

# Ensuring effective competition following the introduction of spectrum trading

**Consultation document**

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## Section 1

# Summary

- 1.1 In November 2003, Ofcom published a consultation document seeking comments on proposals to introduce spectrum trading which would allow holders of Wireless Telegraphy Act licences to transfer their rights to use spectrum. The document also contained proposals to liberalise the use of spectrum by permitting licensees to change the use of, or reconfigure, their licences in certain circumstances.
- 1.2 A key goal of the introduction of spectrum trading is that it should help to promote effective competition in the markets in which spectrum is used and thereby encourage efficient use of spectrum.
- 1.3 Under the EU Framework Directive, which was implemented in the UK in July 2003, Ofcom has a duty to ensure that competition is not distorted as a result of any spectrum trading transaction. The consultation document published in November 2003 proposed that in order to achieve this Ofcom might apply a set of rules to proposed spectrum acquisitions similar to the existing UK rules for mergers of enterprises. Ofcom committed to a further consultation on this issue in 2004.
- 1.4 This document sets out revised proposals on this issue, in the light of the responses to the November consultation and further analysis by Ofcom. The analysis concludes that imposing new regulatory measures in relation to potential spectrum acquisitions, as proposed in November, would be disproportionate. Ofcom believes that such an approach risks significantly complicating the spectrum trading process, increasing costs and lengthening the period required to process trades.
- 1.5 Ofcom already has powers under primary legislation to deal with anti-competitive behaviour. Most significantly, the Communications Act 2003 gives Ofcom concurrent powers with the Office of Fair Trading (OFT) to apply in relation to communications matters the provisions in the Competition Act 1998 prohibiting agreements or concerted practices between undertakings which have the object or effect of restricting competition within the UK and any abusive conduct by dominant undertaking(s) if there is any effect on trade within the UK. Since 1 May 2004, Ofcom's powers also extend to any such agreement or abusive conduct if there is any effect on trade between Member States. All the above are referred to in this document as anti-competitive behaviour.
- 1.6 In addition, the Communications Act gives Ofcom powers to impose specific ex ante regulation in relation to electronic communications networks and services.
- 1.7 The OFT has powers under the merger provisions of the Enterprise Act 2002, in relation to relevant mergers which have or may result in a substantial lessening of competition in markets in the UK for goods or services, though it is not clear to what extent these powers would be applicable to spectrum trades.

- 1.8 These existing powers should be sufficient to deal with most types of anti-competitive behaviour that may arise following the introduction of spectrum trading, assuming it can be detected and proven. Further, Ofcom believes that a test imposed through the application of a set of rules to proposed trades, as proposed in November, would be difficult to enforce and risks reducing the benefits that might be available through trading. Depending on the precise form of the test, it is likely that it would require Ofcom to predict how we expect market(s) to develop and the prospect for future distortions of competition within relevant market(s). Such assessments would increase regulatory uncertainty.
- 1.9 This consultation document also considers the other mechanisms that may be available to Ofcom to prevent distortions of competition in relevant markets. These include spectrum caps, “use-it-or-lose-it” licence conditions and ‘Significant Market Power’ obligations. The document identifies the problems that may arise in relation to the application of these mechanisms and analyses how effective each would be at dealing with the types of competition problem that have been identified as potential concerns. In most cases the document concludes that the measures would be of minimal or no value above the measures which are already in place.
- 1.10 One other mechanism which is relevant to the issues considered here is Administrative Incentive Pricing (AIP). This will be the subject of a separate document to be published later in the year in connection with its role in promoting efficiency, and consequently is only considered briefly in this consultation document. However, Ofcom believes that the potential rewards of anti-competitive hoarding are likely to be greater than any payments under AIP and the benefits of AIP as a deterrent to anti-competitive behaviour are likely to be minimal.
- 1.11 Having considered the various options, Ofcom believes that the existing legislative framework is appropriate and sufficient to prevent distortions of competition and fulfils our obligation under the EU Framework Directive. The Competition Act would be the primary mechanism for preventing anti-competitive behaviour following the introduction of spectrum trading, supplemented by existing powers under the Communications Act and Enterprise Act where these are applicable. We believe that such an approach will keep the trading process simple and maximise the benefits that can be achieved through trading.
- 1.12 A similar view was recently reached in a report prepared by Analysys Consulting Ltd, DotEcon Ltd, and Hogan & Hartson LLP for the European Commission<sup>1</sup>. This study concluded that existing competition law and merger regulations should generally be sufficient to prevent competition abuses following the introduction of spectrum trading.
- 1.13 Nonetheless, Ofcom understands that certain spectrum users may still have some concerns about the potential for distortions of competition following the introduction of spectrum trading. Ofcom will therefore keep relevant market(s) closely under review as spectrum trading develops and maintain the option of

