



Response to Ofcom's Consultation Document on:

**Notice of Ofcom's proposal to make regulations
in connection with the award of 2.3 GHz and
3.4 GHz spectrum**

(Issued by Ofcom on 11 July 2017)

**BT plc and EE Ltd
14 August 2017**

Executive summary

BT/EE is concerned that the revised draft regulations fail to correctly implement a key policy decision that was set out in Ofcom's Statement of 26 May 2015 in relation to the treatment of the existing licence holder.

The issue concerns whether the existing licence holder must consolidate its spectrum holdings if it enters the auction, and in light of Three's acquisition of that licence holder how this should include them.

This is an important issue in that, as drafted, the regulations introduce a significant risk of a split assignment in the auction, which would result in an inefficient use of spectrum. Ofcom's latest decision increases the prospect that Three UK / UK Broadband ("H3G/UKB") do not relinquish their pre-existing 3.4 GHz spectrum. H3G has already signalled in a letter to Ofcom, that unless required to do so it would consider not relinquishing its holdings.

If H3G/UKB decides not to apply for a replacement licence this would significantly increase the risk of at least one bidder in the auction being left with a split assignment, an outcome which Ofcom has itself acknowledged on several occasions is possible. There are numerous scenarios where this could occur if a bidder (but not H3G) won a quantity {X} of spectrum in the auction and H3G/UKB decided to retain its existing assignment in the band.

{X}

This would clearly not represent an efficient use of spectrum compared to a case where only contiguous assignments are awarded. In order for Ofcom to minimise the risk of a split assignment, and thereby promote efficient use of spectrum, it must revert back to its previous decision to make participation in the auction by H3G/UKB conditional on relinquishing their existing licence in the 3.4 GHz band.

1. Ofcom's draft regulations do not implement its policy decision

The Draft Wireless Telegraphy (Licence Award) Regulations 2017 (the "July 2017 Draft Regulations") do not correctly implement Ofcom's earlier policy decision to make UK Broadband's ("UKB") participation in the auction conditional on it relinquishing its pre-existing licences in the 3.4 GHz band. Instead Ofcom's Draft Regulations significantly raise the risk of at least one bidder winning a split assignment, which would represent an inefficient use of spectrum.

In its statement and further consultation on the Public Sector Spectrum Release: Award of the 2.3GHz and 3.4 GHz spectrum bands published on 26 May 2015 (the "May 2015 Statement") Ofcom explained that its consultation proposal in relation to treatment of UKB spectrum was unanimously supported and that UKB had agreed to the proposal.¹ Ofcom confirmed its Decision (at para 4.14) to proceed with their proposed approach to ensuring contiguity of spectrum.

The proposal on which Ofcom consulted, and subsequently confirmed in its May 2015 Statement that it had decided to adopt, was set out in its November 2014 consultation on the Public Sector Spectrum Release: 2.3GHz and 3.4 GHz bands (the "November 2014 Consultation") where it was clearly stated (*emphasis added*) that²:

*"We further propose that while only 150 MHz in the 3.4 GHz band will be available in the auction at the principal stage, UK Broadband's current 40 MHz holding will be added to the frequencies to be allocated in the assignment stage if UK Broadband participates in the auction. **That is UK Broadband must give up their current holding of 40 MHz if they wish to participate in the auction.**"*³

In its October 2015 Statement there is a reminder about the decisions already taken in the May 2015 statement and, on the UK Broadband spectrum issue, it summarises the previous decision as (*emphasis added*):

*"To **allow UK Broadband to participate** in the assignment stage **with its existing 3.4 GHz spectrum** in order to allow all licensees to obtain contiguous spectrum;"*

This policy decision was reflected accordingly in the draft regulations that were first consulted on in October 2015 and then in November 2016. Despite this Ofcom has, without any consultation, significantly changed and expanded the rules around the "existing licence" in the July 2017 Draft Regulations, which now explicitly allow for the scenario of the existing licence holder participating in the auction without a requirement to request a replacement licence. For example, Part 5 regulation 24(a) explicitly lists the possibility of the existing licence holder to bid in the auction without consolidating its existing spectrum. Regulation 67 (2) (a) (ii) and (iii) and Regulation 79 have the same effect.

