

Hutchison 3G UK Limited  
Star House  
20 Grenfell Road  
Maidenhead SL6 1EH  
United Kingdom

T +44(0)1628 765000  
F +44(0)1628 765 001  
www.three.co.uk



Laurence Green  
Floor 3  
Spectrum Markets Team  
Riverside House  
2A Southwark Bridge Road  
London  
SE1 9HA

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Dear Mr Green,

### **Hutchison 3G UK Limited (“3UK”) response to ‘Simplifying Spectrum Trading’**

3UK welcomes the opportunity to comment on Ofcom’s plans to change the methods by which spectrum is traded, as detailed in the consultation paper ‘Simplifying Spectrum Trading’. Spectrum is a vital resource for many businesses and consumers throughout the United Kingdom, and is particularly important to the mobile telecommunications industry so that it may continue to increase productivity and welfare across the country.

We recognise Ofcom’s aims in simplifying spectrum trading and enabling spectrum leasing, particularly in the case of PMSE use. Currently mobile spectrum is not tradable. Our comments are therefore provided as an interested party in the event that mobile spectrum becomes tradable in the future.

#### **The current market and regime**

Our comments in this letter are principally in relation to spectrum used for, or potentially able to be used for, mobile telecommunications services. Mobile telecommunications is an increasingly important industry in the United Kingdom, with a large positive impact on national welfare and productivity. Total revenues of mobile communications in 2008 were £15 billion, but this will significantly underestimate the contribution that the industry makes to the UK economy. In its recent consultation, Mostly Mobile, Ofcom stated that “mobile services play an increasingly important role in our lives, as individuals and a society”. It is important, therefore, that spectrum trading does not evolve in a way which is detrimental to mobile communications.



Currently, the spectrum held by mobile communications operators is not tradable, although this is subject to change. The conditions surrounding transfer of such mobile spectrum have not been decided, and it is not known precisely how the licences of 3UK and other mobile operators will need to change to accommodate this. Nor does this consultation expressly specify whether its proposals would apply to mobile spectrum (if it is made tradable). As such it is not currently possible for 3UK to provide definitive responses to Ofcom's consultation. Therefore our response detailed in this letter is high level and addresses only some of the key issues which may arise. We consider that Ofcom should clarify whether and how these changes to trading arrangements will apply to the mobile communications spectrum bands before they are imposed.

### **Changes to the licence transfer process**

The key change to the spectrum transfer process involves a removal of Ofcom's approval for each and every transfer of spectrum. For many cases, this is understandable. However, Ofcom recognises that there are some cases where such approval is still desirable; in particular:

- where there is certain economic and market significance to the transfer,
- where there are certain characteristics particular to a licence sector, or
- where the risk of interference is particularly high.

Each of these exceptions is important in the mobile communications industry.

The mobile industry plays an important role in the economic welfare of the UK - this role is becoming even more important as mobile data communications become more sophisticated. Spectrum which is suitable for mobile use is limited, yet it largely determines the coverage, capacity and speed that mobile operators can offer. Operators have paid significant sums in order to obtain the rights to use mobile spectrum; in 2000 mobile operators paid approximately £22.5 billion at auction for 2100MHz spectrum. Such operators have also made considerable additional investment in network infrastructure and technology.



If operators are to continue to provide high quality services, to protect their investments and to continue to invest in the mobile sector, then it is important that their spectrum holdings are properly managed and protected.

We believe that the trading of mobile spectrum is likely to trigger a number of Ofcom's list of exceptions. We detail certain of these factors below, and then discuss how these should be allowed for within the framework that Ofcom proposes.

### ***Interference***

Interference is a particular issue for mobile communications. It reduces the quality of mobile services provided and reduces the value of an operator's investment in spectrum and network infrastructure.

The proposals as they stand either remove or reduce Ofcom's ability to monitor and ensure that interference is avoided or appropriately controlled. Instead, the responsibility for managing and avoiding interference will presumably rest with the spectrum licence holder, or band manager in the case of leased spectrum. This may have serious implications for the identification and speed of mitigation or elimination of interference. While Ofcom has considerable experience in managing spectrum interference, licensees of mobile spectrum will have far less experience and, most likely, reduced incentives to keep interference under control. We do not believe that it would be appropriate for interference issues for mobile spectrum to be dealt with by the party trading that spectrum. Accordingly, we consider that trades of mobile spectrum (or spectrum which is liable to interfere with mobile spectrum) would invariably require Ofcom to review the trade.

Further, it is unclear from Ofcom's proposals where legal liability for interference will lie, and how other spectrum users will be protected against the potential for other entities to be unable to meet claims for damages caused by interference.

### ***Competition***

Within the mobile communications industry, there are particular concerns about the way in which competition occurs between operators. Spectrum is a key constraint on



the ability of each operator to compete, and is in particular a constraint on the equality of the market.

Were controls on spectrum trading to be relaxed, there is a possibility that one or two operators would be able to gain a disproportionately high amount of spectrum when other operators sought to remove some spare capacity or reduce their licensing costs. Such acquisitions of spectrum could be aimed at reducing competition through capacity constraints, or preventing other operators from acquiring larger amounts of contiguous spectrum over which they could run higher bandwidth services.