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[http://europa.eu.int/information\\_society/topics/radio\\_spectrum/useful\\_info/studies/secondtrad\\_study/index\\_en.htm](http://europa.eu.int/information_society/topics/radio_spectrum/useful_info/studies/secondtrad_study/index_en.htm)

introducing ex ante controls at a future date should they prove necessary.

- 1.14 Ofcom would welcome comments on this proposed approach and the detailed analysis set out in the main body of this consultation document. We would particularly welcome responses to the questions posed in the text, a list of which is included at Annex 3. Comments are required by **5pm on Friday 16 July**.

## Section 2

# Introduction

## Need for spectrum trading

- 2.1 Under the Communications Act 2003, Ofcom has a duty to ensure the optimal use of the radio spectrum in order to further the interests of citizens and consumers. However, the task of managing spectrum has become much more difficult in recent decades as the demand for spectrum has grown for existing uses, and entirely new uses of spectrum have developed. This has meant that there is not enough spectrum for all those wishing to use it. As a result, spectrum management has increasingly involved finding ways of allocating spectrum most efficiently between competing uses and users.
- 2.2 In November 2003, Ofcom issued a consultation document seeking comments on proposals to introduce spectrum trading which would allow holders of Wireless Telegraphy Act licences to transfer their rights to use spectrum. In addition, the document contained proposals to liberalise the use of spectrum by permitting licensees to change the use of, or reconfigure, their licences in certain circumstances. This document is available at [http://www.ofcom.org.uk/consultations/past/spec\\_trad/?a=87101](http://www.ofcom.org.uk/consultations/past/spec_trad/?a=87101).
- 2.3 The November document explained how the introduction of trading would enable spectrum to be transferred to, and used by, the user that values it most, thus bringing greatest benefit to the economy. Ofcom believes that the introduction of spectrum trading should have a positive impact on consumers through:
- lower prices for the most profitable and popular wireless services as wider availability of spectrum increases competition and supply;
  - greater choice as alternative suppliers enter the market by acquiring rights to use spectrum; and
  - innovation as entrepreneurs acquire spectrum and offer new services.
- 2.4 However, Ofcom also acknowledged in the document that the introduction of spectrum trading could have some less welcome side-effects. These include the risk that spectrum trades could lead to distortions of competition in spectrum markets, or in markets to which spectrum is an input. The consultation sought views from interested parties on the most appropriate design of the trading system so that the maximum benefit could be realised and any risks avoided or mitigated.
- 2.5 The process through which spectrum trading will be introduced and an explanation of how it will actually work in practice will be set out in a statement to be published at the beginning of July. This will also explain which licence classes will be included within the first phase of trading and set out Ofcom's proposals for the expansion of trading to a number of other licence classes.

## Promotion of competition

- 2.6 A key goal of the introduction of spectrum trading is that it should help to promote effective competition in the markets in which spectrum is used and thereby encourage efficient use of spectrum.

