



Trading Guidance Notes

Introduction

These guidance notes provide a guide to spectrum trading and Ofcom's spectrum trading processes. They serve as a first port of call for those who want to understand the possibilities for trading Wireless Telegraphy Act 2006 ('WT Act') licences.

A range of documents providing background to our policies on spectrum trading and other information that would be helpful to those interested in trading is available from the spectrum trading and liberalisation page of our website at:

<http://stakeholders.ofcom.org.uk/spectrum/spectrum-trading/>

The regulations and legislation relating to spectrum trading are available from the Office of Public Sector Information or your licence may contain provisions on spectrum leasing, which is a form of trading.

- The regulations, legislation or licence take precedence. If anything in this guidance is inconsistent with them.
- If you have specific questions about spectrum trading that are not answered by these guidance notes, please contact the Spectrum Trading Desk on 020 7981 3083 or email spectrum.tradingdesk@ofcom.org.uk.

1. Basic information

1.1. What is spectrum trading?

Spectrum trading is a process that allows the holders of certain wireless telegraphy licences granted by us under section 8 of the WT Act to transfer or lease the licence rights to another. Most, but not all, licences are tradable. Please check this guidance, the regulations mentioned in it and your licence before proceeding.

There are three forms of spectrum trading.

1. You may transfer all or part of your licence rights and associated obligations to another party (referred to in this guidance as 'transfer') in accordance with trading regulations as explained in section 2 of this guidance provided that your licence is in a class covered by the regulations.
 - Transfers may be permanent or time-limited. A time-limited transfer will involve reversal of the original transaction by the transferee. An obligation on the transferee to reverse the transaction at the agreed time may be included in a contract.
2. If your licence contains the necessary provisions, you may enter into a contract to let someone else exercise your rights to use the spectrum. This is referred to as 'leasing'. Leasing is a streamlined trading process that is being introduced initially for selected licence classes. You may lease spectrum to others only if your licence expressly permits you to do so. It may be necessary for you to apply for a licence variation before granting leases. Further details are given in section 3 of this guidance.

Transfer is regulated by the Wireless Telegraphy (Spectrum Trading) Regulations 2004 as amended (referred to here as the 'Trading Regulations'). The Trading Regulations set out the classes of licences that may be traded by transfer and the process to be followed. The transfer of Public Wireless Network (PWN) licence rights and obligations is regulated separately by the Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011 (referred to here as the 'Mobile Trading Regulations'). These are broadly similar to the general Trading Regulations but include some provisions specific to PWN trades as described in section 2 of this guidance.

Leasing is governed by licence terms and conditions. A licence-holder may grant leases only if the licence contains the necessary terms and conditions as described in section 3 of this guidance.

3. There is a special trading process, not described in this guidance, for spectrum held by Crown bodies such as government departments. For legal reasons, Crown bodies hold spectrum in the form of Recognised Spectrum Access rather than a WT licence and the trading process is slightly different. For further details, contact the government department concerned or the Spectrum Trading Desk.

1.2. Who can trade spectrum licences?

There are no restrictions on who may apply to participate in a trade for any currently tradable licences.

1.3. What is the difference between transfer and lease?

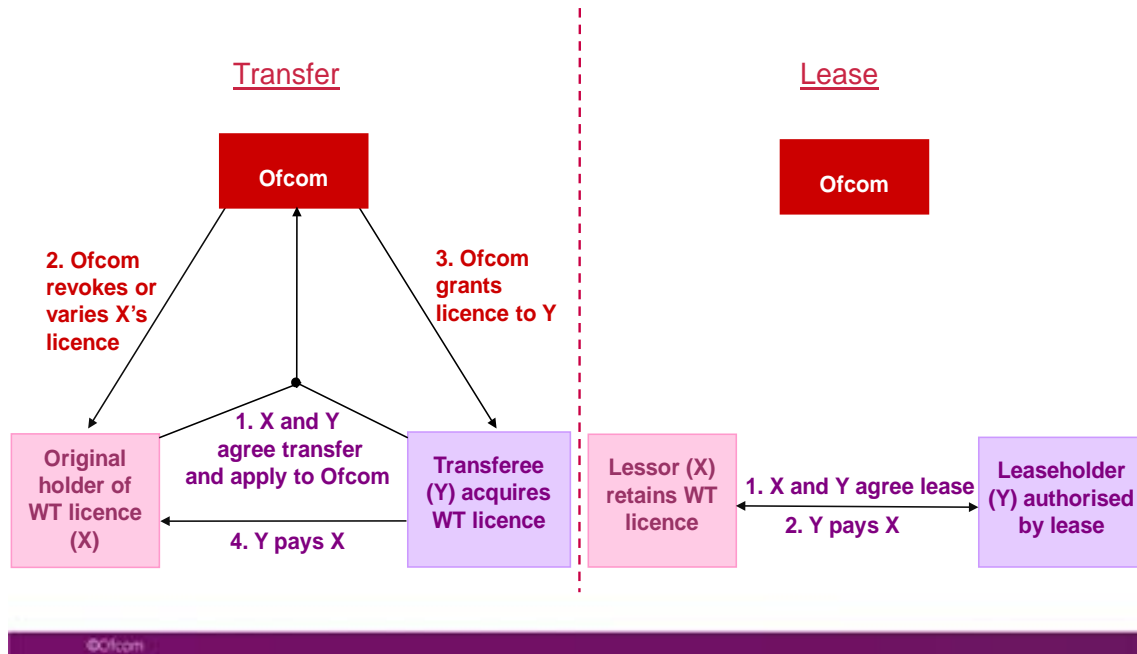
Table 1 below summarises the chief differences. As illustrated in figure 1, transfer involves notification of Ofcom and the grant by us of a new licence to the purchaser whereas leases are contractual between the parties and do not involve us.

