



Notice of proposals to make
900 MHz, 1800 MHz & 2100 MHz
public wireless network licences
tradable

Consultation

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Section 1

Executive summary

- 1.1 The Government's Direction to Ofcom relating to mobile spectrum issues requires Ofcom to make the licences for 900, 1800, and 2100 MHz spectrum tradable. This document sets out Ofcom's proposals for doing this.
- 1.2 Ofcom's proposals are:
 - to allow all types of trade permitted under the WT Act 2006. We believe that this will create the maximum flexibility for the spectrum to be used efficiently and so bring benefits to citizens and consumers;
 - to allow Ofcom to take into account whether competition is likely to be distorted in determining whether or not to consent to a trade, or to consent to a trade subject to certain conditions. In practice, this makes it possible for us to undertake an *ex ante* competition check in cases where that seems appropriate. We believe that this will lead to a better outcome for citizens and consumers than relying solely on competition law.

Section 2

Introduction

- 2.1 On 20 December 2010 the Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 (the “Order”) was made. The Order came into force ten days after this date.
- 2.2 The Order gives a number of directions to Ofcom. This notice relates to paragraph 7 of the directions to Ofcom which provides:
- “7. OFCOM must exercise their powers under section 30 of the WTA to amend the Wireless Telegraphy (Spectrum Trading) Regulations 2004 to make provision to permit the transfer of all or part of the rights and obligations arising as a result of 900MHz, 1800MHz and 2100MHz licences from the licensee to another person”*
- 2.3 Spectrum trading is governed by section 30 of the Wireless Telegraphy Act 2006 (the “Act”). This section provides for Ofcom to authorise by regulations the transfer by the holder of a licence (or grant of recognised spectrum access) under the Act, of the rights and obligations arising as a result of that licence (or grant) to another person.
- 2.4 The Wireless Telegraphy (Spectrum Trading) Regulations 2004 (SI 2004/3154 as amended by SI 2006/339, SI 2006/1807, SI 2007/380, SI 2007/3387, SI 2008/688, SI 2008/2105 and SI 2008/3192) (the “2004 Trading Regulations”), made under this power, specify the basis on which a licensee’s rights to use spectrum specified therein may be transferred. The rights to use 900MHz, 1800MHz and 2100MHz spectrum are currently not specified in the 2004 Trading Regulations. Rather than amending the 2004 Trading Regulations, for reasons of administrative convenience, we propose to make new regulations (the “Mobile Spectrum Trading Regulations”) which authorise the trading of rights to use mobile spectrum, specifically 900MHz, 1800MHz and 2.1GHz spectrum, replicating the relevant provisions of the 2004 Trading Regulations.
- 2.5 In exercising its functions, Ofcom must have regard to its statutory duties. Ofcom’s principal statutory duty is to further the interests of citizens in relation to communication matters and to further the interest of consumers in relevant markets, where appropriate, by promoting competition. Directly relevant to spectrum management, Ofcom are required to secure the optimal use for wireless telegraphy of the electro-magnetic spectrum, while in carrying out their spectrum management duties Ofcom must have particular regard to the different needs and interests of all persons who wish to make use of spectrum.
- 2.6 In performing their duties, Ofcom must have regard to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.
- 2.7 In carrying out its radio spectrum functions, Ofcom must have particular regard to:
- availability of spectrum for use, or further use, for wireless telegraphy; and
 - current and likely future demand for the use of the spectrum for wireless telegraphy.
- 2.8 And to the desirability of promoting:

- efficient management and use of the spectrum available for wireless telegraphy;
 - economic and other benefits arising from the use of wireless telegraphy;
 - development of innovative services; and
 - competition in the provision of electronic communications services.
- 2.9 Spectrum is a valuable and finite resource. Its use underpins about 3% of UK GDP and is worth over £40bn a year to the economy.¹ Spectrum trading is an important mechanism for securing its optimal use for society. Trading allows spectrum to migrate to those that can generate greater benefits for citizens and consumers. Spectrum trading promotes innovation and growth by opening up opportunities for businesses to gain access to the radio frequencies that they need. The ability to trade spectrum is therefore critical to securing maximum benefit for society.
- 2.10 Spectrum trading enables licence holders to transfer some or all of the rights and associated obligations they hold under a licence under the Act to third parties. Trading involves agreement between an existing holder (the ‘transferor’) and another person (the ‘transferee’) to transfer the transferor’s rights under its licence and is put into effect by surrender of the original licence and the grant of a new licence by us.
- 2.11 The 2004 Trading Regulations set out the types of trade that are permitted for each licence class and the procedure to be followed in executing trades. The proposed Mobile Spectrum Trading Regulations do the same for trades of mobile spectrum.
- 2.12 The trading framework permits various different types of transaction or ‘modes of trading’:
- Outright total transfers – all the rights and obligations under a licence are transferred to a third party;
 - Outright partial transfers – only some of the rights or obligations are transferred to a third party and the rest remain with the original owner;
 - Concurrent total transfers – all the licence rights and obligations are transferred to a third party while continuing at the same time to apply also to the original holder; and
 - Concurrent partial trades – some of the licence rights and obligations are transferred to a third party while continuing at the same time to apply to the original holder and the rest of the rights and obligations remain with the original holder.
- 2.13 Ofcom has a duty under the Framework Directive² to ensure that spectrum trades do not distort competition. Ofcom has to date relied on competition law (*ex post* competition law and *ex ante* merger control) to fulfil this duty.