- 2.7 Under the EU Framework Directive, which was implemented in the UK in July 2003, Ofcom has a duty to ensure that competition is not distorted as a result of spectrum trading transactions.
- 2.8 Ofcom recognises that there is potential for individual spectrum trades to lead to a distortion of competition. By allowing companies to purchase more spectrum, trading could lead to the acquisition of market power both in the market for a particular type of spectrum, or in a related downstream market (i.e. a market, like mobile telephony, to which spectrum is an input). Such market power could then be used in ways which distort competition. For example:
- Companies could limit competition in downstream markets by purchasing spectrum which forms an input to the downstream market and then preventing competitors from accessing it.
  - Companies could obtain control of a large proportion of the spectrum necessary for a particular service. They could then seek to distort competition in other related markets by requiring customers to purchase additional products sold by the company when they purchase access to the spectrum. For example, a company holding a large proportion of particular spectrum could force customers to purchase transmission equipment from them along with access to the spectrum.
  - Intermediaries such as spectrum management organisations (SMOs) could dominate access to particular spectrum bands and may then be able to charge excessive prices for access to the spectrum that they control. Users could be forced to pay the excessive prices because their transmission equipment works only on the frequencies controlled by the SMO.
- 2.9 The November consultation document described some proposals as to how Ofcom could address potential competition concerns. It briefly explained how the Competition Act 1998 could be applied following the introduction of trading and highlighted some of the potential difficulties of applying competition law to spectrum. The consultation also considered whether Ofcom should attempt to address the acquisition of market power as well as abusive conduct by a dominant party. One proposal, put forward in the document, was for Ofcom to establish a test to assess whether a particular trade of spectrum might be expected to result in a substantial lessening of competition within a relevant market in the UK. Ofcom asked for comments on the appropriateness of such a test and sought views on how it might be applied in practice.
- 2.10 The November document committed Ofcom to hold a separate consultation on the procedures and substantive assessment that will apply in assessing competition issues in relation to spectrum trading. This document fulfils that commitment to consult. It considers in more detail many of the issues raised in the November consultation. The document takes account of comments received in response to the November document.

## Next Steps

- 2.11 Consultation on the proposals in this document closes on **Friday 16 July 2004**. This consultation is shorter than Ofcom's standard 10 week period because, following the November 2003 document, it represents a second consultation on this issue meaning that respondents have already had the opportunity to provide comments. In addition, this consultation is focused on a relatively narrow field and consequently Ofcom considers that a 5 week period should be sufficient.
- 2.12 Following this consultation Ofcom intends to publish a statement, by the end of August 2004, confirming the approach that we will follow to prevent distortions of competition in relevant markets following the introduction of spectrum trading. The statement will take account of comments received in response to this consultation document.
- 2.13 In addition to the above, Ofcom will issue a statement on the introduction of spectrum trading which will cover the other points raised in the November 2003 consultation document. It is anticipated that this will be published at the beginning of July.
- 2.14 At the end of August, Ofcom intends to publish draft Trading Regulations which will set out the rules under which Ofcom will permit the transfer of rights and obligations under a spectrum licence. Following a 1 month statutory consultation, it is expected that the final Trading Regulations will be published in November which will allow for the effective introduction of spectrum trading from December 2004.



### Section 3

## When should Ofcom act to ensure effective competition?

### Introduction

- 3.1 This chapter sets out more explicitly the types of behaviour that Ofcom should seek to prevent if we are to achieve the goal of promoting effective competition and thereby encouraging the efficient use of spectrum. It sets out how Ofcom will ensure, as required by Article 9(4) of the Framework Directive, that competition is not distorted as a result of any spectrum trading transaction. It focuses on issues raised in response to the November 2003 consultation document on spectrum trading
- 3.2 There are two levels in the value-chain at which competition concerns may arise. The first, upstream level in the value-chain is the market(s) for spectrum itself. Acquisition of a dominant position in a spectrum market may allow the dominant player to, for example, restrict the supply of that spectrum and consequently charge excessive prices for such spectrum or otherwise abuse its dominant position in the supply of that spectrum.
- 3.3 The second, downstream level in the value chain is the market(s) for spectrum dependent products and services. Acquisition of spectrum in the upstream market by a player in the downstream market may allow it to acquire or increase its dominance over the downstream market. The degree to which this is possible will depend upon the closeness of the linkage between the upstream and downstream markets. In some markets, where spectrum is an essential input for both entry and expansion, the linkage may be close. In other markets, where spectrum is useful but not essential, the linkage may be weaker. In the former case the acquisition of spectrum may have an impact on competition in the downstream market. In the latter case there may be no impact.
- 3.4 Thus concerns exist about the potential for distortions of competition following a spectrum trade in either an upstream (spectrum) market or in a downstream market to which spectrum is an input. However, this raises a question as to what point Ofcom should step in to prevent any distortion of competition. In particular, should Ofcom act only once we have evidence that competition is being distorted or should we take action at the time of a trade to try to prevent a company gaining a position in the market from which it might be able to distort competition?