Table 1: Main differences between transfer and lease

Transfer	Lease
More complex process than leasing <ul style="list-style-type: none">• Transferee is granted its own WT licence	Simpler process than transfer <ul style="list-style-type: none">• Leaseholder is not granted its own licence
Both parties hold their own licences from Ofcom that authorise use of the spectrum	Leaseholder is not granted its own licence but uses the spectrum by virtue of a lease contract with a licence-holder



Figure 1: Difference between transfer and lease



Further background on these two forms of trading may be found in sections 2 and 3 of this guidance and in our consultation and statements on *Simplifying Spectrum Trading* at <http://stakeholders.ofcom.org.uk/consultations/simplify/?a=0>.

1.4. How is the price of traded spectrum determined?

As with other tradable assets, the terms on which spectrum trades take place, including price, are a matter for commercial negotiation between the parties. However, the procedure to be followed must comply with certain regulatory requirements as set out in the relevant regulations or licence.

1.5. Do I have to trade if my licence is in a tradable licence class?

No. Spectrum trading is entirely voluntary. Being able to trade a WT Act licence is a right of a licence holder; it is not an obligation.

1.6. Which licence classes may be traded and how?

Section 2 below summarises the position for transfer. Section 3 deals with leasing.

1.7. Will transfer or lease suit the parties better?

The choice between transfer and lease will depend on the parties' circumstances and preferences and is for them to decide (assuming the licence is of a type that may be transferred and contains terms that allow leasing).

2. The transfer process

2.1. Which licence classes may be transferred?

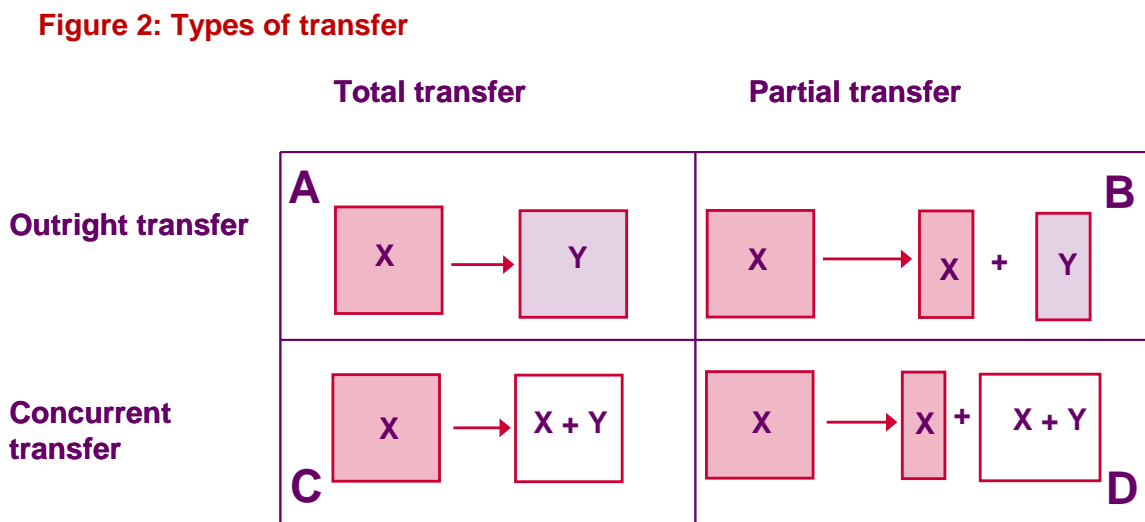
The majority of licences issued by Ofcom are now tradable by transfer as listed in table 2 below with the types of transfer permitted for each.

2.2. What types of transfer are possible?

The Trading Regulations offer the parties various options as to how to structure transactions. Transfers may be:

- *outright* or *concurrent*; and
- *total* or *partial*.

Figure 2 below illustrates the four possible combinations.



2.3. What is the difference between outright and concurrent transfers?

With an *outright* transfer, the rights and obligations of the person making the transfer become the rights and obligations of the transferee to the exclusion of the person making the transfer. After such a transfer, the original licensee (that traded the licence) no longer has any rights and/or obligations under the traded licence.

In a concurrent transfer, 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. Such a transfer enables licensees to share rights to use spectrum. The number of concurrent licence holders is not limited in the regulations, and so joint holdings by three or more licensees might be possible.

Where a licence is held concurrently by a number of licensees, the consent of all those licensees will be necessary to complete a trade. Additionally, under such a holding all licensees will be responsible for complying with licence obligations, including the obligation to pay the licence fee.

Regulation 4 of the Trading Regulations authorises both outright and concurrent transfers but concurrent and partial transfers are not permitted in all licence classes.

2.4. What is a 'partial transfer'?

As well as allowing parties to trade all the rights and obligations under a licence, we permit the transfer of only some rights and obligations in certain cases. This will result in the rights and obligations under the licence being partitioned (divided) into two distinct licences. The rights to use spectrum can be partitioned by frequency, geography or time.


2.5. What types of transfer are allowed in which licence classes?


The transfer options available depend on the licence class as summarised in table 2 below.


Table 2: Licences that are tradable and types of transfer allowed

Licence sector	Licence class/frequency (area)	Types of Transfer	
		Outright or concurrent	Total or partial
Business Radio	<i>Technically Assigned</i>	Fully flexible	Semi-flexible
	<i>Area Defined</i>	Fully flexible	Semi-flexible
	<i>Light Licensing comprising:</i> • <i>Simple UK</i> • <i>Simple Site</i> • <i>Suppliers</i>	Fully flexible	Total only
Spectrum Access	3.6 GHz	Fully flexible	Total only
	412-414 with 422-424 MHz 542-550 MHz (Cardiff) 758-766 MHz (Manchester) 1452-1492 MHz 1785-1805 MHz (NI) 3.5, 10, 28, 32, 40 GHz	Fully flexible	Fully flexible
	1781.7-1785 with 1876.7-1880 MHz	Fully flexible	Total only
	28 GHz	Outright only	Fully flexible
Broadband Fixed Wireless Access (BFWA)	<i>Scanning Telemetry</i>	Fully flexible	Semi-flexible
Fixed Services	<i>Point to Point Fixed Links</i>	Fully flexible	Semi-flexible
	880-915 MHz 925-960 MHz 1710-1781.7 MHz 1805-1876.7 MHz 1899.9-1980 MHz 2110-2170 MHz	Fully flexible	Fully flexible
PWN		Fully flexible	Fully flexible

Key:

 Fully flexible: trades may be either of the types specified at the top of the column with no restriction on partitioning by geography or frequency

 Semi-flexible: partial trades restricted by geography and/or frequency as in table 3

 Restricted: concurrent or partial trades not permitted

Information on tradable licence classes that may be traded by transfer can be found in the *Trading Regulations* or through our on-line *Spectrum Information System*.