¹ Please see ‘Economic impact of the use of radio spectrum in the UK’ by Europe Economics at: http://stakeholders.ofcom.org.uk/binaries/research/spectrum-research/economic_impact.pdf

² Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

- 2.14 A successful market needs information about what is tradable. In order to provide this information we also made the Wireless Telegraphy (Register) Regulations 2004 (SI 2004/3155 as amended by SI 2006/340, SI 2006/1808, SI 2007/381, SI 2007/3389, SI 2008/689, SI 2008/2104, 2008/3193, 2008/2104 and 2009/14) (the “2004 Register Regulations”). These regulations provide for us to publish and maintain a register containing relevant information about tradable Wireless Telegraphy Act licences. We also propose to amend these regulations to cover the licences for 900MHz, 1800MHz and 2100MHz spectrum.

Section 3

Notice – proposals

Introduction

- 3.1 In this section we give notice of our proposals concerning trades of spectrum in the 900MHz, 1800MHz and 2.1GHz bands. These bands are used, and expected in the future to be used, to provide mobile communications services.
- 3.2 Other spectrum bands will soon become available for providing mobile communications services – the 800MHz and 2.6GHz bands. Since we have been directed by the Government to carry out an assessment of future competition in mobile markets, we also set out how our proposals affect these other bands. The proposals cover:
- The types of trade we propose to enable and our rationale for doing so
 - Consideration of the need for an *ex ante* competition check in respect of trades of mobile spectrum – i.e. providing for Ofcom to take into account whether competition is likely to be distorted in determining whether or not to consent to a trade or to consent to a trade subject to certain conditions.
- 3.3 As indicated above, rather than amending the 2004 Trading Regulations, we propose to make new regulations which replicate the provisions of the 2004 Trading Regulations so far as they are relevant to our proposals for the trading of mobile spectrum.

Types of trade to be enabled

- 3.4 We propose to enable all types of spectrum trade in respect of the 900MHz, 1800MHz and 2.1GHz bands. This comprises:
- Transfers of all of the rights and obligations under a licence (i.e. the whole licence in its totality)
 - To the exclusion of the transferor; and/or
 - Concurrent with the transferor
 - Transfers of part of the rights and obligations under a licence (i.e. a trade of only some of the frequencies to which a licence relates and/or a trade of rights and obligations in respect of only a part of the geographic area covered by the licence)
 - To the exclusion of the transferor; and/or
 - Concurrent with the transferor.
- 3.5 Generally, the more flexibility we allow in spectrum trading, the greater the potential benefits to consumers; we create a wider range of potential opportunities for trades to occur that further the efficient and optimal use of the spectrum.

- 3.6 In the past we have not allowed some types of trade (for example, in the case of partial geographic transfers because of concerns over interference to neighbouring users) and we have limited partial transfers of frequencies where one or both parties would have less than the minimum amount of spectrum (or channel width) necessary to run a service. However in the case of these licences we see no need to place such limitations on the types of trade.

Obligations connected to licences

- 3.7 The 2.1GHz licences contain a coverage obligation and it is possible that other mobile spectrum licences could contain similar or other obligations in future. However, we do not consider that the existence of obligations in licences is a reason to restrict the application of trading to those licences.
- 3.8 The acquirer of a licence acquires not only the rights but also any obligations attaching to a licence. In determining whether or not to give our consent to a trade, we are required to take into account whether the transferee is able to meet the terms, provisions and limitations of the wireless telegraph licence which is to be granted as a result of the transfer³ and this could include a consideration of coverage obligations.

An *ex ante* competition check on spectrum trades

- 3.9 Here we set out our assessment of whether to introduce an *ex ante* competition check for trades of mobile spectrum alongside our proposal to make existing mobile spectrum tradable. In particular we:
- Set out our policy to-date, made in the context of spectrum trades in general, that it has not been necessary to introduce an *ex ante* competition check.
 - Discuss why trades of mobile spectrum might in principle be considered differently to spectrum trades in general, given the role of spectrum in the mobile market and the possibility of rules to promote competition in the forthcoming auction of spectrum in the 800MHz and 2.6GHz bands.
 - Present a specific proposal to allow for the possibility of a competition check on mobile spectrum trades.
 - Explain how our proposals here relate to the 800 MHz and 2.6 GHz bands and the 2x15MHz of 1800 MHz spectrum that Everything Everywhere is required by the European Commission to divest.

