

23 August 2007

## UK Broadband application for licence variation: T-Mobile's response

### Executive Summary

T-Mobile welcomes the opportunity to respond to Ofcom's consultation 'UK Broadband application for licence variation' ('the Consultation').

T-Mobile considers that UK Broadband's application is both premature and opportunistic and should be rejected. The liberalisation of UK Broadband's ("UKBB's") licences was the subject of Ofcom's Spectrum Framework Review: Implementation Plan ("SFRIP") published on 13 January 2005. That consultation was not confined to licences such as those under consideration, but also included mobile licences. Ofcom's preference (in relation to both fixed wireless licences and mobile licences) was to liberalise such licences in 2007. However, mobile licences have not yet been liberalised. Indeed Ofcom's long promised consultation has been further delayed. There is no case for the liberalisation of fixed wireless licences prior to the liberalisation of mobile licences.

T-Mobile does not consider that UKBB or Ofcom have adequately made the case for the changes requested:

- As far as consumer benefit is concerned, it is not clear that UKBB has the commitment to the market to deliver any innovative services. As Ofcom hints such services are likely merely to substitutes for existing services, including fixed and mobile broadband services.
- T-Mobile has considered the European Economics' paper contained in UKBB's application, which underlines the opportunist nature of the application. It looks at the economic benefits of what it describes as Personal Broadband services, without distinguishing them from mobile broadband and without attempting to value the UKBB licence. T-Mobile considers that any economic assessment that fails to account for the real value of the licence that UKBB is in effect acquiring, fails to properly assess the economic rationale.
- In respect to the competition analysis, it is the impact on the market which makes it clear that the proposed changes should not be made. There is already a plethora of nomadic services available in the UK and, as is set out in more detail below, UKBB would not be competing on a level playing field with existing mobile operators.

It follows that T-Mobile has a number of comments and concerns related to Ofcom's proposals on UK Broadband (UKBB)'s spectrum. In summary, these are as follows:

1. Ofcom's proposal is inconsistent with previously stated policy and discriminatory with respect to other mobile and fixed operators and other spectrum users. T-Mobile has identified major areas of inconsistency and/or discrimination:
  - a. The timing of the proposed liberalisation: T-Mobile believes that 3.5GHz spectrum should be liberalised within the same timeframe as the 2G refarming process.
  - b. The price of the liberalised spectrum: UKBB should pay a market price for what is de facto a totally different licence. At the very least this should be linked to the price payable for 1800 MHz licences. Ofcom should impose a mobile premium on the

liberalised 3.5GHz spectrum in the form of an additional annual fee to be charged to UKBB.

- c. The lack of coverage obligations attached to this spectrum: mobile operators will be left subject to many restrictions in the use of their spectrum while facing competition from UKBB, which is not similarly constrained.

Accordingly, to proceed on the basis of the current proposals would be contrary to Ofcom's general duties under the Communications Act in respect of administrative consistency and discrimination.

2. Ofcom does not appear to have fully considered the distortions such a proposal will bring to the market and the detriments that it will create:
  - a. With respect to competition: Ofcom's proposals would allow UKBB to use mobile spectrum without any roll-out obligations and at a price significantly below that paid by other mobile broadband operators (i.e. the 3G licence holders). ✗
  - b. ✗ This proposal ✗ risks worsening the digital divide that already exists in the UK, causing additional damage to consumers who need wireless broadband in rural and suburban areas. The UK mobile and nomadic markets are both already fiercely competitive: the increment in competition will be insufficient to compensate for the discriminatory and distortive effect of the entry contemplated.
  - c. With respect to the credibility of Ofcom's auction regime: Ofcom is sending the signal that spectrum conditions and applications can easily be changed at a spectrum holder's request notwithstanding the original licence specifications. This significantly undermines transparency in the Ofcom auction process and confidence in its wider spectrum policy.

Accordingly, to proceed on the basis of the current proposals would also be contrary to Ofcom's general duties under the Communications Act in respect of the promotion of competition and the efficient use of spectrum.

3. In conclusion, Ofcom should:
  - a. align the timeframe of UKBB's licence change with the liberalisation of 2G and 3G licence conditions; and
  - b. impose an additional fee on UKBB to take into account the market value associated with the change in application of the spectrum, linked to the amount payable for 1800 MHz licences.

