

Our ref: JAB/1742325 v1

Mr Laurence Green
Radiocommunications Agency
11B/20C Wyndham House
189 Marsh Wall
London
E14 9SX

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Dear Laurence

Review of Radio Spectrum Management

I am writing with some comments on the review's recommendations with respect to spectrum trading.

I should like to suggest that consideration should be given to the creation of a property right as the basis of the spectrum trading system.

The discussion about spectrum trading in section 7 of the report envisages that spectrum will be "licensed" to a spectrum holder who, if spectrum trading is introduced, will be able to deal with the spectrum by way of either "sale" or "lease" (see paragraph 7.32). "Delegation" of rights alone, mentioned in paragraph 7.35, is not treated as spectrum trading because there would be no transfer of the actual licence. These expressions suggest, but do not examine or develop, assumptions about the legal nature of these transactions and exclude whatever is meant by delegation from the debate.

Neither the concept of sale nor the concept of leasing is entirely apt in relation to dealings with the rights conferred by an administrative licence (how in law do you lease a licence?). The review was not, of course, seeking to specify the legal nature of the transactions that are contemplated and so no criticism of the review is intended here but I suggest that, to base a scheme for spectrum trading on mere administrative rights and obligations could lead to a market which was hindered through having to deal with an unfamiliar commodity and one whose legal nature might be a little hard to perceive or understand.

The draft Communications Bill, no doubt taking its cue from the review, speaks merely of rights and obligations and passes the problem on to OFCOM to solve but it is clear from clause 124 of the Bill that it is envisaged that the spectrum trading regime will be one in which parties will be expected to engage in transactions with respect to rights and obligations under a licence or grant which, while it can no doubt be made to work, might work more efficiently if it were a matter of dealing with a property right.

A “freehold spectrum property right” did not find favour in the RA’s consultative document “Managing Spectrum through the Market” in 1998 on the basis that a discretion to revoke or vary licences had to be retained for reasons of technical change, to comply with international obligations or to meet the needs of national security. I suggest that these reasons are not wholly compelling, since some sort of compulsory purchase right might be reserved by Government, but I should like also to suggest that the law of real property (implied by the use of the word “freehold”) is not the only available model for a spectrum property right. An alternative model might be copyright which is (by section 1 of the Copyright Designs and Patents Act 1988) a property right which subsists in accordance with that Act in certain specified kinds of work.

Copyright is transmissible by assignment, by testamentary disposition or by operation of law as personal or moveable property. Assignments or other transmissions may be partial, that is to say, limited as to apply to particular activities or to a limited period of time. The holder of the copyright, without parting with it, is able to grant licences which would no doubt be analogous to what the review body had in mind when it spoke of “delegation”. All these transactions are readily understood, based as they are on familiar forms of property transactions and they are readily assimilated to familiar legal principles.

I suggest that, if the review’s recommendation 7.3 is to be implemented fully, that is to say that the trading regime should be designed to minimise the transaction costs of trading, a scheme along these lines would be more likely to achieve what is intended than one which involves dealings with administrative rights and obligations.

Furthermore, it is a feature of property ownership that the holder of the property has rights as against the rest of the world and not just bilateral rights against the grantor or his successors in title or licensees. A copyright owner, for example, can take civil action against another person who infringes his rights. If there were a system of spectrum property rights which conferred on the holder of such rights the ability to take civil action on his own behalf to prevent infringements of his rights, he would be able himself to deal with interference instead of always having to go through the regulatory authority. He would have a civil right which he could enforce through the courts. That would lend itself to a more effective administration of interference problems and would form the basis for an effective system of inter-operator coordination agreements.

There are hints in the review that suggest that the review body had some sort of scheme of this sort in mind: for example, the fourth bullet in the box on page 109 refers to the “owner of the legal title” but there is not much more than this and there is no hint that that has been picked up in clause 124 of the Communications Bill.

I therefore commend to you the suggestion that the recommendations of the review might be more readily implemented if the Communications Bill were to provide that spectrum right is a property right subsisting in accordance with appropriate provisions of the new Act. That would mean that dealings could be structured in ways more familiar to the legal and commercial community than dealings in administrative rights. It would put in the hands of operators a civil right to look after themselves to a very great extent in relation to interference problems without having to work through the regulatory authority, which would be more flexible and efficient in practice than leaving such problems to enforcement by OFCOM.

Yours sincerely

Tony Ballard

Direct Line: 020 7861 4103

Email: jab@ffwlaw.com