Our policy to-date has been that a general *ex ante* competition check is not necessary for spectrum trades

- 3.10 Ofcom has an obligation under Article 9(4) of the Framework Directive⁴ to ensure that spectrum trades do not distort competition. We first considered this and, in particular,

³ Regulation 9(b) of the 2004 Trading Regulations and Regulation 8(b) of the proposed Mobile Spectrum Trading Regulations.

⁴ It should be noted that Directive 2009/140/EC, which revises the telecoms regulatory framework, removes the obligation in Article 9(4) and instead inserts a new Article 5(6) in the Authorisation Directive which states that NRA's shall "*ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies*".

whether to introduce a general competition check on transfers of spectrum, in our Statement on '*Ensuring effective competition following the introduction of spectrum trading*' published 29 September 2004⁵.

- 3.11 We concluded then that introducing an *ex ante* competition check would be disproportionate given:
- our view that the likelihood that spectrum trades might lead to a distortion of competition was relatively low generally;
 - the costs that a competition check would impose on spectrum users through a potential significant increase in the time taken to approve a trade; and
 - that the existing legal framework – namely the Competition Act 1998, supplemented by the Communications Act 2003 and the Enterprise Act 2002 where applicable – was sufficient to ensure effective competition following the introduction of spectrum trading.
- 3.12 We recognised that trades where spectrum was a key input into producing services, such as for mobile spectrum, could potentially lead to a distortion of competition. However, we did not make mobile spectrum tradable at that time, so we did not consider the case of a specific competition check for mobile spectrum. Now that we are required to allow trading of mobile spectrum, it is appropriate to consider whether there is a particular case for allowing for the possibility of some form of competition check with regard to mobile spectrum.

We consider that the situation for trades of mobile spectrum is different

- 3.13 There are a number of reasons why we consider that trading of mobile spectrum is different to spectrum trading in general that affect the argument for introducing an *ex ante* competition check.
- 3.14 First, our analysis and research since the 2004 Statement, e.g. in the context of mobile spectrum liberalisation, has made it clearer now that there is a material risk that concentration of mobile spectrum holdings could affect downstream competition, because:
- Spectrum is a necessary input to the provision of mobile services and can affect competition at a level of the mobile value chain which fundamentally determines the nature and quality of the services that consumers receive. Access to spectrum is essential for firms to compete at the crucial wholesale⁶ level in the mobile market where firms control the nature of the service proposition and the quality of the service provided to the consumer.
 - Mobile spectrum is relatively scarce. This, together with its nature as a key input for mobile services, makes spectrum a strategic asset in the mobile market. Concentration in mobile spectrum holdings could potentially lead to reductions in the intensity of competition to the detriment of consumers. This for example was part of the concerns which led the European Commission to accept commitments

⁵ <http://stakeholders.ofcom.org.uk/binaries/consultations/sec/statement/statement.pdf>

⁶ i.e. the wholesale level of the value chain. Retail competition is possible without access to spectrum, but retail competition relies on wholesale access services and much of the service proposition and service quality is set by the wholesale access provider.

from Deutsche Telekom and France Telecom to divest some 1800 MHz spectrum when allowing the merger of Orange UK and T-Mobile UK⁷.

- The auction of 800MHz and 2.6GHz is likely to be the last significant opportunity for the next decade or so to acquire new spectrum suitable for the provision of mobile services and mobile spectrum is likely to remain relatively scarce even after the auction, given the rapid increase in mobile (especially data) traffic.

3.15 Second, while no decisions have yet been taken regarding the measures that might be taken to promote competition, including as part of the rules for the award of the 800 MHz and 2.6 GHz spectrum, following completion of Ofcom's current assessment of future mobile competition, it is possible that some measures will be needed. If this were the case, we believe that it is unlikely to be in the interests of consumers to allow spectrum trades to take place shortly after the auction that would be inconsistent with any competition rules established for the auction. If we did, it might allow participants to game the rules in the auction.

Our specific proposal regarding an *ex ante* competition check

- 3.16 In light of our conclusion that trading of mobile spectrum is different to spectrum trading in general, we are proposing, alongside making mobile spectrum tradable, inserting a provision in the proposed Mobile Spectrum Trading Regulations to allow for the possibility of Ofcom undertaking an *ex ante* competition check where this is considered appropriate.
- 3.17 Section 30 of the Act provides that regulations authorising the transfer of rights and obligations under a wireless telegraphy licence may, among other things: restrict the circumstances in which, the extent to which and the manner in which a transfer may be made by reference to such factors (including the terms and conditions of the licence or grant in question) as may be specified in or determined in accordance with the regulations; require the approval or consent of Ofcom for the making of a transfer; and set out the matters to be taken into account in the making of determinations under such regulations. Therefore, we propose to insert a provision into the proposed Mobile Spectrum Trading Regulations allowing Ofcom to take into account whether competition is likely to be distorted in determining whether or not to consent to a trade or to consent to a trade subject to certain conditions.
- 3.18 We propose to consider on a case by case basis whether to undertake a detailed assessment of whether a proposed trade is likely to distort competition, and hence whether Ofcom may have grounds to decline to consent to the trade. The extent of this assessment in any particular case will depend on the context. Any assessment will factor in any appropriate competition analysis undertaken and conclusions reached in the context of any relevant auction, including the forthcoming 800MHz and 2.6GHz auction, to ensure that there is not a distortion of competition.
- 3.19 Where a proposed trade forms part of a transaction reviewed by the EU and/or the UK merger control authorities, we would propose not to undertake a separate *ex ante* competition assessment, but we would expect to follow the findings of the merger control review in deciding whether or not to consent to that proposed trade.

