



Notice of Ofcom's proposal to make regulations for the award of the 700 MHz and 3.6 – 3.8 GHz spectrum bands

- Proposals to make the auction regulations

BT's response to the consultation published on 31 January 2019

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Comments should be addressed to:
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1 Introductory remarks

BT considers Ofcom to be premature in formally consulting on these draft regulations^{1,2} at this time:

- Ofcom has yet to decide many details of the award of these frequencies, including many details of the policies that these regulations are intended to implement. Without a definitive decision from Ofcom on these matters it is premature for Ofcom to be asking stakeholders for detailed comments on potential regulations.
- There was and is more than enough time between now and when Ofcom intends to hold this auction (in the first half of 2020) for Ofcom to consult on the regulations for this auction (if need be repeatedly) and indeed, BT would expect Ofcom to consult at least once more on these regulations before making them.
- It also seems to us that these regulations could benefit from further consideration and review by Ofcom and its external advisors, as we note there are numerous of examples of drafting that appears to be 'left over' from previous auctions, that has not been updated to reflect the specifics of Ofcom's proposals in this case and which may benefit from additional scrutiny.

For the avoidance of doubt, BT would have had no objection to Ofcom including a set of draft regulations in its broader consultation on the award of these frequencies, for the purpose of setting out more clearly Ofcom's intentions as regards the auction format and rules, and inviting early commentary on the drafting thereof, as has been done for previous auctions. BT's objection is to Ofcom seeking formal comments on a proposal to make the proposed auction regulations before Ofcom has even decided on the details of the relevant policies.

2 Auction format

We have separately explained in our response to the main consultation document on the 700 MHz and 3.6 - 3.8 GHz auction proposals that we do not support the proposed CCA auction design. We set out our arguments as to why an SMRA format is much more suitable for stakeholders and would be able to deliver Ofcom's policy objectives. Our review of these draft auction rules, and the worked example that Ofcom has provided alongside the draft regulations, has only served to reinforce our concerns on this matter. Indeed we note that the worked example does not exactly follow the approach as set out in the draft regulations (in particular, the two separate tests to be met for a relaxed bid) and there are also appears to be some drafting errors in it. But more significantly, the fact that there are errors in the drafting of the regulations, and the challenge these regulations have presented to us in validating their formulation, illustrates how the proposed auction format is as difficult for bidders to use as it is for Ofcom to design. Ofcom should reconsider the auction format with a view to adopting a more straightforward SMRA type format and not proceed with the CCA (and its various enhancements).

Notwithstanding our opposition to the proposed auction format, we have provided our comments on the proposed regulations to implement that auction format in case Ofcom were to proceed as it has proposed.

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0013/135112/proposal-make-regulations-700MHz-3.6-3.8GHz.pdf

² https://www.ofcom.org.uk/_data/assets/pdf_file/0021/135138/draft-regulations.pdf

3 Spectrum trading considerations

If Ofcom were to agree to facilitate trading to resolve band fragmentation as part of the auction process, for example as BT proposed in its response to the main auction consultation document or in line with one of the options that Ofcom discussed in that document, we consider that the auction regulations may need to be adjusted to remove potential barriers to such a process.

Our concern is that the draft regulations require a bidder's existing spectrum holdings to be declared, which the regulations define to include the entire holdings of any third party that may have an agreement relating to the licences to be awarded in the auction. This could become problematic if such information had to be updated as a result of trading that is agreed between the principal and assignment stage of the auction. Various auction regulations appear relevant to this situation, notably Regulations 4(3)(a)(iii)(ee), 5(b), 9, 17, 118 and 120.

If Ofcom does include options for trading within the auction and shares our concerns in relation to how the regulations could be interpreted, then some adjustments to the proposed auction regulations may be necessary. For example, any cap could be considered in relation to a bidder's own existing spectrum holdings plus new spectrum bid for in the auction as well as the net position including any auction-related trades aimed at band defragmentation.

4 Detailed comments on the draft regulations

Our detailed comments on the draft regulations that Ofcom proposes to make, as Ofcom set out in Annex 5 to the consultation document, are provided in the table 1 below. These comments address Ofcom's three consultation questions:

Question 1: Do you have any comments on our proposals to make Wireless Telegraphy (Licence Award) Regulations 2019, which are set out in draft form in annex 5?

Question 2: Do you have any comments on the implementation of the bid activity constraints in the primary bid rounds in the draft regulations, in particular relaxed bids, relative caps, and chain bids?

Question 3: Do you have any comments on the implementation of the supplementary cap (i.e. final price cap), relaxed supplementary bids and relative caps in the supplementary bids round.