2.6. What kind of partial transfers are allowed and in which licence classes?

Regulation 6 of the general *Trading Regulations* sets out the conditions that govern the forms of partial transfer that are allowed in various frequency bands and licence types¹.

As shown in table 3 below, not all types of licence can currently be partitioned and partial trades are restricted in some licence classes, for example by requiring the frequencies to be transferred in multiples of a certain bandwidth. These restrictions

¹ NB: the numbering of the parallel provisions in the *Mobile Trading Regulations* is different from that of the general *Trading Regulations*.

are necessary to ensure that partitioning of licences does not result in increased interference. We keep the need for them under review.

Table 3: Types of partial transfers allowed

Type of partitioning	Licence class <i>and any restrictions on partitioning</i>
Partitioning by frequency	<p>Semi-flexible - restrictions apply as below</p> <p>Business Radio Technically Assigned - <i>spectrum segmentation to a minimum channel width of 6.25 kHz (subject to clearance by Ofcom and prior licence variation)</i></p> <p>Business Radio Area Defined - <i>spectrum segmentation to a minimum channel width of 6.25 kHz (subject to clearance by Ofcom and prior licence variation)</i></p> <p>Fixed Service Point to Point Fixed Links – <i>partial transfer of whole individual links</i></p> <p>Fixed Service Scanning Telemetry – <i>spectrum segmentation to 12.5 kHz</i></p> <p>Fully flexible - may be segmented in any way</p> <p>BFWA 28 GHz</p> <p>PWN: •880-915 •925-960 •1710-1781.7 •1805-1876.7 •1899.9-1980 •2110-2170 MHz</p> <p>Spectrum Access: • 412-414/422-424 MHz •542-550 MHz (Cardiff) •758-766 MHz (Manchester) •1452-1492 MHz •1755-1785 MHz (NI) •3.5 GHz •10 GHz •28 GHz •32 GHz •40 GHz</p>
Partitioning by geography	<p>Semi-flexible - restrictions apply as below</p> <p>Business Radio Technically Assigned – <i>partial transfer of individual assignments where licence covers more than one assignment</i></p> <p>Business Radio Area Defined – <i>partial transfer of individual assignments where licence covers more than one assignment and by geographical segmentation down to a minimum trading unit 50 km grid square</i></p> <p>Fixed Services Point to Point Fixed Links and Scanning Telemetry - <i>partial transfer of whole individual links</i></p> <p>Fully flexible - may be segmented in any way</p> <p>BFWA 28 GHz</p> <p>PWN: •880-915 •925-960 •1710-1781.7 •1805-1876.7 •1899.9-1980 •2110-2170 MHz</p> <p>Spectrum Access: • 412-414/422-424 MHz •542-550 MHz (Cardiff) •758-766 MHz (Manchester) •1452-1492 MHz •1755-1785 MHz (NI) •3.5 GHz •10 GHz •28 GHz •32 GHz •40 GHz</p>
Partitioning not permitted	<p>Restricted</p> <p>Business Radio Light Licences comprising: • Simple UK • Simple Site • Suppliers</p> <p>Concurrent Spectrum Access: 1781.7-1785/1876.7-1880 MHz</p> <p>Spectrum Access: 3.6 GHz</p>

2.7. Can I make types of partial transfers besides those mentioned here?

Other types of partial transfer may be possible but involve two stages: (i) partitioning the licence into two or more licences using the licence variation process followed by (ii) transfer of one or more of the resulting parts. The two stages are necessary to enable us to consider fully the interference impact of the proposed partition on other users of the spectrum.

For more detailed information on the licence variation process, please consult the *Liberalisation Guidance Notes* published on the spectrum trading and liberalisation homepage.

2.8. In future, will Ofcom allow other types of trading transaction?

Provided that new types of transfer can be accommodated within the Trading Regulations and there is sufficient evidence of the benefits, we would be willing to consider amending the Trading Regulations to authorise additional types of transfer.

2.9. What if a company holding a WT Act licence is taken over by another company?

A licensee that is a corporate entity and is taken over by way of share purchase will not have to notify a transfer to us as there is no change in the identity of the licensee. However, where a company sells a business other than by way of share purchase, a spectrum trade will be necessary.

2.10. Is it possible to carry out time-limited transfers?

Yes, although it is normally necessary to structure this as two separate transactions. The parties enter into a contract requiring the transferee to reverse the transaction at the end of the transfer period. If allowed by your licence, leasing (see below) provides an alternative way of executing time-limited trades.

2.11. How do I apply for a transfer?

This depends upon the type of transfer you are applying for as explained below.

- To apply for an outright transfer (without specifying a completion date), please complete Ofcom application form OfW437 "Application for Spectrum Trading (Outright Transfer)".
- For all other types of transfer or for an outright transfer with a scheduled completion date, please complete Ofcom application form OfW206 "Application for Spectrum Trading".

Please send your completed form to the Spectrum Trading Desk at the address indicated on the form.

2.12. What happens during the transfer process?

Companies and others that hold WT Act licences are allowed to transfer their licence rights and obligations to others on terms agreed commercially between them.

The basic steps in the transfer process are as follows.

- i. The licence holder submits the appropriate trading application form signed by the transferee and transferor (and any concurrent licensees).
- ii. We assess the information provided on the form and consider whether we require further information in order to be able to consent to the transfer.
- iii. We publish a notice setting out basic details of the proposed transfer on the trade notification register (TNR).
- iv. We check that none of the circumstances in which transfers are not authorised apply.