⁷ M.5650 T-Mobile / Orange

http://ec.europa.eu/competition/mergers/cases/decisions/M5650_20100301_20212_247214_EN.pdf

The potential alternatives to our proposal are unlikely to provide a better outcome for consumers

- 3.20 The alternative to inserting a provision in the proposed Mobile Spectrum Trading Regulations to allow for the possibility of Ofcom undertaking an *ex ante* competition check where this is considered appropriate would be to not insert such a provision and instead rely solely on existing competition law.
- 3.21 The two main elements of existing competition law that are likely to be relevant to mobile spectrum trades would be the merger control regime, (both UK and EU), and the prohibition on anti-competitive agreements (Chapter I of the Competition Act 1998 and Article 101 TFEU).
- 3.22 In summary, we do not consider that relying on these alone would lead to a better outcome for consumers compared to our specific proposal. They may not be as effective at addressing competition concerns nor capture all the potential risks of a distortion of competition. More specifically:
- A significant period of time may pass between when a trade happens and when there is enough evidence of anti-competitive behaviour to intervene *ex post*. During that time, consumers may suffer substantial detriment and operators (both the buyer of the spectrum and its competitors) may have made investments which, for some time, lock them into strategies that are not in the best interest of consumers.
 - Although the threat of an *ex post* competition law intervention may deter anti-competitive trades, it may be difficult to detect anti-competitive behaviour and there is no guarantee that an *ex post* competition law intervention will be successful.
 - It is not certain that merger control would apply to every mobile spectrum trade. Where such trades raised potential competition concerns but fell outside the merger control regime, these concerns would not be addressed by that regime.

Treatment of the EE divestment

- 3.23 As part of the commitments given by T-Mobile and Orange to the European Commission in order to obtain EU merger control clearance for its proposed joint venture (known as “Everything Everywhere”), T-Mobile and Orange have to divest 2x15MHz of 1800MHz spectrum. The commitments make clear that this spectrum could be divested through a private sale to a single purchaser, or unconditionally offered for sale as part of our forthcoming 800MHz and 2.6GHz auction or another spectrum auction i.e. handed back to Ofcom for re-award.
- 3.24 Since this divestment forms part of the merger clearance from the European Commission, it is subject to a separate process as specified in the commitments given to the Commission. Whilst any trade of this spectrum would also require Ofcom’s consent pursuant to the proposed Mobile Spectrum Trading Regulations, consistent with our stated approach to mergers set out above, we would not undertake an *ex ante* competition check in this case.

Simplifying spectrum trading consultation

- 3.25 We published a consultation document on 22 September 2009 entitled Simplifying spectrum trading⁸ which discussed reform of the spectrum trading process and introduction of spectrum leasing. An interim statement was subsequently published on 15 April 2010⁹. In respect of spectrum leasing in connection with the 900 MHz, 1800 MHz and 2.1 GHz bands, we intend to give this matter further consideration in 2011 once the revisions to the EU Framework Directive have been implemented.

Do you have any comments on the proposals to enable spectrum trades in respect of the 900 MHz, 1800 MHz and 2.1 GHz bands?

Do you have any comments on the proposal regarding an ex ante competition check?

Do you have any comments on the proposed statutory instruments set out in this notice?

⁸ <http://stakeholders.ofcom.org.uk/binaries/consultations/simplify/summary/simplify.pdf>

⁹ <http://stakeholders.ofcom.org.uk/binaries/consultations/simplify/statement/statement.pdf>

Section 4

General effect of the proposed Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011

The legislative framework

- 4.1 Under section 30(1) of the Act Ofcom may by regulations authorise the transfer to another person by the holder of a wireless telegraphy licence, or the holder of a grant of recognised spectrum access, of rights and obligations arising by virtue of such a licence or grant. Under section 30(4) and (5) transfers that fail to comply with these regulations (or with certain conditions in licences) will be void.
- 4.2 We propose to give effect to the proposals set out in this document by regulations made under sections 30(1) and (3) and 122(7) of the Act. Section 30 implements Article 9(3) and (4) of the Framework Directive. As indicated above, rather than amending the 2004 Trading Regulations, we propose to make new regulations consistent with the 2004 Trading Regulations relevant only to trades of mobile spectrum. A draft of the regulations which Ofcom proposes to make is set out at Annex 6.