## GENERAL COMMENTS

As requested by UKBB, in the Consultation Ofcom is proposing to allow two major changes in the current licence acquired by UKBB in 2003. Ofcom is proposing to: (i) allow application neutrality, which implies that UKBB would not be restricted to providing fixed applications only; and (ii) to increase the allowed power levels. Both proposals will allow UKBB to provide connection to mobile terminals and use base stations to provide mobile services. In addition, Ofcom is proposing to allow the changes in the licence from 2007 and has proposed that the licence fee associated with this spectrum should not change.

T-Mobile regards this proposal as highly discriminatory with respect to the other market operators, both fixed and mobile, and in general to all spectrum users. Not only does this distortion to competition breach Ofcom's duties to act in a consistent and non-discriminatory manner, but will create an uneven playing field thereby harming competition.

In making this proposal, Ofcom has not properly grasped the impact of this liberalisation. In this case liberalising the application properties of this spectrum entails an entire change in the purpose of the spectrum usage. Ofcom's proposal will allow spectrum use to move from fixed applications to mobile applications. This is different from the case of other proposed liberalisations, such as the refarming of 2G spectrum, where there is only a technology change.

Since the purpose/application of the spectrum is changed, the value attached to that spectrum has significantly changed too, and that should be reflected in the fee charged annually to UKBB. That fee needs to be reviewed to reflect the change of purpose of the spectrum and to be realigned with the market value.

In addition, the consequences of Ofcom's proposal on competition in the market and on consumers' welfare are significant. T-Mobile is not against the liberalisation of the UK market for spectrum, and spectrum usage. However, T-Mobile has serious concerns over the apparently inconsistent and potentially discriminatory implementation of this policy should the UKBB application be accepted on the basis of the current proposals, at least where the same principals are not applied to other licence holders. T-Mobile's concerns are listed below.

### 1. OFCOM'S PROPOSAL IS DISCRIMINATORY AND INCONSISTENT WITH ITS STATED LIBERALISATION POLICY

Ofcom's proposals are discriminatory because existing mobile operators will be subject to licence conditions that will not apply to UKBB:

- Licence conditions restricting use of 3.5GHz spectrum would be removed only 4 years after the issue of that spectrum;
- Ofcom proposes to immediately remove restrictions to allow 3.5GHz spectrum to be used for 3G services, while 2G spectrum may be prevented from being refarmed until some later (uncertain) date;
- Existing 3G operators have had to pay a substantial premium for mobile spectrum at a time of policy-induced spectrum scarcity, while Ofcom proposes no variation in the fee paid by UKBB; and
- The existing 3G mobile operators remain under a licence obligation to achieve coverage of 80% of the UK population by the end of this year while no such obligation is attached to

UKBB.

T-Mobile has identified at least three major grounds of discrimination and/or inconsistency in Ofcom's proposals.

### **1.1 Timing of the licence change**

The Consultation proposes that the UKBB spectrum should be liberalised in 2007. Such a liberalisation would not be consistent with the liberalisation path proposed by Ofcom in relation to other licences and in particular to the refarming of 2G spectrum. This is discriminatory against the 2G licensees, who will not be able to benefit from liberalisation whilst UKBB is. T-Mobile is hence of the view that liberalisation of spectrum for the provision of mobile services should be aligned for all parties so that it is introduced at the same date.

Ofcom's current proposals will have a considerable negative impact on the business case underlying T-Mobile's investment programme going forward. T-Mobile is of the view that both these effects can be reduced by aligning the timing of the 2G refarming decision and the change in UKBB's licence. This would create a liberalisation policy where parties are treated on an equal basis, and would achieve an orderly transition that does not disrupt the current high levels of investment by the industry. This will also help ensure a level playing field between the various classes of operators and reduce the windfall gains to a more reasonable level.

In short, spectrum liberalisation policy and its implementation should be applied on an industry wide basis and not to particular individual operators, in order to smooth the transition of spectrum policy management from "command & control" to the radically different market-oriented approach.

### **1.2 Licence fee paid by UKBB**

Ofcom is not proposing to make any variation to UKBB's licence fee. T-Mobile regards the proposal not to change UKBB's licence fee as both discriminatory and inconsistent with the move to the pricing spectrum at market rates.

The value of spectrum for mobile services is totally different to that of fixed-only services. The additional value of mobile spectrum was not incorporated when this spectrum was auctioned in 2003. This is clear from the prices these two categories of spectrum achieved at auction: the five 2.1 GHz licences were sold for billions of pounds each, whereas all fifteen 3.5 GHz licences were sold for less than £7 million.