In prior versions of the regulations this was not set out and the implication was that it was not a scenario that would arise given Ofcom's decision on the matter that was clearly set out in previous consultations/statements. In the 2015 draft regulations, for example, the regulations numbers 5 and 17 (in particular 17(7)) do not mention scenarios where the existing licence holder bids in the auction without applying for a replacement licence. Similarly in the November 2016 draft regulations, for example Part 5, this scenario is not covered.

¹ Para 5.12-5.13

² https://www.ofcom.org.uk/data/assets/pdf_file/0027/98172/2_3_and_3_4_GHz_award.pdf

³ Para 5.10

Ofcom's July 2017 Statement incorrectly summarises the decision on the UKB spectrum set out in the May 2015 Statement as follows:

*“Pre-existing licence holder: We decided that if the existing holder of 40 MHz in the 3.4 GHz band (UK Broadband) wished to take part in the Auction it would have the option of applying for a replacement licence for the frequencies it held. Those frequencies would then be included in the assignment stage of the Auction, and so allow all allocations in the 3.4 GHz band to be contiguous following the Auction.”*⁴

*“First, we have assessed whether it might be appropriate to require the pre-existing licence holder to apply for a replacement licence if it wished to participate in the principal stage. We had previously considered making participation in the Auction by the pre-existing licence holder conditional upon relinquishing the existing licence. However, we subsequently reached the view that it would not be proportionate to impose such a condition, as it would exceed the conditions imposed upon other participants.”*⁵

Ofcom's characterisation of the events is incorrect in that it was never just an “option” to apply for a replacement licence if participating in the auction. As explained above, it was clearly stated in the consultation proposal, and subsequently confirmed in the May 2015 Statement, that “UK Broadband must give up their current holding of 40 MHz if they wish to participate in the auction”.

We assume that the previous considerations that Ofcom refers to above relates to some internal Ofcom deliberations rather than external engagement, as we are unable to find any fresh consultation proposal to re-open and reverse the previous decision on this matter clearly set out in the November 2014 Consultation and May 2015 Statement, and confirmed in the October 2015 Statement. This raises serious concerns that due process has not been properly followed in accordance with Ofcom's general duties to give effect to a legitimate expectation of consultation⁶ and Stakeholders have not been properly consulted about this apparent change to Ofcom's position.

BT/EE also notes a further potential conflict between the July 2017 Statement and Draft Regulations, insofar as the former treats H3G and UKB as a combined entity, whereas the latter treats them as separate. For example para 2.13 of the July 2017 Statement indicates that H3G has the option of applying for a replacement licence in respect of the current holdings of UK Broadband, whereas the Regulations 7(1) and 7(2) explicitly state that only the pre-existing licence holder can apply for a replacement licence, which according to the definition in Regulation 2 is UK Broadband Limited.

2. Ofcom's latest decision increases the risk of a split assignment in the auction

Ofcom's latest decision raises the prospect that H3G/UKB do not relinquish their pre-existing 3.4 GHz spectrum, thereby removing the prospect of 190 MHz of contiguous spectrum being auctioned. H3G has already signalled in a letter to Ofcom, that unless required to do so it would consider not relinquishing its holdings.⁷ Noting that H3G/UKB has suggested in its letter that it wishes to keep part of the existing UKB assignment where it is currently located, it may decide not to apply for a

⁴ [Para 3.1](#)

⁵ Para 8.53-8.54

⁶ The legitimate expectation to consult arises from, among other administrative law principles, Ofcom's established practice of consultation including Ofcom's Consultation Principles, 9 July 2010 (see <https://www.ofcom.org.uk/consultations-and-statements/how-will-ofcom-consult>).