Total and partial transfers under the proposed Mobile Spectrum Trading Regulations

- 4.3 Regulation 4(1) of the proposed Mobile Spectrum Trading Regulations authorises the transfer of all rights and obligations arising by virtue of the wireless telegraphy licences of the Public Wireless Network class which applies to a station or apparatus operating within any of the frequency bands 880-915MHz, 925-960MHz, 1710-1781.7MHz, 1805-1876.7MHz, 1899.9-1980MHz and 2110-2170MHz. Regulation 5(a)(i) to (iii) of the proposed Mobile Spectrum Trading Regulations authorises the transfer of rights and obligations relating to parts of that licensed range of frequencies for the same licences.
- 4.4 One of two conditions must be satisfied for a transfer to be authorised by regulation 4(1) or regulation 5. These conditions are:
 - 4.4.1 that the rights and obligations of the person making the transfer become rights and obligations of the transferee to the exclusion of the person making the transfer (“outright transfer”).
 - 4.4.2 that the transferred rights and obligations become rights and obligations of the transferee while continuing, concurrently, to be rights and obligations of the person making the transfer (“concurrent transfer”).
- 4.5 Under an outright transfer, the rights and obligations being traded are transferred in their entirety from one party to another. Thus the original licensee (that traded the spectrum) no longer has any rights to use the traded spectrum.

- 4.6 Concurrent transfers, on the other hand, enable licensees to share rights to use spectrum as they see fit over a period of time without the need to undertake further transfers between themselves to effect that sharing.
- 4.7 Section 30(2)(a) to (b) of the Act determine the sorts of transfers which Ofcom may authorise in the regulations. To be sure to permit the maximum possible types of transfer Ofcom decided to mirror in the proposed Mobile Spectrum Trading Regulations the wording used in that section, which was the approach adopted in the 2004 Trading Regulations.

Circumstances where transfers are not authorised under the proposed Mobile Spectrum Trading Regulations

- 4.8 Regulations 4(1) and 5 of the proposed Mobile Spectrum Trading Regulations which authorise transfers are both subject to Regulation 6. Regulation 6 sets out particular circumstances in which transfers are not authorised.
- 4.9 These are:
- Where any of the licence holder, or all of the concurrent holders and the transferee have not consented to the transfer.
 - Where licence fees are outstanding or where the licence holder has opted to pay Ofcom its licence fee by instalments. In the latter situation, the licensee could pay up its outstanding instalments under a licence and then approach Ofcom with a proposed transfer.
 - Where Ofcom has served notice under paragraph 7(1) of Schedule 1 of the Act of a proposal to revoke or vary the licence but that revocation or variation has not been made. That notice is served around two months prior to the final revocation decision. In the case of a notice concerning a licence variation this will not in fact be an obstacle to trade because if the licensee consents to the variation being made and, if that happened, the licence amendment would be implemented quickly.
 - Where the holder of the licence has requested Ofcom to revoke or vary the licence but that revocation or variation has not been made.
- 4.10 Finally, a transfer is not authorised where Ofcom has not consented to it being made.

Notification of a trade under the proposed Mobile Spectrum Trading Regulations

- 4.11 Once a transfer has been agreed, the licence holder or concurrent holders must notify Ofcom of certain information about the proposed trade (regulation 7(1) of the proposed Mobile Spectrum Trading Regulations). Once all the information is provided, Ofcom will check the documentation in order to ensure that the mandatory information requirements have been met and that the proposed transfer is consistent with the information held by Ofcom. Ofcom will then publish a notice stating the names of the transferor and the transferee and setting out basic information about the licence (regulation 7(2) of the proposed Mobile Spectrum Trading Regulations).

Giving consent to a trade under the proposed Mobile Spectrum Trading Regulations

- 4.12 After publishing a notice under Regulation 7(2), Ofcom must decide whether it consents to the transfer under Regulation 8 or whether to give any directions under Regulation 9 of the proposed Mobile Spectrum Trading Regulations.
- 4.13 When deciding whether or not to consent to a transfer, Ofcom must under Regulation 8 take into account the following factors:
- whether the holder, or concurrent holders, of the licence is/are in breach of the terms of the licence.
 - whether the transferee (and the transferor in the case of a partial transfer) is able to meet the terms of the licence.
 - whether the transferee is able to meet any criteria relating to the persons to whom a wireless telegraphy licence of the class to be transferred may be granted.
 - whether competition is likely to be distorted as a result of the transfer.
 - whether it is requisite or expedient for Ofcom to refuse consent:
 - in the interests of national security;
 - to comply with European Union or international obligation of the UK; or
 - a direction by the Secretary of State under the Act or the Communication Act 2003.
- 4.14 Under Regulation 9 Ofcom may consent to a transfer but give a direction to the parties to the trade that the transfer will only be put into effect after compliance with conditions which may relate to any matter mentioned in Regulation 8.
- 4.15 In line with our proposals set out in Section 3 and as indicated above, the proposed Mobile Spectrum Trading Regulations provide for Ofcom to take into account whether in its opinion competition is likely to be distorted as a result of the transfer in determining whether or not to consent to a trade or to consent to a trade subject to certain conditions. As discussed above, this provision does not form part of the 2004 Trading Regulations.