In addition, this band has now been harmonised internationally for mobile services and, furthermore, is the only band which Europe is proposing as a candidate band for IMT at WRC-07. T-Mobile also notes that at the last RSC meeting the European Commission presented a first draft decision on harmonizing the 3.4 - 3.8 GHz bands for broadband wireless applications. The final draft decision is expected at the next RSC meeting with a view to adoption before the end of 2007. These developments have the potential to add significant value to this spectrum.

Ofcom is well aware that when a band is harmonised for mobile services its value grows enormously to reflect the increased revenue opportunities associated with mobile services. Not recognising this important aspect equates to granting a high-revenue band for free, which is

contrary to Ofcom's policy of adopting a market led approach to spectrum management, is highly discriminatory, and distorts competition.

Accordingly, granting UKBB's request would be discriminatory towards other operators such as mobile operators who have always acquired harmonised bands and who have therefore had to pay a premium in the form of a higher annual licence fee (2G spectrum) and higher auction fee (3G spectrum) to secure a high-value band. In addition, UKBB would gain a massive advantage with respect to participants in the forthcoming 2.6GHz spectrum auction, where participants will inevitably have to purchase spectrum for the same purpose at much higher prices.

Furthermore, the proposals set out in the Consultation are inconsistent with the policy of the market based pricing of spectrum licences. T-Mobile therefore urges Ofcom to reconsider its position on this issue. As Ofcom has previously stated, spectrum pricing is crucial in sending the right signals to the market. T-Mobile would regard it as both highly discriminatory and inconsistent if Ofcom decided to allow such a significant licence change without rebalancing the fee paid by UKBB to take into account the increase in the value of its spectrum. At a minimum an additional fee needs to be paid by UKBB to reflect the value of the spectrum for mobile. Ofcom should analyse a suitable AIP figure based on the new usage of this band. The MNOs currently pay £110,880 per year for 2x200 KHz of spectrum based on a mobile AIP figure at 1800 MHz. This could be used as the basis for the fee for this band and increased in line with any increases in AIP for 1800 MHz spectrum. This proposal appears to us to be reasonable, transparent, proportionate, non-discriminatory, easy to implement and consistent with Ofcom's declared spectrum policy.

In conclusion, Ofcom has a duty to change its proposal regarding the pricing of this spectrum if it intends to allow the licence change. The new fee needs to recognise the increase in value, determined both by the change in the purpose of the band and by the fact that now this band has been harmonised internationally. T-Mobile believes that a reasonable approach would be to base the new AIP figure on the fee paid by MNOs for 2G spectrum and adjust the value to reflect the different propagation characteristics of the band.

### **1.3 Coverage Obligations**

The existing 3G mobile operators are under an obligation to provide 80% population coverage by the end of 2007. According to Ofcom's proposals in the consultation UKBB will not be subject to any coverage obligation. The consequence of this proposal would be to allow new operators to target their entry on the areas and services of highest value while the existing operators are lumbered with the cost of providing widespread coverage to UK consumers. The proposal risks significant distortions to competition and investment and harm to overall efficiency. This is addressed in more detail at section 2 below.

## **2. DETRIMENTS GENERATED BY OFCOM'S PROPOSALS**

T-Mobile is concerned that the changes proposed in this consultation regarding a licence variation for UK Broadband ('UKBB') appear to have been developed without consideration to the distortions such a decision will bring to competition in the market, to consumers, and to Ofcom's auction regime itself.

T-Mobile has previously raised its concerns that Ofcom's proposal regarding the licence variation in this band would cause disruptive changes and would cause significant harm to mobile operators, in particular because this proposal fundamentally alters the market environment and consequently the market model. This will harm competition and consumers.

Ofcom's proposal to grant application neutrality to the 3.5GHz band alters the market model and the sheer extent of the change creates substantial uncertainty that will deter future investment. ✂

## 2.1 Ofcom's proposals ultimately harm competition

Ofcom's proposals would allow UKBB to use mobile spectrum without any roll-out obligations and at a price significantly below that paid by the current 3G operators. ✂

T-Mobile disagrees with Ofcom's market analysis. ✂

Mobile operators would therefore suffer at least two significant disadvantages with respect to UKBB were Ofcom's discriminatory proposals to become effective:

✂

✂ It is important to note that Ofcom's proposals create distortions in the competitive playing field since UKBB's advantages do not in any way relate to UKBB being more efficient or with UKBB's business plan being more successful. UKBB's commercial advantages will have been created by Ofcom and competition will be dramatically distorted by a regulatory decision. This will create a serious precedent in Ofcom's spectrum policy and will add a significant risk that prospective spectrum buyers might receive the wrong signals following this decision, thus increasing the risk of further distortions in the coming auctions.

