask that Ofcom clarifies that this is the intent.
17. As Ofcom recognises, in order to facilitate negotiations, it is necessary to relax some of the award rules concerning disclosure of confidential information. This is addressed in the regulations in Regulation 122(2), which exempts winning bidders from two specific events that would otherwise lead to exclusion and/or forfeiture of the deposit, while the negotiation phase is underway. The events that are removed concern disclosure or receipt of confidential information outside a bidder's bidding group – Regulations 124(d) and 124(g)(ii). Telefonica support these changes.
18. To further facilitate negotiations, we propose that Ofcom consider further amendments and/or clarifications of the regulations:

- We support the preservation of requirements that bidders not submit false or misleading statements and not act in a way that could “*distort the outcome of the award process*”. We request that Ofcom clarify that there are no circumstances under which a valid partial or full adjacency agreement could be interpreted as distorting the auction outcome.
- We note that rules prohibiting collusion remain in place. We support this but request that Ofcom clarify that under no circumstances can participating in negotiations related to full or partial adjacency agreements be interpreted as a form of collusion.
- Ofcom should consider also exempting bidders from event 124(e), with regard to obtaining or attempting to obtain confidential information relating to another applicant or bidder, or at least clarify that this does not apply to information that may reasonably be requested to facilitate negotiations.
- We also request that Ofcom clarify that there are no circumstances under which a member of a bidder’s bidder group could be deemed to have become a member of another bidder’s bidder group as a result of receiving information during the negotiation phase.
- We request that the period for any exclusion of events be extended from the beginning of the negotiation phase through to the end of the award process. This would eliminate any ambiguity that a bidder might later be in breach of regulations based on information it legitimately learned during the negotiation phase.