OfW513 (December 2011)

- v. We consider and determine whether or not to consent to the trade and if we consents whether or not to issue a direction requiring matters to be done before the transfer is put into effect. *NB we intend as soon as convenient to amend the Trading Regulations to dispense with this requirement (and associated steps ii and vi) for tradable licences other than PWN but it continues to apply for the time being.*
- vi. We inform the parties to the transfer of its decision about consent and directions. If a trade is refused, we will make clear the grounds on which we have withheld consent.
- vii. The transfer is executed. The original licence holder surrenders the licence to us and we issue a new licence or new licences to reflect the terms of the trade.
- viii. The status of the trade is updated in the TNR.

Regulations 8, 9 and 10 of the Trading Regulations set out the transfer procedure.

Regulation 8(4) of the Regulations requires Ofcom to notify the parties of the transfer, and *regulation 8(5)* sets out how the trade will be effected.

More detailed information on the transfer process is available with the trading application forms, available on the trading and liberalisation homepage.

2.13. What information do I need to submit?

Regulation 8(1) of the Trading Regulations sets out the information that must be provided by those wishing to trade.

Once the commercial details of a transaction have been agreed between the parties, the licence holder (or holders in the case of a concurrent licence) must submit the appropriate completed application form to our Spectrum Trading Desk. The forms request certain basic information although we are entitled to require additional information if we need it. See 2.15 below for the special case of PWN trades.

2.14. Why might we ask for additional information?

We might request additional information in order to monitor the effects of spectrum trading. This might include details of the underlying commercial transaction, including information on price.

2.15. What are the information requirements for PWN trades?

The parties are encouraged to approach us for informal discussion about the process we will undertake to assess the proposed transfer, in particular if they think that it may raise competition issues.

Regulation 7(1)(f) of the Mobile Trading Regulations requires the licensee to provide all information necessary for Ofcom to determine whether or not to consent to the transfer. We would expect the licensee to provide with its trading application any information it considered relevant to a competition check. This might include the following:

- nature of the spectrum to be transferred;
- current spectrum holdings of the trading parties and of other mobile spectrum licensees;
- services and technologies the spectrum to be transferred is likely to support;
- how the spectrum is currently being used;
- contractual obligations attached to the spectrum to be transferred.

OfW513 (December 2011)

This list is not exhaustive and the information we require will be tailored to the specific circumstances.

2.16. Under what circumstances will transfers not be authorised?

Regulation 7 of the Trading Regulations sets out the circumstances in which transfers are automatically barred.

In summary, these are:

- where any or all of the (concurrent) licence holder(s) and the transferee have not consented to the transfer. All of the parties must consent to the transfer. We will require the parties to a trade to provide us with a document which provides evidence of that consent (normally the relevant trading application form);
- where licence fees are outstanding and are being paid in instalments, the licence-holder should contact us and consider paying any outstanding instalments;
- where we have served notice of a proposal to revoke a licence (under schedule 1 paragraph 7 of the WT Act 2006) (see section 4 below on ‘due diligence’);
- during the period between receiving a request from a licensee for a licence revocation or variation (or consenting to a variation or revocation proposed by us) and implementation of the revocation or variation;
- where we have not consented to a transfer being made (see following question).

2.17. For what reasons may Ofcom not consent to a proposed transfer?

While the requirement to obtain our consent remains, *regulation 9* of the Trading Regulations sets out the information we take into account when determining whether or not to consent to a proposed transfer.

In determining whether or not to consent to a proposed transfer we will take into account whether:

- 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;
- 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;
- in the case of a partial transfer, the transferor will be able to meet the terms, provisions and limitations of the wireless telegraphy licence which is to be granted as a result of the transfer;
- the transferee is able to meet any eligibility criteria relating to the class of wireless telegraphy licence to be transferred;
- it is requisite or expedient to refuse consent to the transfer –
 - in the interests of national security;
 - for the purposes of complying with an international (including EU) obligation or any international agreement or arrangement; or
 - for the purposes of complying with a direction from the Secretary of State; and,

- in the case of PWN trades only, competition is likely to be distorted as a result of the transfer.

2.18. What is the process for assessing competition issues for PWN trades?

a) Initial competition assessment

When we publish details of a proposed transfer on the TNR, we will publish an Ofcom update that will invite interested parties to submit within 10 working days details of any competition concerns they might have about the proposed transfer.

We will undertake an initial assessment of whether the proposed transfer raises sufficient competition issues to justify further analysis. This will involve:

- assessing the information that the parties provide with the application;
- requesting, if necessary, further information or clarification from the parties;
- considering whether there is a possible distortion of competition that needs assessing (including any representations from third parties); and
- notifying trading parties of our decision on whether to undertake a competition assessment.

We aim to complete this part of the transfer process within 20 working days of publication of details in the TNR.

b) Further competition assessment process

If we decide to undertake a competition assessment, we will ask the parties to provide their analysis and evidence for believing that the trade should be approved. We will also invite further comments from third parties. Responses will be required within 10 working days. The competition assessment process will usually involve the following:

- providing the trading parties with a statement of the issues we consider need to be addressed, including issues raised by third parties;
- an opportunity for the trading parties to comment on the issues raised;
- meeting the trading parties to discuss the issues and, if necessary, with third parties to discuss their concerns;
- an assessment of the potential of the transfer to distort competition, which will usually take account of:
 - the potential impact of the transfer on competition, which, depending on the circumstances, might include the possible impact on prices, on service quality and on innovation;
 - possible changes to the competition landscape arising from the trade;
 - likely prospects for competition with and without the trade; and
 - efficiencies and other benefits, including for citizens and consumers, that might arise from the trade;
- a provisional decision by Ofcom on whether to consent to the transfer. In determining whether to consent there are a number of other matters that we may consider (ie those set out at 2.17);
- informing the trading and other interested parties of our provisional decision, including our reasoning, and assessing any representations that are made within 10 working days;

OfW513 (December 2011)

- informing the trading parties of our final decision and any conditions that apply to our consent and our grounds for refusal if we refuse consent; and
- publishing our decision and reasons.
- See also our statement at <http://stakeholders.ofcom.org.uk/binaries/consultations/trading-900-1800-2100/statement/900-1800-2100-statement.pdf>, from which the above has been taken.