The proposals set out in the Consultation are therefore contrary to Ofcom's duties to promote competition and ensure the efficient use of spectrum.

## 2.2 Ofcom's proposals threaten services to consumers

The Consultation proposes that UKBB not be subject to roll-out obligations and hence will not face the substantial fixed costs of the current 2G/3G operators. Moreover, UKBB will be able to cherry-pick locations and roll-out services only where significant revenues can be obtained. Given this ability of new entrants to develop their networks in the most profitable areas only, Ofcom's proposals will result in mobile operators being hit in areas where it is most dependent on revenues. The consequent reduction in revenues could force operators to reduce their currently planned investments. In terms of development of products and services, the most likely reaction would be to significantly reduce higher risk investments, such as the development and deployment of new services, to decrease the variety of handsets offered, streamline the portfolio of services and raise handset prices, in particular for prepay customers. This would ultimately result in reduced choice for consumers.

✂ Consumers in rural areas would suffer from less choice and less competition. This proposal therefore risks worsening the digital divide that already exists in the UK, causing additional damage to consumers who need wireless broadband in rural and suburban areas.

Ofcom does not appear to have grasped the implication of this process. T-Mobile strongly disagrees with the following Ofcom's statement:

*“Ofcom considers that in the mobile segment within this market, the incumbent 3G mobile network operators (MNOs) would be in a position to compete with the new entrant in particular relying on their pricing flexibility. Whether entry by UK Broadband following the removal of licence restrictions will occur in geographically targeted entry or not, the 3G MNOs will thus be able to respond to targeted entry also by changing their tariff structures”.<sup>1</sup>*

This statement is extraordinary. The UK mobile market is already fiercely competitive and existing operators do not have the flexibility to compete on pricing or otherwise with a competitor not subject to the same coverage obligations or the same financial pressure. On the contrary UKBB would appear to have more pricing flexibility, particularly in its ability to combine fixed, nomadic and mobile services. This comment denotes a poor understanding of the market and of the obligations attached to 3G operators. The cost structure differences between a light metropolitan network and a national network are enormous and would prevent MNOs from offering a competitive price for a service which has a lower quality of service attached to it.

In conclusion, UKBB could reap the whole of the market profits not because of a genuine business advantage but only because of an unfair spectrum licence variation. This constitutes a significant inefficiency whose consequences would be borne by consumers. We believe Ofcom needs to analyse more carefully the long term impact of this decision on consumers' welfare and on the level of investment and not just take a very limited short term view.

### 2.3 Ofcom's proposal risks undermining the spectrum auction regime

The 3.4GHz licences were auctioned in 2003 on the explicit basis that the use of the spectrum for mobile services was not permitted. Ofcom is now proposing to allow the use of the spectrum for mobile services in 2007 which would deliver a substantial windfall to the 3.4 GHz spectrum holder (who acquired the spectrum at much lower prices than the prices for 3G spectrum) while harming the interests of other parties who would have bid if they knew such a major change to the licence conditions would take place within a mere 4 years of the issue of the licences.

T-Mobile agrees with Ofcom's statement in Paragraph 6.59 of the Consultation believes that:

*“the bidding behaviour of participants in the 2003 auction was influenced by the services that they would be able to offer using the spectrum to be awarded and that they relied on statements that RA made on this matter and that “others with an interest in the spectrum were similarly influenced in their decisions not to participate”.*

However, we found are extremely concerned by the following Ofcom statement:

*“no statements or representations were given at the time of the auction or since which would give rise to a ‘legitimate expectation’ in law that the licence conditions would not be changed during the term of the licence, such that Ofcom would now be prevented on the basis of the principle of legal certainty from changing them”<sup>2</sup>.*

T-Mobile believes Ofcom's proposal has the potential to undermine the credibility of Ofcom's auction regime. Ofcom is sending the signal that spectrum conditions and applications can easily be changed at a spectrum holder's request notwithstanding the licences original specifications or Ofcom's announced policy. Furthermore, this amendment may apparently be

<sup>1</sup> 'UK Broadband application for licence variation', para 6.21

<sup>2</sup> 'UK Broadband application for licence variation', para 6.63

accorded absent any material condition or changes to the cost of the spectrum. This carries the risk of adding significant uncertainty to the auction regime before a key auction (2.6GHz) is held. T-Mobile is extremely worried that Ofcom's behaviour might encourage speculative bidding, i.e. spectrum holders might encourage Ofcom to change applications for free based on this precedent and resell spectrum that has much higher value. T-Mobile urges Ofcom to consider this implication of this decision especially in the light of the decision not to charge any extra fees to UKBB.