Enacting the transfer under the proposed Mobile Spectrum Trading Regulations

- 4.16 Once Ofcom has decided whether to consent to the transfer and whether to issue directions it must then notify the parties.
- 4.17 In order to affect a transfer, the transferor's licence will need to be surrendered. Ofcom will then grant a new licence to the transferee and in the case of a concurrent or partial transfer to the transferor(s) (Regulation 7(5) of the proposed Mobile Spectrum Trading Regulations).

- 4.18 Once the transfer has been affected, Ofcom will update its public notice to indicate that the transfer was completed and the public register to ensure that the new licence holdings are reflected.

Section 5

General effect of the proposed Wireless Telegraphy (Register) (Amendment) Regulations 2011

The legislative framework and the existing regulations

- 5.1 Under section 31(1) of the Act Ofcom may, by regulations, make provision for the establishment and maintenance of a wireless telegraphy register. Under section 31(2) of the Act Ofcom may only include relevant information in the register if it is information of a description prescribed by regulations. The 2004 Register Regulations provide for the establishment and maintenance of such a register and prescribe “relevant information” for these purposes.
- 5.2 In order to give effect to the proposals set out in this document, we also propose to amend the 2004 Register Regulations. A draft of the regulations which Ofcom proposes to make is set out at Annex 7.
- 5.3 The 2004 Register Regulations are available on the website www.legislation.gov.uk
- 5.4 Ofcom’s notice of its proposal to make the 2004 Register Regulations and a statement explaining the decisions made in the light of feedback received in response to the notice are available at www.ofcom.org.uk.

The proposed amendments to the 2004 Register Regulations

- 5.5 The draft 2011 Register Regulations add a category of licences 880-915MHz, 925-960MHz, 1710-1781.7MHz, 1805-1876.7MHz, 1899.9-1980MHz and 2110-2170MHz for which information will be published on the register.
- 5.6 The register provides basic information about licensees such as names, contact details, class of licence, the band(s) of frequencies and, where appropriate, the geographical area of operation.

Section 6

Next Steps

- 6.1 Following the publication of this Notice, any interested parties may make representations to us in relation to our proposals to make the Mobile Spectrum Trading Regulations and amend the 2004 Register Regulations. Such representation should be sent to Ofcom by 17 March 2011.
- 6.2 This period for making representations is in accordance with the requirements of Schedule 1 of the Wireless Telegraphy Act 2006 and Article 14 of the Authorisation Directive (Directive 2002/20/EC).
- 6.3 Subject to consideration of responses to this consultation, we intend to make Mobile Spectrum Trading Regulations and 2011 Register Regulations as soon as possible.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm 17 March 2011**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/trading-900-1800-2100/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email trading@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Ofcom
Mobile & Auctions Team
3rd Floor
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3990
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Robert Emson on 020 7783 4375.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your

response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement as soon as possible.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation questions

Do you have any comments on the proposals to enable spectrum trades in respect of the 900 MHz, 1800 MHz and 2.1 GHz bands.

Do you have any comments on the proposal regarding an ex ante competition check?

Do you have any comments on the proposed statutory instruments set out in this notice?

Annex 5

Impact Assessment

- A5.1 The analysis presented in section 3 of this document represents an impact assessment, as defined in section 7 of the Communications Act 2003 (the Act).
- A5.2 The specific issue we considered was how to fulfil our duty to ensure that trades of mobile spectrum do not result in a distortion of competition. Our preferred option is set out in paragraphs 3.16 to 3.19.
- A5.3 You should send any comments on this impact assessment to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals.
- A5.4 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on our website:
http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

Annex 6

Draft Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011

STATUTORY INSTRUMENTS

2011 No. [xxxx]

ELECTRONIC COMMUNICATIONS

The Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011

Made - - - - - ***

Coming into force - - - - - ***

The Office of Communications (“OFCOM”), in exercise of the powers conferred by section 30(1) and (3) and section 122(7) of the Wireless Telegraphy Act 2006¹⁰ (“the Act”), make the following Regulations.

Before making the Regulations OFCOM have given notice of their proposal to do so in accordance with section 122(4)(a) of the Act, published notice of their proposal in accordance with section 122(4)(b) of the Act and have considered the representations made to them before the time specified in the notice in accordance with section 122(4)(c) of the Act.

Citation, commencement and extent

1. These Regulations may be cited as the Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011 and shall come into force on **[date of coming into force]**.
2. These Regulations shall not extend to the Bailiwick of Guernsey.