One further issue is around the inclusion of service quality and coverage obligations in the current mobile spectrum licences. It is unclear at present how these will be affected once mobile spectrum is able to be traded. Such service quality obligations may be applied to the direct users of the spectrum, or the owners. As such, we are unable to comment on the impact of removal of Ofcom's approval until the way in which mobile spectrum is to be traded is decided.

### ***Invocation of exemptions***

3UK's main concern with the current consultation is that it does not indicate under which conditions a review or more rigorous procedure would be initiated, or how this would be evaluated. It is clear from our comments above that we believe it will be necessary for any spectrum trading within the bands set aside for mobile communications to be subject to this rigorous procedure; however it is not stated whether or how this will be invoked.

This is not limited to mobile spectrum. For our purposes, the spectrum either side of the mobile bands (or, in the case of the 2.6GHz forthcoming auction, the 50MHz in the centre of the band) must also be subject to these controls.

Therefore we ask that Ofcom clarifies how the objection process will work in practice:

- How companies and individuals will be able to respond to any Transfer Notification Register publication
- Whether Ofcom's investigations will commence on a formal objection or on a request for information



- How it will be determined whether Ofcom needs to follow a rigorous approval procedure.

Unless the process for objection and investigation is clearly set out and capable of imposing sufficient restraints upon the trading of spectrum and the control of interference, then we suggest that the current requirement for Ofcom to consent to transfer should be retained for mobile spectrum (and other spectrum which is liable to interfere with mobile spectrum). However we would welcome further details from Ofcom in relation to this process.

### **Transfer without licence issue**

Ofcom describe a potential system where they are not required to issue a new licence, but may simply change the ownership details.

We believe that the use of transfer without licence issue is sub-optimal in that it does not reduce the regulatory burden, but Ofcom loses significant control and information. In particular, Ofcom would lose visibility of what the spectrum is intended to be used for, which has further impact on the interference issues highlighted above.

### **Leasing**

Leasing, on the other hand, represents a more optimal system, under which all existing licence obligations can be retained and simply managed by the spectrum owner. However, this retains issues around interference and in particular hands responsibility for interference compliance to the band manager. As such, our comments on interference, and the need for Ofcom to remain involved, are relevant in this case as well.

We note Ofcom's cut-off point of 24 months for short-term leases. This cut-off point seems to be designed to enable some spectrum users to make some investment to make best use of spectrum, which will have economic benefits. It will give some spectrum users flexibility to roll out new services with less financial risk. However, again it is unclear how coverage and service quality obligations would be governed, particularly given that the user of the spectrum and the owner of the spectrum will be two separate parties. We therefore require clarity on this issue, particularly as to



whether leasing parties will be restricted to those who are already covered by coverage obligations.

### **Ofcom's recommended options**

In total, Ofcom sets out six options for spectrum trading in the future:

- Status quo
- Amending the process of transferring licences to reduce Ofcom involvement
- Transfer without licence issue
- Leasing
- Automation
- Complete deregulation

We agree with Ofcom's assessment that the last of these options is unrealistic.

We also believe that pure automation of the current system, or the second system (where Ofcom's approval is not needed) is sub-optimal. While Ofcom's reasoning is that it is subject to mechanical failure, we have concerns that this system would remove a crucial level of interaction, and would therefore result in inappropriate transfers being permitted after not being referred.

Ofcom's suggests that the best means for simplifying spectrum trading (where full Ofcom involvement were not appropriate) would be a system which is a combination of the second and the fourth systems. This would however be subject to the procedures for Ofcom's involvement and scope for regulating and where appropriate rejecting trades being more clearly defined.

### **Overall conclusions**

While 3UK recognise the aims of Ofcom's consultation, we remain concerned about the removal of the need for Ofcom's approval for mobile spectrum. We are concerned in particular about the removal of a consultation stage, and believe it is not clear how this will work in cases where spectrum licences have service obligations.



We believe there are complex issues that will arise surrounding the transfer of spectrum used by mobile telecommunications networks, and Ofcom should not risk these issues being overlooked. We believe that trading of spectrum used by mobile operators – and spectrum that could be used by mobile operators – should be subject to an automatic need for investigation.

We further believe that Ofcom's consultation does not sufficiently describe how and when a consultation process is opened. It is not stated whether such a process is public or private, and whether a process is started when there is a formal objection or a request for information after the transfer is published on the Transfer Notification register.

In general, for spectrum as a whole, we believe Ofcom's proposals are sensible. We believe that our requirements for more detail for mobile spectrum could form part of Ofcom's overall framework, but such exceptions must be formalised at this consultation stage. The key issues of interference must be addressed clearly and in a level of detail which provides comfort to licence holders that their spectrum in the UK will remain capable of optimum use. It is not clear from the current consultations who is responsible or liable for interference issues (particular in the case of leasing). Those using or leasing out the spectrum may not have appropriate incentives to minimise and manage interference. Ofcom must therefore design appropriate incentives to prevent interference, and must define which parties carry legal liability to compensate for undue interference. Related to this last point, Ofcom must consider the abilities of entities to meet claims caused by interference.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'S L'. The signature is stylized and cursive, with a large initial 'S' and a smaller 'L'.

Stephen Lerner  
General Counsel  
For and on behalf of Hutchinson 3G UK Ltd