### Anti-competitive behaviour

- 3.5 Spectrum trading itself is unlikely to constitute a distortion of competition. Instead it is the activity of the party that has acquired the spectrum, at some point after the trade has been completed, that may raise competition concerns.
- 3.6 A major concern in relation to anti-competitive behaviour following the introduction of spectrum trading is the potential for spectrum hoarding. This

could potentially be a problem now, although it seems likely that the introduction of spectrum trading could increase the chances of it occurring. Spectrum hoarding could lead to distortions of competition in either upstream and/or downstream markets. However, not all hoarding will be anti-competitive in its intent or effect. There may be perfectly legitimate reasons for holding but not using spectrum, for example to meet future potential growth in demand. This makes the identification of anti-competitive hoarding difficult.

- 3.7 Another type of anti-competitive behaviour of concern is the refusal to supply access to spectrum on reasonable terms. This could comprise an extension of the hoarding problem described above and may occur where a user holds a dominant position in the supply of particular spectrum and is consequently able to manage the terms on which access to that spectrum is supplied. Examples of this type of behaviour include excessive pricing and bundling in the purchase of other products along with access to the spectrum.
- 3.8 Thus it is clear that there is potential for distortions of competition to arise following a spectrum trade. However, a number of respondents to the November consultation were concerned by the potential for an adverse effect on competition to result directly from a spectrum trade. This might arise if a trade results in a change to the structure of the spectrum market which could then have implications for the development of competition within that market.

### Potential for an adverse effect on competition

- 3.9 Some respondents to the November consultation suggested that Ofcom should consider preventing trades which would lead to the acquisition or strengthening of a dominant position. Others were of the view that Ofcom should prevent trades which we considered would be likely to lead to a substantial lessening of competition in relevant markets. Either approach would require Ofcom to seek to control trades prior to actual anti-competitive behaviour arising.
- 3.10 A general concern raised by some respondents was that spectrum trading may eventually lead to spectrum ending up in the hands of the richest players, the implication being that it might eventually lead to smaller users being forced to exit the market. However, market exit may not necessarily be a result of anti-competitive behaviour and may simply be an outcome of the effective functioning of the market. This issue is considered in more detail later in this document.

### What behaviour must Ofcom prevent?

- 3.11 Thus there are a range of different types of behaviour, in both upstream and downstream markets, which Ofcom may wish to try to prevent. In the main, however, they can be separated into one of two categories:
- anti-competitive behaviour in relation to an upstream and/or downstream market at some point after a trade has been completed; or

- the potential for a trade to have an adverse effect on competition, for example through the acquisition or strengthening of a dominant position, or from a trade resulting in a substantial lessening of competition.

3.12 It seems clear that behaviour falling into the first category represents a genuine competition concern which Ofcom should address. However, competition concerns that may arise from a trade falling within the second category are more debatable. At the time of the trade it seems unlikely that anti-competitive behaviour will have yet resulted (from the trade itself) and consequently any competition check would effectively be trying to predict the impact of the trade on the future development of competition within the relevant market. This is likely to be difficult, particularly if the competition concerns relate to a downstream market to which spectrum is an input.

3.13 Ofcom would welcome comments from respondents as to the nature of the problems that we should be seeking to address. In particular, do you think it is sufficient for Ofcom to deal with any anti-competitive behaviour as it arises, or do you think that we should attempt to predict the impact on competition at the time of a trade and thus prevent certain trades? If the latter, what criteria should Ofcom use to decide which trades to block?

*Question 1: Is it sufficient for Ofcom to deal with any anti-competitive behaviour as it arises, or should we attempt to predict the impact on competition at the time of a trade and have the power to prevent certain trades?*

## Section 4

# Existing mechanisms available to Ofcom to ensure effective competition

## Introduction

- 4.1 This section sets out the existing legislative powers available to Ofcom to deal with competition concerns under the Competition Act 1998 and the Communications Act 2003. In addition, it also mentions OFT's powers under the merger provisions of the Enterprise Act 2002, which may be applicable to prevent the acquisition of market power in relation to certain types of spectrum trade.
- 4.2 Table 1a) briefly describes the controls which are currently available to Ofcom to deal with competition concerns that may arise following the introduction of spectrum trading while Table 1b) focuses on the OFT's merger powers under the Enterprise Act. The tables summarise the circumstances in which each control can be applied and the remedies available under each to prevent distortion of competition. A more detailed description of each of the controls follows the tables.