Table 1 – BT comments on the draft auction regulations

Regulation	Comment
4(3)(a)(iii)(ee) and 5(1)(b)	See comments in section 3 of this consultation response above.
9	Suspect second cross-reference should be to regulation 17 (rather than 19).
13(1)	Inclusion of the parenthetical phrase “(with refund of initial deposit)” suggests that it is possible for a bidder to withdraw after this point at the cost of their initial deposit. However, 13(5) says that an applicant may not withdraw from the award process after the last day for withdrawal.
15(1)	The regulation begins “A bidder that wishes to participate in the principal stage”, but aren’t all bidders required to participate in the principal stage of this auction since otherwise they would be disqualified under Regulation 27?
15(1)	Presumably the amount of the additional deposit will depend upon the minimum reserve price for a single lot and hence may differ from nine hundred thousand pounds?
16(1)(a)	Suggest inserting “or less” after “[Subject to consultation. 4 x 700MHz individual frequency lot reserve price]”.
16(1)(b)	Suggest replacing “less than” by “not more than”.
18	Suggest this be retitled “Overall bid limit” and the term “overall bid constraint” be changed to “overall bid limit” throughout the regulations where it is this quantity that is being referred to (but suggest that the constraint defined in regulation 21 continue to be referred to as the “Overall bid constraint rule”).
18(3) & 18(4)	Suggest replace “number” by “quantity”. Frequencies are not countable and hence you can’t have a number of them, but you can have a quantity of them.
18(4)	Current drafting “[Subject to consultation 416 MHz] – z rounded down to the nearest multiple of 5 MHz” does not make clear whether it is z that is rounded down to the nearest multiple of 5MHz or the overall result of the calculation (and the difference is potentially important).
18(5)	This regulation appears superfluous given that regulation 17(3)(b) says that a bidder’s recorded spectrum holdings will not be amended.
19(3)	Needs to be made clearer. A licence doesn't authorise the use of coverage obligations (which is what the current text says).
20(3)	This duplicates the requirement in regulation 76 (which seems the more logical place for it to be).

Regulation	Comment
21(1)	<p>Suggest deletion of “and coverage”. Inclusion or otherwise of the coverage obligation in a bid does not affect the quantity of frequencies included in that bid.</p> <p>Suggest also deletion of “the number of MHz for that bidder which is” (and as above, replace “overall bid constraint” by “overall bid limit”).</p>
21(3)	<p>As currently drafted this regulation uses the phrase “number of such bids” throughout (3 instances), which would be appropriate if this was an SMRA, but for a CCA should be replaced by “number of lots selected in that bid”.</p>
22(1)	<p>Again suggest deletion of “and coverage” as the inclusion or otherwise of the coverage obligation in a bid will not affect the eligibility points associated with that bid (assuming Ofcom maintains its current proposal that there be no eligibility points associated with the coverage obligations).</p>
23(6)	<p>Incorrect cross-reference and missing “and”?</p>
23(7)	<p>Incorrect cross-reference?</p>
23(9)	<p>The inclusion of the parenthetical “(and any discount arising from the selection of the coverage obligation)” makes it sound as if the discount is separate from the amount of the bid, whereas 23(4) says the amount of a bid is after the deduction of the coverage obligation discount if selected. Suggest therefore deletion of the parenthetical “(and any discount arising from the selection of the coverage obligation)”.</p>
24(1)(iv)	<p>We understood that the coverage obligations proposed by Ofcom would attach to the licence and not require the use of any particular frequencies (in particular not require the use of the specific frequencies acquired in the auction). Suggest therefore replacement of the phrase “to apply to these lots” by “to be included in that licence”.</p>
24(2) and numerous subsequent regulations	<p>The phrase “[t]he selection in relation to lots and coverage” (or “selection of lots and coverage obligation” as is used in other regulations) implies that the bidder has a choice of different coverages or coverage obligations to choose from. This therefore does not align well with our understanding of Ofcom’s proposals as regards coverage obligations, nor does it align well with regulation 20 (which talks about a bidder indicating whether or not it wishes to bid for the coverage obligation such that the obligation will be included in a licence).</p> <p>We therefore suggest replacing all uses of the phrase “selection of lots and coverage [obligation]” (and similar phrases) with “selection of lots and inclusion or otherwise of the coverage obligation”.</p>
25(3)	<p>Incorrect cross-reference?</p>
26	<p>Replace “or regulations” by “of regulations”?</p>