2.19. Might we make our consent to a transfer conditional?

Under *regulation 10* of the Trading Regulations, we may make our consent conditional upon compliance by the parties with a direction from us concerning any of the consent matters mentioned in *regulation 9*.

2.20. When do we publish a notice about the proposed transfer?

After checking the documentation, we publish a notice on the TNR, stating the names of the transferor and the transferee and setting out basic information about the licence to be transferred. The status of the transfer on the TNR will initially show 'being processed' until we have consented to the trade when the status will be updated to show "Consent granted" followed by "Completed" once the trade has been effected.

Where we do not consent to a trade or where either party to the transfer decide not to continue the trade, the status will show "Transfer not completed".

Regulation 8(2) of the Trading Regulations lists the information we will publish in its notice – after determining the information requirements are met.

2.21. Does Ofcom charge a fee for the transfer process?

Currently we will not charge a fee for processing transfers although we keep the position under review.

See: A Statement on Spectrum Trading (6 August 2004) – Section 3

2.22. What happens to the licence fees when the rights are transferred?

A licence transfer should neither trigger the payment of additional licence fees nor the repayment to a transferor of any fees already paid. The rights transferred under a licence will include the transferor's rights which arise from having paid a licence fee.

If, as with most of our licences, fees are payable annually, the annual payment date will remain the same as set out on the licence issued to the transferee.

We ensure that all licence fees which are owed have been paid in full before a transfer can take place.

See: A Statement on Spectrum Trading (6 August 2004) – Section 3

2.23. What happens to my old licence?

In executing a transfer, the transferor's original licence will need to be surrendered. In the case of a total transfer, it will be cancelled. In the case of a partial transfer, it will be varied to reflect the transfer and re-issued.

2.24. How long does it take to give consent to a proposed trade?

We have not set a rigid timescale as the time taken will depend on the complexity of the case and other circumstances. However, we aim to complete all trades (measured from the day the proposed transfer is received by the Trading Desk, to the day the transfer is executed or rejected) within 42 calendar days.

2.25. How long will it take to assess a PWN trade?

We aim to complete initial competition assessments within 42 calendar days although some cases may take longer.

OfW513 (December 2011)

Further competition assessments are likely to take up to four months but may take longer depending on complexity.

2.26. May I schedule transfers to take place on a set date?

It is possible to request a particular date on which you wish a trade to become effective. To do this, enter the required date in the appropriate box on the relevant trading application form. Please note that the date specified should be a working day and give us reasonable time to properly process your application. The date must be later than 42 calendar days after application and before the expiry of 3 months after application.

We cannot guarantee meeting any such date since timing will depend on the issues that arise on any particular transfer application. However, we will take the parties' desired date into account. If the exact date when a transfer is to be put into effect is of significance to parties, we recommend that you liaise with the Spectrum Trading Desk.

2.27. Where can I access information about tradable spectrum licences?

We publish a number of online databases in order to provide as much relevant information to the market as it can. These registers are accessible on our online Spectrum Information System (SIS).

The SIS provides a range of information about spectrum licences and authorisations that is useful to spectrum users interested in trading. The system has been designed to facilitate access to a wide range of detailed information in a simple and accessible way.

2.28. What information can I find on the SIS?

Three inter-related online registers are available.

- The UK Plan for Frequency Authorisation (UK PFA) provides information about which frequencies are available for assignment, for what purposes the different frequencies have been allocated and whether these can be traded.
- The Wireless Telegraphy Act Register (WTR) provides information about individual tradable licences such as contact names and address details, class of licence, band(s) of frequencies and where appropriate geographic area of operation.
- The Trade Notification Register (TNR) displays details of proposed trades notified to Ofcom, trades in progress and completed trades.

Whilst each of these registers may be accessed independently, users may find that the best way to use the SIS is to access the UK PFA first and then link to the other registers as appropriate.

3. The leasing process

You may grant spectrum leases only if your WT licence contains terms that allow you to do so.

3.1. Which licences may be leased?

Before leasing spectrum rights, you should check whether your licence allows you to do so and obtain the necessary licence variation if it does not. As indicated in table 4 below, we are currently limiting the availability of licence variations to allow leasing to Area Defined Business Radio licences and most auctioned licences. Suppliers Light Business Radio licences already contain the necessary terms and no variation is needed to allow holders to hire out equipment.

3.2. How may I check whether my licence contains the necessary provisions to allow leasing?

Table 4 below indicates the licence classes in which we are currently prepared to allow leasing. If in doubt, or you wish to apply for a licence variation for leasing, please check with the Trading Desk at the address at the end of this guidance.

Table 4: Availability of leasing

Licence sector or type	Licence class	Availability of licence variation on leasing
Business Radio	<i>Area Defined</i>	Variations to allow leasing available on application
	<i>Suppliers Light</i>	Leasing already permitted under terms of existing licences without need to obtain a variation
Auctioned licences	<i>All except 3G and Concurrent Spectrum Access (CSA) licences (at 1781.7-1785 MHz paired with 1876.7-1880 MHz – also known as the ‘DECT guard band’)</i>	Variations to allow leasing available on request
	<i>CSA licences</i>	Leasing not currently available (because of coordination complications)
	<i>PWN 3G</i>	Under consideration
PWN	<i>2G/3G</i>	Under consideration

3.3. Will Ofcom allow leasing in other licence classes in future?

We will keep the position under review and look positively at requests to extend leasing more widely if there is market demand. However, this might involve changing our business processes and systems and complicate investigation of interference. We would need to assess whether the benefits justified the costs and the risks could be effectively mitigated.

3.4. How do I apply for a variation if I need one?

You may apply to the Trading Desk. For operational and enforcement-related reasons, we are currently restricting the availability of these variations as indicated in the table above.

3.5. Is there any limit on the length of lease that a licensee may grant?

Leases may be of any length up to the lifetime of your licence.

3.6. What happens at the end of the lease period?

The leaseholder is no longer authorised to use the spectrum. Continued use may be in breach of contract and constitute a criminal offence under the WT Act. Ofcom may take enforcement action against persons using the spectrum without authorisation or causing interference to authorised users.