**Table 1a) Existing regulatory powers available to Ofcom**

| Regulatory control   | How applied?    | Circumstances of use  | Remedies available   |
|--|-----------------|---|--|
| Communications Act 2003  | Ex ante control | Applicable to electronic communications networks and services (ECN and ECS) markets and 'associated facilities'. Ofcom must take action to prevent distortion of competition by operators/users with significant market power (SMP) in a relevant market. | Ofcom can impose SMP obligations in markets which have been notified to the European Commission. Doubtful that this would apply to spectrum markets. However, it could apply to certain (downstream) markets to which spectrum is an input.                  |
| Competition Act 1998 and/or Articles 81 and 82 of the Treaty of Rome | Ex post control | Applicable to undertakings across all sectors. Prohibition on agreements/concerted practices between undertakings which restrict competition and may affect trade and on abusive conduct by dominant undertaking(s) that may affect trade.                | Ofcom and OFT have concurrent powers to require that anti-competitive behaviour is immediately ceased. Powers to impose substantial fines provide deterrent against such behaviour. Potential to impose interim measures whilst an investigation is ongoing. |

**Table 1b) Existing regulatory powers available to OFT**

| <b>Regulatory control</b>             | <b>How applied?</b> | <b>Circumstances of use</b>  | <b>Remedies available</b>   |
|---------------------------------------|---------------------|--|---|
| Enterprise Act 2002 (merger controls) | Ex ante control     | Applicable to enterprises which 'merge' and which meet either turnover value or share of supply thresholds if "merger" results/may result in a substantial lessening of competition in UK markets for goods or services. Might be applicable where trade involves a transfer of revenue stream or business which was attached to the spectrum (i.e. if the transfer was from an entity that leased out the spectrum such as an SMO). | Trades falling within the scope of the merger provisions could be considered by the OFT and/or referred to the Competition Commission. The Competition Commission ultimately has power to block trades. |

### **The Communications Act 2003**

- 4.3 Under the Communications Act, Ofcom has powers to impose regulations on dominant undertakings in ECN/ECS markets to prevent them abusing a dominant position. In particular, the EU Framework and Access Directives, which are implemented in the UK through the Communications Act, give Ofcom powers to require that a dominant undertaking grants competitors access to its network. The Communications Act applies to markets falling within the scope of electronic communications networks and services (ECN/ECS), or "associated facilities" as defined under the Act.
- 4.4 This means that Ofcom could impose access obligations on an undertaking that is dominant in an electronic communications market to which spectrum may be an input. In such a case the impact of any ownership of spectrum in the upstream spectrum market would need to be taken into account when assessing the extent of market power in the downstream market. It appears, however, that Ofcom cannot impose access obligations on spectrum that is not being utilised by an ECN/ECS.

### **The Competition Act 1998**

- 4.5 Ofcom has jurisdiction under the Communications Act to exercise Competition Act powers in relation to agreements or conduct which relate to activities connected with "communications matters". Any Competition Act investigation falling outside of Ofcom's scope would need to be conducted by the OFT.

- 4.6 The Chapter I Prohibition of the Competition Act prohibits agreements/concerted practices between undertakings that have as their object or effect the preventing, restricting or distorting of competition and which may affect trade within the UK. This could therefore be used to prohibit a situation whereby a group of competitors agree amongst themselves to deny access to other users. The Chapter II Prohibition prohibits abusive conduct by dominant undertakings if it may affect trade within the UK and thus could be used to prevent a dominant undertaking from behaving anti-competitively by restricting access to its spectrum. Thus, the Competition Act can be applied to spectrum markets to prevent anti-competitive behaviour, either by a dominant undertaking or through some form of agreement between two or more undertakings. Importantly, however, the Competition Act cannot be used to prevent a company acquiring a dominant position in the first place.
- 4.7 Some respondents to the November 2003 consultation expressed concern that the provisions set out in the Competition Act would be insufficient to prevent distortions of competition due to the particular nature of spectrum markets. One respondent, for example, suggested that it was unrealistic to anticipate that the advent of a market mechanism could simply replace the complex and detailed work in the assignment of spectrum that had previously been performed by Government and its agencies. Others were concerned that the ex post nature of the Competition Act meant that it would only come into effect after competition had been distorted by which point the damage would have been done.
- 4.8 A particular concern in relation to the application of the Competition Act is that it may not always be straightforward to prove anti-competitive intent. It may be necessary to demonstrate inefficient technical use of spectrum which may require judgements about whether a particular application might be able to use spectrum more efficiently at a different frequency. For example, it may be possible to engineer a system to use more spectrum than strictly necessary, therefore making it difficult to detect hoarding. Further, it may be difficult to make objective judgements on the most efficient way of using spectrum because it may depend on future evolution of demand, equipment cost trends, and system tolerances, all of which may be subject to many different interpretations.
- 4.9 However, although the application of competition law may be difficult, it is not immediately obvious that imposing specific ex ante regulation would be any better. Many forms of ex ante control would still require complex assessments to be made about market behaviour and the impact on competition. Such assessments are likely to be very uncertain.
- 4.10 Furthermore, the Competition Act provides scope for significant fines to be imposed which should represent a strong deterrent against breaching the conditions set out in the Competition Act. It is also within Ofcom's powers to impose interim measures as a matter of urgency where Ofcom's investigation has not been completed and where we believe that the suspected anti-competitive behaviour would otherwise have serious and irreparable damage on a particular person or category of person or to protect the public interest. This may help to address the concern raised by some respondents that competition law is too slow to come into effect.

