

**Hutchinson H3G UK Limited (“H3G”), and, British Telecommunications PLC and EE Limited (“BT/EE”)**

**v**

**Office of Communications (“Ofcom”) with Vodafone Ltd (“Vodafone”) and Telefonica UK limited (“Telefonica” / “O2”) intervening**

**NOTE TO ATTEND HAND DOWN OF JUDGMENT: 20<sup>th</sup> December 2017**

This Note does not form a part of the judgment and is for information only.

1. Ofcom intends to dispose of new radio “*spectrum*” by means of an auction. This will determine the award of wireless telegraphy licences for use of spectrum in the 2.3 GHz band and the 3.4 GHz bandwidths. This amounts to about 29% of the spectrum presently available.
2. The Auction is therefore a major opportunity for all mobile phone operators to expand their service offering. The new spectrum may be of particular importance in the roll-out of future 5G mobile phone services.
3. On 11<sup>th</sup> July 2017 Ofcom took a decision (“the Decision”) in which it set out that it was going to impose caps on the amount of new spectrum that any single operator could acquire. The operator most affected by this was BT/EE. Ofcom explained that in the rules governing the Auction it would introduce two limits.
4. These were: first, a cap of 255 MHz on the amount of mobile spectrum that was *immediately* useable after the Auction; and secondly, a total cap of 340 MHz per operator on mobile spectrum *overall* after the Auction.

5. In practical terms the operator most directly affected by these proposed restrictions was BT/EE. BT/EE already holds about 42% of all the available spectrum. The overall cap of 340MHz means that no operator can possess more than 37% of all the mobile spectrum. For BT/EE the cap therefore limits the extent to which it can expand in the future by seeking to acquire extra spectrum in the Auction. But by the same token it means that BT/EEs rivals, Vodafone, H3G and O2, have a greater chance to win more spectrum.
6. Radio spectrum is a scarce and finite resource. It is a major asset to the UK economy and to society because it is the means by which all wireless communications devices operate. It is critical to areas such as mobile telephony and multimedia, radio and television broadcasting, satellite communications, air travel, emergency services, and public utilities.
7. Because spectrum is of such importance to the future expansion plans of the mobile phone operators they, understandably, are concerned to protect their positions in relation to the architecture of any auction.
8. In this case both H3G and BT/EE have brought claims.
9. H3G argues that the rules of the Auction are too generous to BT/EE. In its submission to Ofcom during the consultation stage it argued that BT/EE should not be allowed to hold more than 30% of the total spectrum. It was however prepared to accept the ultimate figure of 37% chosen by Ofcom but it objected to the way in which Ofcom allowed BT/EE considerable leeway and tolerance to possess more than 37% of the spectrum before it finally had to succumb to the cap. It has argued that

Ofcom's approach as set out in the Decision was illogical and disproportionate and Ofcom failed to take account of key considerations.

10. BT/EE says, to the contrary, that Ofcom adopted far too rigid an approach to the setting of the 37% cap. It argued that in economic theory the use of an auction to dispose of a commodity such as spectrum can be trusted to ensure that the optimal competitive and market driven outcome prevails. Any departure from the ideal of an unconstrained auction requires full and objective reasoning. BT/EE argued that in the Decision there was no proper reasoning or evidence to support the end result which represented a major departure from the principle of an unconstrained auction.
11. In the judgment I have set out fully Ofcom's economic reasoning. The Decision seeks to summarise at a relatively abstract level the underlying logic. Even though it is a relatively high-level document it is still complex and technical. The approach taken has been to relegate a great deal of the nuts and bolts analysis to an annex, which is more than 390 pages long. And even that annex is only, in truth, a summary of the more compendious analysis which lies in the substrata to the Decision, and which has been conducted by Ofcom over a period of years and during the course of a lengthy consultations stretching back to 2012.
12. In the light of my review of the evidence I am clear that the approach taken by Ofcom was comprehensive, coherent and logical.
13. Ofcom's findings are evidence based and justified. To arrive at its Decision Ofcom engaged in a detailed predictive analysis of how the market would work in the future under a series of different assumptions and scenarios. It consulted upon its economic and econometric analysis and modelling. In the Decision it sought to strike a delicate

balance between protecting competition and consumers, on the one hand, and setting restrictive caps which were not disproportionate to BT/EE. The balancing exercise was sound.

14. I therefore reject the argument of H3G that the balance struck was too generous to BT/EE and I also reject the argument of BT/EE that it was too tight and rigid.
15. BT/EE advanced additional arguments. These impacted upon H3G which is now the owner of two pre-existing licences of spectrum on the 3.4MHz band. These assignments are of 20MHz each and they relate to different points on the relevant bandwidth. These are termed “*split*” assignments because they are not adjacent or contiguous to each other on the bandwidth. In technical terms it is more convenient for an operator to hold contiguous assignments of spectrum, and not split assignments.
16. Initially, in early 2015, Ofcom decided that as a condition of being able to participate in the Auction *at all* the then holder of these two split assignments should be compelled to relinquish them and obtain a replacement contiguous assignment. This would make the Auction, when it happened, more efficient. Ofcom published this decision.
17. But it then changed its mind and when it issued drafts of the Auction Regulations in 2015 and 2016 the decision was not reflected in the draft rules. Ofcom did not expressly flag up the point that it had changed its mind, and nor did it give any reasons for its changed stance. BT/EE has argued that it did not notice this change of position until 2017 and that by these omissions Ofcom failed properly to consult on the change of position. Had it consulted properly BT/EE would have pointed out that the initial decision compelling relinquishment and replacement was by far and away

the best solution and Ofcom's unheralded change of mind causes many commercial and technical problems. Ofcom's omissions were serious administrative law failures and the consultation was on this issue flawed and unlawful. BT/EE also argued that on the merits of the matter Ofcom simply got the decision wrong.

18. In my judgment I have rejected BT/EEs arguments. I accept that ideally Ofcom would have highlighted its change of position and given brief reasons. But in my view any mobile operator would have understood when it saw the draft Auction Regulations that Ofcom had changed its position. On the evidence this either *was*, or at the very least *should have been*, obvious, especially to such expert and sophisticated consultees as the mobile phone operators.
19. I have concluded that the consultation was a fair one. The issue of split and contiguous licenses was covered by the draft Regulations in successive consultations from 2015 onwards and all operators either were or should have been fully aware that Ofcom had necessarily shifted its position. They had a full chance to comment on all aspects of the draft Regulations. In the alternative I have addressed BT/EEs ground of challenge that on the merits Ofcom's decision was simply wrong. I have rejected this. Ofcom's decision was evidence based and properly balanced all the competing pros and cons of the issue. BT/EE had put forward no adequate evidence sufficient to undermine Ofcom's reasons.
20. I have therefore rejected all the challenges to Ofcom's Decision. The detailed reasoning is set out in the judgment which is now handed down.

The Hon Mr Justice Green

20<sup>th</sup> December 2017