3.7. What happens if there is a dispute between the parties about whether a lease is valid?

We would expect the parties to resolve this themselves in the first instance and there is a requirement for leases to provide for a binding procedure to resolve disputes between the licensee and leaseholder. We will not normally involve ourselves in disputes that are contractual in nature. However, we may intervene, including to order immediate shutdown, if necessary.

3.8. What regulatory requirements apply to the leasing process?

The licensee and prospective leaseholder are free to negotiate the terms for the lease, including price and duration and there is no need to notify us of leases. However, they must comply with the conditions in the licence variation. Please see the following question for details.

3.9. What obligations are there on the parties to the lease?

The licensee granting the lease (the 'lessor') must comply with the terms of the licence that relate to leasing. The standard form of variation is reproduced at the end of this guidance. This requires the licensee to:

- have written contracts with leaseholders and make these available to Ofcom on request;
- provide for prompt and satisfactory resolution of disputes;
- inform leaseholders of the terms and conditions of the head licence and give them information about these;
- inform leaseholders that failure to meet the licence terms and conditions may result in closedown of the equipment and incur penalties;
- ensure that leaseholders' use of radio equipment complies with the lessor's licence conditions;
- maintain records of leaseholders and sub-leaseholders where they permit sub-leasing; and
- make that information available in timely manner on request to Ofcom personnel.
- The Suppliers Light licence contains slightly different provisions on leasing and does not need to be varied as it already contains the necessary provisions.

The *leaseholder* must operate within the terms of the lessor's licence. Failure to do so may constitute a criminal offence under section 8 of the WT Act. The leaseholder may also be bound by contractual terms in the lease agreement.

3.10. What is the lessor's role and responsibilities?

This depends on the nature of the leasing arrangements. The simplest form of leasing is where the lessor allows a single leaseholder to exercise all the licence rights for a defined period.

At the other extreme, a lessor may choose to divide the spectrum rights under the licence between several leaseholders and, in effect, act as a commercial band manager. In such cases, the lessor may:

- plan the use of the spectrum in a way that takes account of leaseholders' needs for spectrum availability and quality; and
- be responsible for acting as first port of call to resolve disputes and interference complaints as described in more detail below.

3.11. Who is responsible for paying the licence fee and other obligations under the licence?

Under the licence, the lessor remains responsible for all obligations under the licence, including paying licence fees to Ofcom. However, the parties may enter into whatever financial arrangements they wish as to payments between themselves.

3.12. Who may apply for a variation to allow leasing if the licence is held concurrently?

We expect all concurrent licensees to apply for the variation in these circumstances or to signify consent to any one or more of them doing so.

3.13. What will happen if a leaseholder causes or complains of interference?

The licensee remains ultimately responsible for all obligations under the licence including payment of licence fees. We expect the lessor to act as first port of call to resolve complaints from its own leaseholders and to involve us only if unable to resolve the problem itself. In particular, we expect the lessor to resolve interference complaints between its leaseholders.

If we are called in and the problem on investigation proves to have been caused by something the lessor has done, for example in planning use of the spectrum, we may charge for the work involved in identifying the problem. We may also charge if the cause of the interference lies in the complainant's own installation.

3.14. Will Ofcom act against the lessor or against the leaseholder?

This will depend on the circumstances. Ofcom is under an obligation to act reasonably and proportionately in taking enforcement action and the legislation sets out the procedure we must follow. Relevant considerations include the following:

- whether, in the particular circumstances, the licensee could reasonably have been expected to have done more to ensure that the leaseholder complied, in which case we may act against the licensee;
- whether the licensee had contributed to the breach in some way, for example by imposing contractual technical conditions that are incompatible with the licence, in which case we may act against the licensee;
- whether the leaseholder had knowingly or recklessly acted in breach of the licence conditions and so may have committed a criminal offence under section 8 of the WT Act, in which case we may take prosecution action against the leaseholder;
- whether the leaseholder is causing serious harmful interference, for example to a safety-of-life service, in which case it may be necessary to act directly against the leaseholder to require immediate shutdown;
- whether the licensee has failed to keep adequate records of leases or sub-leases or to provide information when required, in which case we may act against the licensee.

3.15. What will happen if the lessor's licence is revoked (for example for non-payment of licence fee), varied or transferred?

If a lessor's licence is *revoked or surrendered*, leaseholders' authorisation to use radio equipment will cease as the leases will automatically extinguish and they will no longer be authorised to use the spectrum. Leaseholders should be aware that the lawfulness of their use of the spectrum will depend on the continuing validity of the lessor's licence, whether the leased rights fall within the terms and conditions of that licence and whether the licensee is allowed under the licence to grant leases so they may consider it prudent to undertake due diligence into these matters (see following section 4).

A similar scenario could occur if the lessor's licence is *varied* in a way that means that the leases are incompatible with the new licence terms, for example if the frequency range or coverage area is reduced or technical conditions are altered.

Revocation or variation could occur for various reasons, including changes in international obligations or directions from the Secretary of State that are outside the

control of the licensee or Ofcom. Such occurrences are not expected to be frequent but cannot be ruled out.

If the licence is *transferred*, new lease arrangements will automatically extinguish and a new lease will need to be entered into with the new licensee. However, the parties may arrange contractually for leases to be assigned to a new licensee in the event of a transfer as part of the transfer process.

3.16. What provisions should appear in lease contracts?

The contract terms will need to be carefully tailored to the parties' circumstances and wishes and it is their responsibility in their own interests to take such expert advice, including legal, that they consider necessary to ensure this. However, they may wish to consider the following list of issues, which is not intended to be exhaustive:

- lease length and security of tenure;
- technical restrictions on spectrum use, including frequency range and geographical coverage, and compatibility of these with the lessor's licence;
- payment terms, spectrum quality and availability, which may be affected by grants of leases to other leaseholders;
- whether sub-leasing (see following question) is allowed and, if it is, an obligation to provide details of sub-leaseholders to the licensee and process for so doing;
- the lessor's responsibility to maintain the licence in force and liability if it lapses;
- any contractual restrictions on transfer of the licence by the lessor and arrangements for notifying leaseholders of any intention to transfer the licence;
- the obligations and liability of the licensee and leaseholder in the event that the licence is revoked, varied or transferred, including arrangements for assigning leases to the new licensee;
- liability for interference caused by other leaseholders;
- any right of the lessor to access the leased spectrum;
- dispute resolution.