⁷ Para 1.7 of H3G's letter to Ofcom of 23 June 2017 discussed the “possibility of allowing Three/UKB to choose at the outset of the auction whether to seek re-assignment of 0, 20 or 40 MHz of its spectrum”.

replacement licence to have its holding consolidated but instead first see what new spectrum it acquires and where it is located and later seek to trade its spectrum once the spectrum assignments become clear.

H3G/UKB may also have strategic reasons for not applying for a replacement licence including the potential to deny other MNOs access to contiguous spectrum.

If H3G/UKB decides not to apply for a replacement licence this would significantly increase the risk of at least one bidder in the auction being left with a split assignment, an outcome which Ofcom has itself acknowledged on several occasions is possible. In the November 2014 Consultation Ofcom stated that *"if they [UKB] participate in the auction, other winning bidders in the award could also be guaranteed a contiguous spectrum assignment"*, and *"a consequence, if UK Broadband does not come to the auction, is that winning bidders could have a split assignment"*.⁸ {X}.

3. A split assignment would result an inefficient use of spectrum

Ofcom has a duty to promote both allocative and productive efficiency in the use of spectrum under section 3 of the Communications Act ("CA 03"), section 3 of the Wireless Telegraphy Act 2006 ("WTA 06") and Articles 8 and 9 of the Framework Directive. In the July 2017 Statement Ofcom state that the case where H3G put all 40 MHz into the assignment stage *"is most likely to achieve efficient use of the spectrum"*.⁹ Yet, despite it having a statutory duty to promote efficient use of spectrum, Ofcom has taken a decision, without proper consultation, that significantly reduces the likelihood of this more efficient outcome occurring.

BT/EE has undertaken an assessment of the potential impact of a split assignment {X}. This would clearly not represent an efficient use of spectrum compared to a case where only contiguous assignments are awarded.

{X}.

The risk of a split assignment {X} is made even more acute because of Ofcom's decision to auction the 3.4 GHz and 3.6 GHz bands separately, but also if H3G/UKB is permitted to retain its assignment in both bands (whilst still participating in the auction). As a result an MNO could for example acquire 40 MHz of 3.4 GHz (at any part of the band) and subsequently 40 MHz of 3.6 GHz, across the two auctions, and face substantially higher deployment costs. This would not represent an efficient allocation of spectrum. Apart from undertaking a single award of 3.4-3.8 GHz, the least interventionist way for Ofcom to reduce this risk is to make participation in both auctions conditional on relinquishing pre-existing licences.

{X}.

{X}.

4. Promoting efficient use of spectrum

Whilst Ofcom correctly notes in the July 2017 Statement that a case where H3G would put all 40 MHz into the assignment stage is most likely to achieve efficient use of the spectrum (Ofcom's 'scenario 1')

⁸ Paras 4.43 and 5.3

⁹ Para 8.70

and that Ofcom's Option A (i.e. unconditional option for H3G/UKB to relinquish 40 MHz) is more likely to achieve this than its Option B (i.e. unconditional option for H3G/UKB to relinquish 20 or 40 MHz), its original policy proposal to make participation conditional on relinquishing the full 40 MHz for reassignment is more likely to lead to scenario 1 (i.e. an efficient outcome) than either of these new options. Ofcom can significantly increase the probability that H3G/UKB apply for a replacement licence for all of its spectrum, thereby allowing for an efficient spectrum allocation and circumventing H3G's attempts to fragment the band for its own ends.

5. Response to consultation Questions

Question 1: Do you have any comments on the changes we are proposing to the draft Regulations, as summarised in paragraph 2.5 and described in detail in this Notice?

No, other than the concerns detailed above.

Question 2: Do you have any other comments on the drafting of the proposed draft Regulations?

Yes, see concerns and solutions as set out above.