Furthermore the statement made at the time of the auction would clearly indicate that the argument in the second statement above is incorrect. The response to questions asked made it clear that the spectrum was for fixed use only. In addition to the public law obligations imposed on Ofcom (which are summarised below), for the reasons outlined below, 3G licensees, including T-Mobile, have (at a minimum) legitimate expectations:

- a) that during the term of the 3.5 GHz licences that they would not be able to be used to provide mobile services and that if any consideration of liberalisation to permit this was to take place the impact (and, in particular, differential impact) of any such liberalisation on 3G operators, including any distortions in the market caused thereby, would be properly taken into account in any decision;
- b) that appropriate measures would, if necessary, be put in place to address such effects; and
- c) that full consultation (on the mobile market as a whole as well as technical issues) would be undertaken prior to any liberalisation.

T-Mobile considers that it has a legitimate expectation that any liberalisation of UKBB's licences would be undertaken in such a manner as to ensure that it operates under a level regulatory playing field vis-a-vis other market participants. T-Mobile is aware that separately Ofcom intends to consult on liberalisation of mobile licences later this year but it does not consider that as yet any of the expectations described above have been met.

A legitimate expectation may arise where representations (by statement or practice) by a public authority lead a person to have an expectation as to the procedure that will be followed in particular circumstances and/or of a particular substantive outcome or advantage.<sup>3</sup> Ofcom has quoted the statements made at the time of the 3.5 GHz auction in the consultation and in the SFRIP and it is submitted:

- a) that these representations amount to clear and unambiguous representations;
- b) that, in any event, in the context of the course of conduct regarding this issue, to breach them would be so unfair as to give rise to unlawfulness;<sup>4</sup> and
- c) that those representations have been relied upon by T-Mobile in its commercial decision-making and planning; but
- d) that, if and insofar as there has been no reliance on those representations, such reliance is not required in order to establish an actionable legitimate expectation.<sup>5</sup>

<sup>3</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401B

<sup>4</sup> *Rowland v Environment Agency* [2003] EWCA Civ 1885 [2004] 3 WLR 249 at [68]



The legitimate expectations of T-Mobile and other mobile licensees are, as set out above, both substantive and procedural.

T-Mobile has a substantive legitimate expectation that appropriate measures would be put in place to redress any differential impact on operators arising from any changes to the UKBB licence. Insofar as its legitimate expectations are procedural, they serve to augment and particularise the general administrative law obligations on Ofcom, some of which are summarised below, in particular as regards consultation and the matters to be taken into account in reaching any decision on the proposed liberalisation.

Failure to meet these legitimate expectations may render the decision on amending the UKBB licence unlawful and thus open to challenge by way of judicial review.

If an authority acts in a manner equivalent to a breach of a representation or breach of contract, such action may be challenged by judicial review as an abuse of power,<sup>6</sup> where it denies a party a legitimate expectation.<sup>7</sup> Where a public authority decides to act contrary to such a representation, and that decision gives rise to unfairness to the claimant, its decision is equivalent to a breach of contract, and may give rise to an entitlement to damages.<sup>8</sup>

A legitimate expectation can be protected in the face of a change of policy. The courts will look at whether the change of policy was a lawful exercise of discretion, and whether the public body exercised its discretion to alter its policy taking into account relevant considerations.<sup>9</sup> The existing legitimate expectations and interests of third parties may be relevant considerations and may serve to initiate a purported change of policy.

#### **ADMINISTRATIVE LAW DUTIES**

As a public authority, irrespective of its statutory obligations and any legitimate expectations (as set out above), Ofcom is also obliged, as a minimum, to comply with the principles of administrative law. Those include (relevantly in the instant case):

- a) the principle of administrative consistency;
- b) the duty to act rationally and reasonably; and
- c) the requirements of procedural fairness.