3.17. Is sub-leasing allowed?

'Sub-leasing' is an arrangement in which a leaseholder (referred to here as the 'first-level leaseholder') leases spectrum to another person (the 'sub-leaseholder'). The licence variation on leasing allows sub-leasing and it is for the parties to the lease to agree whether or not to allow sub-leasing. If sub-leasing is allowed, it is subject to various restrictions and conditions.

- Only one level of sub-leasing may be permitted and the licensee is required to include a restriction to that effect in the lease contract with the first-level leaseholder (in other words, licensee A may lease to B, who may sub-lease to C, but C may not sub-lease to D).
- The licensee must maintain records of sub-leases and make these available to Ofcom personnel in the same way as for leases.
- Any sub-leasing must be conducted in accordance with similar restrictions as apply to leasing, for example that the sub-lease must be compatible with the terms of the lessor's licence.

OfW513 (December 2011)

- The licensee remains responsible for all obligations under the licence, including paying the licence fee to Ofcom.

4. Due diligence

4.1. What checks should prospective transferees or leaseholders make before entering into trades? Will Ofcom help with these?

To facilitate due diligence, we have developed a checklist of matters on which we are willing to provide information to a licensee to pass to prospective transferees or leaseholders. If you want us to do this, please complete the Due Diligence Form that is available through the spectrum trading page on our website.

We will provide information following receipt of a completed Due Diligence Form signed by the licensee.

- **Licence holder** – We will confirm whether the licence was issued to the licence holder, or all of the concurrent licence holders.
- **Fees (or instalments)** – We will confirm whether, under any Wireless Telegraphy (Licence Charges) Regulations, any fees in respect of the relevant licence remain owing to us in respect of the relevant licence.
- **Revocation or variation notice** – We will confirm whether or not we have served a notice, under schedule 1, paragraph 7 of the Wireless Telegraphy Act 2006 on the holder, or concurrent holders, of the relevant licence of a proposal to revoke or vary that licence (but that revocation or variation has not yet been made).
- **Revocation or variation request** – We will confirm whether the holder, or concurrent holders, of the relevant licence have asked us to revoke or vary that licence, and whether we have requested consent to a revocation or variation proposed by us but not yet made.
- **Leasing** - We will confirm whether the licensee is allowed under the terms of the licence to grant leases.

We will also consider requests to disclose other relevant information about a licence. However, we would provide such information only after obtaining the licensee's consent.

Whether the licence is tradable and the types of trades permitted may be ascertained from the Trading Regulations. The WTR 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.

4.2. How can I check whether a notice for licence revocation or variation has been served on a licensee?

If we have served a notice under the licence (for example notice to revoke or vary for spectrum management reasons), then the licence remains transferable until a formal variation notice (under schedule 1 paragraph 7 of the Wireless Telegraphy Act 2006) is served. This usually happens around two months prior to the final implementation of the revocation. Once we have served such a notice, the licence is no longer tradable. We have instigated a procedure to ensure that in such a case any transferee will take the licence subject to the notice so prospective transferees and leaseholders will wish to be aware of the situation.

Prospective transferees or leaseholders may obtain further information from us on notices served on a licensee through the due diligence process.

4.3. Can I find out about trades that are in progress? Will information about transfers be publicly available?

Yes. Once a transfer application is being progressed we will update the Trade Notification Register (TNR) to reflect this along with details of the trade. The TNR will then indicate if we have given consent to the transfer and, after completion, the completion date. If the trade was not completed the TNR will be updated to reflect this however, no reasons will be given on the TNR as to why the trade was not completed. We will also update the WTR to reflect any new licence holdings.

Regulation 8(6) of the Trading Regulations requires us to publish information about effected transfers.

4.4. What about information on leases?

We do not hold information on leases. However, information about the licensee of a particular frequency may be found in our Wireless Telegraphy Register.

4.5. Is other information available?

Further information that is publicly available, and to which the parties of the transaction may wish to refer, can be accessed from the trading and liberalisation page and from the Spectrum Information System.

4.6. Can third parties provide input into our approval process?

In general, we do not formally consult before giving or refusing consent to any proposed trades but we take into account relevant information supplied by third parties in reaching our decision. Third parties can learn about proposed trades via the online TNR and may make representations concerning a particular trade by writing to the Spectrum Trading Desk (see below for contact details).

4.7. What about tax?

Spectrum trading, like all business activities, may give rise to income and gains which will be subject to tax in the normal way. This includes income tax, corporation tax, value added tax and other taxes as appropriate.

Trading parties who have tax-related queries are advised to refer them to the Inland Revenue or Customs and Excise or to seek their own professional advice.

See: A Statement on Spectrum Trading (6 August 2004) – Section 3

5. Legal background

5.1. What is the legislative framework for trading in the UK?

Section 168 of the Communications Act 2003 originally enabled the introduction of spectrum trading in the UK. The Trading Regulations (<http://www.legislation.gov.uk/ukSI/2004/3154/contents/made>) entered into force on 23 December 2004 and made trading possible by detailing possible transfers, tradable licence classes, trading procedures etc. Subsequent amending regulations have added further classes of eligible licences. Section 168 was superseded without amendment by section 30 of the Wireless Telegraphy Act 2006, under which trading is now authorised and regulated. Section 30 was amended on 26 May 2011 by the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011 No. 1210) (<http://www.legislation.gov.uk/ukSI/2011/1210/made>) to facilitate spectrum leasing.

The Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011 (<http://www.legislation.gov.uk/ukSI/2011/1507/contents/made>) were made on 16 June 2011 to regulate transfer of PWN licences.