Interpretation

3. In these Regulations “concurrent holders” means persons who concurrently hold the rights and obligations under a wireless telegraphy licence by virtue of a transfer authorised by these Regulations which has that effect.

Transfer of all of the rights and obligations arising by virtue of a wireless telegraphy licence

4.—(1) Subject to regulation 6, a transfer by the holder of a wireless telegraphy licence to which this paragraph applies of all of the rights and obligations arising by virtue of that wireless telegraphy licence is authorised if it satisfies one of the two conditions set out in paragraph (2).

¹⁰ 2006 c. 36

(2) Those conditions are —

- (a) that the rights and obligations of the person making the transfer become rights and obligations of the transferee to the exclusion of the person making the transfer;
- (b) that the transferred rights and obligations become rights and obligations of the transferee while continuing, concurrently, to be rights and obligations of the person making the transfer.

(3) Paragraph (1) shall apply to wireless telegraphy licences within the licence class specified in Column 1 of the Schedule which applies to a station or apparatus operating within any of the frequency bands specified in Column 2 of the Schedule.

Partial transfer of rights and obligations arising by virtue of a wireless telegraphy licence

5. Subject to regulation 6, transfers satisfying one of the two conditions set out in regulation 4(2) are also authorised where the transfer is of —

- (a) all of the rights arising by virtue of a wireless telegraphy licence which relate to —
 - (i) a part of the range of frequencies under one of the licences of the class specified in Column 1 of the Schedule which applies to a station or apparatus operating within any of the frequency bands specified in Column 2 of the Schedule;
 - (ii) a geographical area being part of the total geographical area in which the holder is authorised to establish, install and use radio transmitting and receiving stations or apparatus under one of the licences of the class specified in Column 1 of the Schedule which applies to a station or apparatus operating within any of the frequency bands specified in Column 2 of the Schedule; or
 - (iii) both of the situations set out in sub-paragraphs (i) and (ii); and
- (b) the corresponding part of each of the obligations under the licence.

Circumstances in which a transfer is not authorised

6. A transfer of rights and obligations arising under a wireless telegraphy licence is not authorised where —

- (a) any of the licence holder, or all of the concurrent holders, and the transferee have not consented to the transfer;
- (b) any sum payable under the Wireless Telegraphy (Licence Charges) Regulations 2005⁽¹¹⁾ in respect of that licence is owing to OFCOM because it has not been paid by the time it became due;
- (c) any instalment payment is to be paid to OFCOM under regulation 4(7)(b) of the Wireless Telegraphy (Licence Charges) Regulations 2005 in respect of that licence;
- (d) OFCOM has served notice under paragraph 7(1) of Schedule 1 of the Act on the holder, or the concurrent holders, of that licence of a proposal to revoke or vary that licence but that revocation or variation has not yet been made;
- (e) the holder has, or all of the concurrent holders have, requested OFCOM to revoke or vary the licence or have consented to a revocation or variation proposed by OFCOM but that revocation or variation has not yet been made; or
- (f) OFCOM have not given their consent, under regulation 7(3)(a), to the transfer being made.

Transfer procedure

7.—(1) The holder, or concurrent holders, of a wireless telegraphy licence who wishes, or who wish, to make a transfer authorised by regulations 4(1) or 5 must provide to OFCOM —

¹¹ S.I. 2005/1378, amended by SI 2006/2894, SI 2007/2326, SI 2008/139, SI 2008/2106, SI 2009/66.

- (a) the reference number of the wireless telegraphy licence under which rights and obligations are to be transferred;
 - (b) the name and address of the holder or concurrent holders of the wireless telegraphy licence;
 - (c) the name and address of the proposed transferee;
 - (d) a description of which type of transfer authorised by regulation 4(1) or regulation 5 is proposed;
 - (e) a document signed by or on behalf of the holder, or each concurrent holder, of the licence and signed by or on behalf of the transferee, under which each of those persons warrants to OFCOM that he has consented to the proposed transfer;
 - (f) all information necessary for OFCOM to determine whether or not they shall consent to the transfer; and
 - (g) in the case of a transfer authorised by regulation 5, a description of which rights and obligations under the licence are to be transferred.
- (2) OFCOM shall, after determining that the requirements of paragraph (1) have been met, publish a notice stating:
- (a) the name of the wireless telegraphy licence holder or concurrent holders and the name of the transferee to whom it is proposed that the rights and obligations arising under the licence shall be transferred;
 - (b) the date when OFCOM determined that the requirements of paragraph (1) were met;
 - (c) the licence class and the reference number of the wireless telegraphy licence under which rights and obligations are to be transferred; and
 - (d) in the case of a transfer authorised by regulation 5, a description of which rights under the licence are proposed to be transferred.
- (3) After publishing a notice under paragraph (2) OFCOM shall decide —
- (a) if they consent to the transfer in accordance with regulation 8; and
 - (b) if they shall give any directions under regulation 9.
- (4) OFCOM shall notify the parties to the proposed transfer of their decisions under paragraph (3).
- (5) A transfer shall be effected by the holder or concurrent holders of the wireless telegraphy licence under which rights and obligations are to be transferred surrendering that licence and by OFCOM granting a new one to the transferee and —
- (a) in the case of a transfer which satisfies the condition set out in regulation 4(2)(b), the holder or concurrent holders who made the transfer; and
 - (b) in the case of a transfer authorised by regulation 5, to the holder or concurrent holders who made the transfer.
- (6) OFCOM shall publish the information specified in paragraph (2) in relation to transfers that have been effected pursuant to paragraph (5).