Regulation	Comment
28(2)	Why does Ofcom propose that any bid for zero lots at zero pounds be an “invalid bid”? This seems to us to be a perfectly acceptable and appropriate bid for a bidder to make if prices have got so high that they no longer wish to bid for any lots. Our concern is one of terminology, but the problem could be solved by just omitting 28(2) as it is not needed.
30(a)	The term “demand” needs to be properly defined (which could well then remove the need for the parenthetical “(not including chain bids)”).
30(a)	Replace “and” by “or”?
30(b)	Replace “it wished the coverage obligation to apply to its bid selection” by “they wished to have the coverage obligation included in their licence”?
30(b)	Replace “where” by “and”?
32(2)	Insert “in respect of a particular type of lot” after “unless paragraph (3) applies” and replace the second instance of “a type of lot” by “that type of lot”?
34(2)	Need to make clear that this means excess demand for the coverage obligation e.g. by referring to regulation 30(b).
34(3)	Current drafting suggest that there could be different discounts for each of the two coverage obligations on offer, whereas it is our understanding that the two coverage obligations should have the same discount. Suggest simply delete “for that coverage obligation”.
36(2)	Suggest appending “in accordance with paragraph (4)”.
36(3)	Delete “for the next primary bid round”. Paragraph (4) specifies how a bidder’s eligibility limit for the next primary bid round is to be calculated. This paragraph (3) is just about how to calculate the number of eligibility points associated with a valid primary bid (as required by (4)(a)). Would also suggest swapping paragraphs (3) and (4).
37(1)	Current drafting suggests that the overall bid constraint and overall eligibility cap do not apply in this case (“A bidder may make a bid for <u>any</u> selection...”). Suggest amendment to make clear that this is not the case. (See also earlier comment about use of the phrase “selection of lots and coverage obligation”).
37(3)	Unclear why the word “otherwise” is included?
37(4)	This regulation clearly illustrates the complexity of Ofcom’s proposed choice of auction format and rules.

Regulation	Comment
38	This regulation makes repeated reference to the electronic auction system. We do not believe it is appropriate or necessary to specify the means by which bidders and Ofcom must communicate with each other in this regulation (this is already covered by other regulations).
38(1)	Replace “make” by “bid for”?
38(3)	Current drafting says that once a bidder has received a response from Ofcom in accordance with paragraph (2) then it may “make a bid for <u>any</u> selection of lots and coverage obligation” i.e. not just for the selection that the bidder indicated that it was interested in bidding for in paragraph (1). We assume this is not what Ofcom intended.
38(4)	The regulation defines the term “chain bids” but that term has already been used in the preceding paragraphs.
38(5)	Unclear what “circumstances” are being referred to in this regulation.
39(e)	“previous” to when?
41(3)	What if ‘D minus B plus C’ is not higher than the ‘maximum connected round selection price’?
41(3)(a)	How is it possible to make a bid for a bid (which is what the current drafting says)? Suggest deletion of “a valid primary bid for”.
41(5)	Ofcom is proposing to use a second price rule, so how will it know what sum would be “payable” for the connected round actual selection at the round prices in the current round”?
42(3)	Should “CB1” be “the sum which is payable for CB1 in accordance with 41(3)”?
42(3)(a)	“previous” to when?
42(3)(c)	Should “connected round” be “connected eligibility reducing round”?
42(3)(c)	Replace “CB1” by “the sum which must be bid for CB1 in accordance with 41(3)”?
42(4)	Should “CB1” be “the amount bid for CB1”?
42(6)	Same comment as above re “payable”. Also, doesn’t the reference to “the connected round actual selection” need to be a reference to “the selection of lots and coverage obligation in CB2”?
43(1)	Suggest append “and whether that amount is greater than the relevant cap, in which case the relaxed bid (with accompanying chain bids) cannot be made.”

Regulation	Comment
43(3)	Suggest append “and whether the relaxed bid (with accompanying chain bids) can be made”.
43(4)	Isn’t this just repeating regulation 38(2)?
44(d)	Who is “it”?
44(d)	As previously, suggest replace “to apply to these lots” with “to be included in a licence”.
45(1)(d)	See comment above in relation to 44(d).
45(2)	Missing “in” between “selection” and “relation”?
45(5)	Appears to duplicate/supersede (3).
46	As above, suggest removal of all references to the electronic auction system.
47(3)	47(5) appears to supersede this regulation.
47(5)	Not clear why the answer in all three cases couldn’t be simply the bidder’s eligibility limit in the final primary bid round.
47(7)	In what circumstances may a bidder make a relaxed supplementary bid once they have “proposed” one?
50(1), 50(2)(a) and 50(2)(b)	The term “the bidder’s selection in the final primary bid round” and “the selection of lots and coverage bid for in the final primary bid round” are presumably intended to refer to the selection in the standard primary bid or relaxed primary bid that the bidder submitted in the final primary bid round, and not to the selection in any chain bid that bidder may also have submitted in that round?
50(2)(a)	Isn’t each bidder limited to at most one supplementary bid for each possible selection in the supplementary bids round, in which case how can there be a “highest” such bid – surely there can only be one or none?
50(2)(b)	This isn’t the same as the definition of ‘G’ in regulation in 42(3)(c).
50(2)(c)	Same comment as above re “payable”.
51(1)	See earlier comment re regulation 37(1).
51(3)	What if the sum actually bid isn’t the sum “which would be bid”? Suggest replacing “which would be bid” with “which is bid”. (There is also a spurious comma between “not” and “greater”).