#### **Administrative Consistency**

In addition to the statutory obligations placed upon Ofcom in relation to non-discrimination, it is a cardinal principle of administrative law (known as the principle of administrative consistency)

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<sup>5</sup> *R v Department for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1133D-F per Sedley LJ; *AG of Hong Kong v Ng Yuen Shui* [1983] 2 AC 629

<sup>6</sup> *R v Inland Revenue Commissioners, ex p Preston* [1985] AC 835, per Preston LJ at 866H-867C

<sup>7</sup> *R (Zeqiri) v Secretary of State for the Home Department* [2002] UKHL 2 [2002] INLR 291, per Hoffman LJ at 44

<sup>8</sup> *R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850, (2000) 2 WLR 622, CA

<sup>9</sup> *R v Inland Revenue Commissioners, ex p Unilever Plc* [1996] STC 681

that all persons in a similar position should be treated similarly.<sup>10</sup> This is reflected in the duty of regulatory consistency imposed on Ofcom under section 3(3) of the Communications Act 2003.

There is no question that the proposed amendment would allow UKBB to compete with holders of 3G licences without the coverage and other conditions on their licences, which would amount to a significant commercial advantage as compared with other operators. T-Mobile considers that, particularly in circumstances where it is open to Ofcom to take steps to remedy any such imbalance, this impact constitutes differential treatment imputable to Ofcom, because it would arise directly from its actions and failings.

As any difference between the 3G operators and UKBB would be the creature of the differential treatment complained of: it cannot therefore be relied upon to justify such differential treatment.

It is well established that actions that are contrary to the principle of administrative consistency may be regarded as so unreasonable as to be invalid.<sup>11</sup> Furthermore, “[t]reating like cases alike and unlike cases differently is a general axiom of rational behaviour”<sup>12</sup>, and, in failing to take proper account of the differential impact on 900MHz operators, Ofcom would be acting irrationally.

### **Rationality**

T-Mobile considers that Ofcom would not be acting rationally were it to proceed with the proposed licence amendment at this stage and without implementing appropriate mechanisms to address any imbalances created thereby, because (inter alia):

- a) in so doing, it would have failed to take proper account of the competitive imbalance created, which is a relevant consideration; and
- b) as indicated above, its breach of the principle of administrative consistency would amount to irrationality.

### **Procedural Fairness**

It is axiomatic that, where an authority proposes to change its existing policy, it must act reasonably and fairly in so doing. That requires, at the very least, that it consults appropriately and that it makes its decision reasonably and conscientiously taking into account the consultation responses and all relevant issues.

As such, Ofcom is required, in accordance with the Cabinet Office Code on Consultation, good practice, and the legitimate expectations it has created (as to which, see above), to undertake proper consultation on the mobile market prior to any changes to the UKBB licence. Adequate consultation must afford relevant parties the opportunity to provide a considered and intelligent response, taking account of all relevant issues. As such, it must:

- a) be undertaken at a time when the proposals are still at a formative stage;

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<sup>10</sup> *R v Hertfordshire CC, exp. Cheung, per Lord Donaldson MR, cited in R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin).

<sup>11</sup> *Kruse v Johnson* [1898] 2 QB 91

<sup>12</sup> *Matadeen v Pointu* [1999] 1 AC 98, per Lord Hoffmann at 109; *Hall v Simons* [2002] 1 AC 618 per Lord Hoffmann at 688.

- b) provide sufficient information and reasoning on the relevant issues to allow a proper and informed response; and
- c) allow adequate time for responses and the subsequent conscientious consideration of those responses.<sup>13</sup>

### 3. A WAY FORWARD

T-Mobile strongly believes that Ofcom's proposal in the consultation is highly discriminatory, inconsistent, harmful to competition and will undermine the efficient use of spectrum and future spectrum auctions. T-Mobile believes Ofcom should adopt the following approach:

1. Ofcom to realign the timescale of the proposed liberalisation to that of the refarming of 2G spectrum. The realignment of the timescale is critical to achieve a level playing field in the market and to provide consistent signals within Ofcom's liberalisation policy.
2. Ofcom to impose an additional fee on UKBB. The new fee needs to recognise the increase in value determined both by the change in the purpose of the band and by the fact that now this band has been harmonised internationally. T-Mobile believes that a reasonable approach would be to base the new AIP figure on the fee paid by MNOs for 2G spectrum and adjust the value to reflect the different propagation characteristics of the band. Failure to do so would constitute discriminatory behaviour towards other spectrum users and would provide UKBB with an unfair advantage towards its competitors especially in the light of the 2.6GHz auction.

T-Mobile (UK)  
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<sup>13</sup> *R v North East Devon Health Authority, ex p. Coughlan* [2001] QB 213 at [108]