Consent by OFCOM

8. In determining whether or not to consent to a proposed transfer OFCOM shall take into account whether—

- (a) the holder is, or the concurrent holders are, in breach of the terms of the wireless telegraphy licence under which the rights and obligations are to be transferred;
- (b) the transferee is able to meet the terms, provisions and limitations of the wireless telegraphy licence which is to be granted as a result of the transfer;
- (c) in the case of a transfer authorised by regulation 5 the transferor is able to meet the terms, provisions and limitations of the wireless telegraphy licence which is to be granted as a result of the transfer;
- (d) the transferee is able to meet any criteria relating to the persons to whom a wireless telegraphy licence of the class under which rights and obligations are to be transferred may be granted;

- (e) competition is likely to be distorted as a result of the transfer; and
- (f) it is requisite or expedient to refuse consent to the transfer —
 - (i) in the interests of national security;
 - (ii) for the purposes of complying with a Community obligation of the United Kingdom or with any international agreement or arrangements to which the United Kingdom is party; or
 - (iii) for the purposes of complying with a direction by the Secretary of State given to OFCOM under section 5 of the Communications Act 2003 or section 5 of the Act.

Directions by OFCOM

9.—(1) If OFCOM consent to a transfer they may also direct that a transfer shall only be put into effect in accordance with regulation 7(5) after compliance with conditions which may relate to any matter mentioned in any of the paragraphs of regulation 8.

(2) A transfer may not be put into effect in accordance with regulation 7(5) until after compliance with the conditions set out in any such direction.

** 2011

Chief Executive Officer
For and by authority of the Office of Communications

SCHEDULE Regulations 4 and 5
LICENCE CLASSES AND FREQUENCY BANDS

<i>Column 1</i>	<i>Column 2</i>
Licence class	Frequency bands
Public Wireless Network	880 – 915 MHz 925 – 960 MHz 1710 – 1781.7 MHz 1805 – 1876.7 MHz 1899.9 – 1980 MHz 2110 – 2170 MHz

Annex 7

Draft Wireless Telegraphy (Register) (Amendment) Regulations 2011

STATUTORY INSTRUMENTS

2011 No. [xxxx]

ELECTRONIC COMMUNICATIONS

The Wireless Telegraphy (Register) (Amendment) Regulations 2011

Made - - - - - ***
Coming into force - - - - - ***

The Office of Communications (“OFCOM”), in exercise of the powers conferred by section 30(1) and (3) and section 122(7) of the Wireless Telegraphy Act 2006⁽¹²⁾ (“the Act”), make the following Regulations.

Before making the Regulations OFCOM have given notice of their proposal to do so in accordance with section 122(4)(a) of the Act, published notice of their proposal in accordance with section 122(4)(b) of the Act and have considered the representations made to them before the time specified in the notice in accordance with section 122(4)(c) of the Act.

Citation, commencement and extent

10. These Regulations may be cited as the Wireless Telegraphy (Register) (Amendment) Regulations 2011 and shall come into force on **[date of coming into force]**.

Amendment of the Wireless Telegraphy (Register) Regulations 2004

11. The Wireless Telegraphy (Register) Regulations 2004⁽¹³⁾ (“the Principal Regulations”) shall be amended in accordance with these Regulations.

Amendment of Schedule

12.—(1) Regulation 4(1)(a) of the Principal Regulations is amended by substituting for “and 10”, “, 10 and 11”.

13.—(1) After Part 10 of the Schedule to the Principal Regulations insert—

“Part 11

⁽¹²⁾ 2006 c.36.

⁽¹³⁾ S.I. 2004/3155 as amended by S.I. 2006/340, S.I. 2006/1808, S.I. 2007/381, S.I. 2007/3389, S.I. 2008/689, S.I. 2008/2104, S.I. 2008/3193 and S.I. 2009/14.

<i>Column 1</i>	<i>Column 2</i>
Class	Frequency bands
Public Wireless Network	880 – 915 MHz
	925 – 960 MHz
	1710 – 1781.7 MHz
	1805 – 1876.7 MHz
	1899.9 – 1980 MHz
	2110 – 2170 MHz

”

** 2011

Chief Executive Officer
For and by authority of the Office of Communications