Regulation	Comment
51(4)(b)	What if the bid that could have been submitted was a relaxed primary bid rather than a standard primary bid? (c.f. regulation 39(b)).
51(4)(d)	Add “in the connected eligibility reducing round”?
51(4)(e)	“previous” to when?
51(5)	These definitions aren’t the same as the previous definitions of A, B and C in regulation 37(5).
Chapter 6	See earlier comments re Chapter 5. But in any case, why are regulations 52 to 57 (inclusive) required at all? Why isn’t regulation 51 sufficient on its own? (If a bidder wishes to make a relaxed supplementary bid, and the current amount of its ‘maximum supplementary connected round selection price’ is not sufficient for it to comply with the upper limit, it needs to submit a higher supplementary bid for the relevant ‘connected round actual selection’. That bid may itself need to be a relaxed supplementary bid, in which case regulation 51 may once again require a bid for a different selection (the ‘connected round actual selection’ for the ‘connected eligibility reducing round’ relating to the new relaxed supplementary bid) to be increased if the upper limit is to be complied with, and so on.)
52(1)	Replace “make” by “bid on”?
52(2)	Will Ofcom specify the exact amount that the bidder must bid for each chain bid, or might the bidder be able to bid a higher amount for some or all of the required chain bids?
52(4)	This regulation makes reference to “the round prices in the current round” but it is our understanding that there won’t be any round prices in the supplementary bids round.
53(a)	Aren’t all primary bid rounds “previous” to the supplementary bids round?
53(b)	Precisely which “relaxed bid selection” is being referred to?
54(3)	Spurious extra “each round” – suggest delete. Also, is there a word missing at the end of the text in parentheses?
55(3)	Again, does the amount to be bid have to be exactly equal to D minus B plus C or can it be higher?
55(4)	We assume this restriction is not intended to apply to all relaxed supplementary bids, only to the specific relaxed supplementary bid that requires a chain bid for CB1. We think this needs to be clearer.

Regulation	Comment
55(4)	Immediately after “50(2)” should the word “if” be deleted?.
56	See earlier comments on similar text.
60(1)	Incorrect cross-reference?
61	Whilst BT is content for Ofcom to close a round early once all bidders have placed their bid(s), BT would not be content for Ofcom to bring forward the start of the next round as a result. Reasonable certainty over the timing and number of rounds to be held each day is essential to bidders from an internal governance perspective.
62(1)(a)	Presumably the total number of each type of lot included in each primary bid, rather than the total over all primary bids?
62(1)(b)	Likewise, presumably notification of which valid primary bids included the coverage obligation (given that a bidder may have submitted some valid primary bids that included the coverage obligation and some that did not)?
68(4)	BT notes that a bidder with a zero eligibility limit is not automatically precluded from submitting further bids – they may for example be able to submit a relaxed primary bid. Is Ofcom content with this situation?
76(2)	Incorrect cross-reference?
76(5)	Replace “with which a” by either “with a” or “which include a”.
76(6)	Incorrect cross-reference?
76(9)(a)	We think it might be helpful if this regulation made reference to the ad hoc definition of “amount bid” in regulation 23(4).
76(9)(b)(ii)	The word “first” appears to be missing from “the primary bid round”.
81(1)	Reference to “and either” – not clear if something is missing or this should be deleted.
90(1)	We understood that Ofcom would be issuing one 700MHz licence per winning bidder, in which case replace “one or more” by “a”.
91(2)(a)	This and subsequent regulations repeatedly refer to “the number of that bidder’s winning principal stage bids”. This would be appropriate for an SMRA, but for a CCA the more appropriate text would be “the number of [700MHz paired frequency lots] included in that bidder’s winning principal stage bid”.
92(1)	Likewise, reference to “the total [700MHz paired frequency] base price for that bidder’s winning principal stage bids for [700MHz paired frequency] lots” would be appropriate for an SMRA, but for a CCA there is only one base price for an

Regulation	Comment
	entire winning principal stage bid – not a separate base price for each type of lot (let alone each individual lot).
Chapters 5 and 6	See above comments on Chapter 4.
115(2) and (4)	Incorrect cross-reference (to regulation 11820!)
115(3)	Incorrect cross-references?
116(1)	Incorrect cross-references?
Schedule 4	We note that this schedule currently makes no reference to the coverage obligation discount. We believe it needs to do so. Until we see a version of this schedule that includes reference to the coverage obligation discount we are unable to comment on whether or not it correctly implements what we understand to be Ofcom’s intended policy.
Schedule 8	We note that this schedule includes the entire range of frequencies from 3410 to 3800MHz. Given that the frequency range from 3680-3800MHz is the subject of this award, it would seem more appropriate to us that this schedule only include the range 3410-3680MHz.

