



Cliff Mason
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

7th July 2009

Dear Cliff,

Freedom4 application for licence variation

O2 welcomes this opportunity to comment on Ofcom's proposal to vary the licence of Freedom4. Liberalisation is a process that O2 has consistently supported, we have no objection to the proposed variation as set out in your recent consultation.

The purpose of this response is to draw Ofcom's attention to the inconsistency of analytical approach between this consultation and Ofcom's recent "further" consultation on the "Application of spectrum trading and liberalisation to the mobile sector".¹

You will be aware that Ofcom is required by law, under s3(3)a of the Communications Act 2003, to discharge its statutory duties in a consistent manner.

In this consultation, at §§6.9-6.23 and in the licence variation of UK Broadband², Ofcom has undertaken a high level analysis of the competitive impact on various potential relevant markets.

In this consultation Ofcom correctly identifies that

- *"it is not therefore possible to define the precise boundaries of the relevant markets as that would rely on speculation about how broadband markets will develop",³*
- It is prudent to look at both broad (broadband market) and narrow (mobile or nomadic) and assess the impact in each case, at a high level; and
- *"The question of the precise scope of the relevant economic market is an empirical one and can only be fully addressed once relevant services are being offered and consumers' and suppliers' behaviour observed".⁴*

Ofcom's mobile spectrum liberalisation consultation asserts that there is the potential for a detrimental competitive impact on a fairly narrow market (competition between just the five macrocellular networks of the MNOs) and then assesses the impact of liberalisation on that market. The mobile spectrum liberalisation consultation goes on to suggest that a sub-market of customers sensitive to differential quality may then emerge and that these customers (a very narrow market) could only be addressed by 900MHz MNOs⁵.

¹ <http://www.ofcom.org.uk/consult/condocs/spectrumlib/>

² http://www.ofcom.org.uk/consult/condocs/bb_application/

³ §6.13

⁴ §6.22

⁵ This proposition is itself, of course, factually incorrect. UMTS2100 players can cost effectively address these customers. Ofcom's assertions are driven by its analytical error regarding the achievable speed at cell edge.

A *Telefonica* company



This determinative approach to market definition is at odds with the approach adopted in the cases of Freedom4 and UK Broadband.

In order for Ofcom to comply with its duty under s3(3)a of the 2003 Act with regard to mobile spectrum liberalisation, Ofcom will need to adopt the appropriate approach to market definition. That is an empirical one which examines whether broad or narrow market definitions give rise to competitive concerns. Furthermore, as Ofcom itself identifies in the case of Freedom4, that market definition can only be evaluated *ex post*, in light of the observable behaviour of customers and suppliers.

Yours sincerely

Nicholas Blades
Head of Regulatory Affairs & CEO Office

cc Justin Moore, Ofcom
Graham Louth, Ofcom