OfW513 (December 2011)

Transfer of Crown spectrum holdings is regulated by Wireless Telegraphy (Recognised Spectrum Access and Licence) (Spectrum Trading) Regulations 2009 (SI 2009 No. 17) (<http://www.legislation.gov.uk/ukxi/2009/17/contents/made>).

5.2. What European Union requirements apply?

Spectrum transfer and leasing) are permitted and governed in the EU by Article 9b of the EC Framework Directive (2002/21/EC) as revised in 2009. This requires that:

- transfers are notified to the national regulatory authority and carried out in accordance with procedures laid down by it;
- intended and effective transfers are made public; and
- competition is not distorted as a result of any transfer or accumulation of spectrum rights (article 5.6 of the revised Authorisation Directive).

Further information

Our Spectrum Trading Desk is the first point of contact for more detailed information and clarification on spectrum trading, or that would like to conduct a trade. The Desk can be contacted by:

- post: Spectrum Trading Desk, Ofcom, 03:77 Riverside House, 2a Southwark Bridge Road, London SE1 9HA
- email: spectrum.tradingdesk@ofcom.org.uk
- telephone: 020 7981 3083
- fax: 020 7981 3052

Typical licence variation to allow leasing

Spectrum Leasing

Grant of lease

The licensee may confer the benefit of the licence (which is hereinafter referred to as a “lease”) on another person (referred to as the “leaseholder) in respect of any wireless telegraphy station or wireless telegraphy apparatus to which the licence relates, provided that the conditions [1 to 14] below are met.

Conditions

The conditions are –

1. The licensee may only confer the benefit of the licence on one or more than one leaseholder for –
 - (a) any geographical area forming part of the geographical area in which the licensee is authorised to establish, instal or use wireless telegraphy stations or apparatus under this licence; and
 - (b) for any frequency range forming part of the frequency band which the licensee is authorised to use.
2. The licensee shall remain responsible for all obligations under the licence (including without limitation the obligations to pay licence fees in condition []).
3. If –
 - (a) the licensee transfers his rights and obligations under the licence by way of spectrum trade; or

OfW513 (December 2011)

(b) the licensee receives a notice of revocation from Ofcom revoking his licence,

the lease (and any sub-lease) shall automatically extinguish.

4. If Ofcom varies this licence in such a way that the provisions in condition 1 are no longer satisfied in respect of a lease which has been granted (or any sub-lease made by the leaseholder), that lease (or sub-lease) shall automatically extinguish.

5. The licensee shall inform the leaseholder and any sub-leaseholder immediately when his licence terminates (regardless of the reason for such termination).

6. The licensee must inform the leaseholder (and any sub-leaseholder) that it proposes to apply for a spectrum trade, prior to any such application being made to Ofcom.

7. The licensee shall ensure that the use of Radio Equipment by the leaseholder (and any sub-leaseholder) complies with the terms, provisions and limitations of this licence.

8. The licensee shall inform the leaseholder in writing of the following matters in writing before use of the radio equipment commences:

- (a) the terms, provision and limitations of the licence that governs the establishment, use and use of the Radio Equipment;
- (b) that failure to meet the terms, provisions and limitations of this licence may be a criminal offence;
- (c) that failure to meet the terms, provisions and limitations of this licence may also result in close down of the Radio Equipment.

9. The licensee must have a written contract with the leaseholder containing the terms of the lease and must make this available to Ofcom immediately on request.

10. The licensee must maintain records at all times of the persons to whom he has granted a lease and any persons who have been granted a sub-lease under this Licence.

11. The licensee must make these records (and any other relevant information) immediately available to Ofcom on request.

12. The licensee must ensure that one of the terms of the written contract is that both parties are bound by a dispute resolution procedure that provides for the prompt and satisfactory resolution of disputes with or between the holders of leases or any sub-leases under this licence, including any relating to interference management.

13. If Ofcom investigates interference management issues which arise as a result of a complaint to Ofcom, and if both the person which is the subject of any undue interference caused and the source of any undue interference caused are the leaseholder, sub-leaseholders or the licensee himself, Ofcom will charge the licensee (and the licensee shall pay) Ofcom's costs which relate to the investigation.

14. The licensee must comply with all instructions given by Ofcom (whether verbal or in writing) which relate to the licence or the use of the frequency band, and ensure that any leaseholder any sub-leaseholder are immediately informed and also comply with these instructions.

Grant of sub-lease

OfW513 (December 2011)

The licensee may in his contract with the leaseholder permit the leaseholder to confer the benefit of the licence (hereinafter referred to as “sub-lease”) on any other person (“sub-leaseholder”) provided that the conditions [2 to 7 and 10 to 21] are met.

15. The licensee must –

- (a) prohibit the sub-leaseholder from further conferring the benefit of the licence on any other third party; and
- (b) ensure that the sub-leaseholder is made aware of that prohibition.

16. The licensee must procure that the terms of any such permission are contained in his contract with his leaseholder.

17. The licensee must procure that the written contract between the leaseholder and the sub-leaseholder containing the terms of the lease is made available to Ofcom immediately on request.

18. The licensee must require in his contract that the leaseholder informs him immediately of any sub-lease which has taken place.

19. The sub-lease may only confer the benefit of the licence on one or more than one such person for –

- (a) any geographical area forming part of the geographical area in which the licensee is authorised to establish, instal or use wireless telegraphy stations or apparatus under this licence; and
- (b) for any frequency range forming part of the frequency band which the licensee is authorised to use.

20. The licensee shall remain responsible for all obligations under the licence (including without limitation the obligations to pay licence fees in condition []).

21. The licensee shall procure that the sub-leaseholder is informed of the following matters in writing before use of the radio equipment commences:

- (a) the terms, provision and limitations of the licence that governs the establishment, installation and use of the Radio Equipment;
- (b) that failure to meet the terms, provisions and limitations of this licence may be a criminal offence;
- (c) that failure to meet the terms, provisions and limitations of this licence may also result in close down of the Radio Equipment.

NB:

(i) see Table 4 above for availability of the variation

(ii) the Suppliers Light licence provisions on leasing take a slightly different form and are already included in the licence.