- 4.11 As of 1 May 2004, Ofcom has the power under the Competition Act 1998 to apply Articles 81 and 82 of the EC Treaty, in addition to the Chapter I and II prohibitions, to agreements or conduct relating to communications matters. In order for Articles 81 and 82 to apply, the agreement or conduct must be capable of having an effect on trade between Member States.

## **The Enterprise Act 2002**

- 4.12 As the November consultation document explained and as set out in the table above, the OFT has powers to review mergers between enterprises which meet certain turnover value or share of supply threshold.
- 4.13 The definition of 'enterprise' is broad and can include the sale of intangible assets such as rights to use spectrum. However, the relevant OFT guidelines<sup>2</sup> state that 'intangible assets' such as intellectual property rights are unlikely, on their own, to constitute an 'enterprise' unless it is possible to identify turnover directly related to the transferred intangible assets that will also transfer to the buyer. Some types of spectrum trade might therefore qualify, for example, trades where revenue is attached to the spectrum being traded such as where the transfer was from an entity that leased out spectrum.
- 4.14 However, Ofcom acknowledged in the November consultation that those trades which involve only the sale of rights to use spectrum, and do not have revenue directly attached to the spectrum, are unlikely to fall within the merger provisions of the Enterprise Act. This point was raised by a couple of respondents to the consultation who felt that the Enterprise Act was not applicable to spectrum rights. They argued that spectrum was a bare asset and, as such, should not be treated any differently to any other type of bare asset or commodity which may be traded. These commodity markets do not involve merger-type analysis and some respondents therefore questioned why spectrum should be treated differently.
- 4.15 This argument is weakened somewhat by the fact that one part of the spectrum is not substitutable for another. In the short term, substitutability of spectrum is limited partly by its physical characteristics and partly by the fact that equipment for most services only works over limited frequency ranges. Thus spectrum is specific to a service at least in the short term. Over a longer horizon, it is possible, though not inevitable, that equipment would be developed to operate in alternative frequency bands where spectrum was available.
- 4.16 Ofcom continues to believe that the merger provisions of the Enterprise Act may be applicable to spectrum trades where revenue is attached to the spectrum being traded. Although the turnover value threshold of £70 million is unlikely to be exceeded in all but the most exceptional of trades, the alternative share of supply test set at 25% may bring some such trades within the scope of the Act.

*Question 2: Do you believe that the existing legislative framework (based around existing competition law) will be sufficient to prevent distortion of competition following the introduction of spectrum trading? If not, why not?*

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<sup>2</sup> Mergers – substantive assessment guidance, OFT



## Section 5

# Other mechanisms available to Ofcom to ensure effective competition

## Introduction

- 5.1 Under the Communications Act, there is a range of other mechanisms available to Ofcom which may help to prevent distortions of competition. This section provides an overview of these options. It should be noted that Ofcom should only introduce new controls where it is clear that the existing powers – under the Communications Act, Competition Act and Enterprise Act – are inadequate to deal with distortions of competition and where the additional intervention would be proportionate and effective in meeting Ofcom’s duties. A summary of the mechanisms available to Ofcom is set out in Table 2. A more detailed description of each control follows the Table.

**Table 2: Other regulatory controls available to Ofcom**

| Regulatory control                     | How applied?                                     | Circumstances of use   | Remedies available   |
|--|--|--|--|
| Administrative Incentive Pricing (AIP) | Licence fees applied by Statutory Instrument     | Potentially applicable to all blocks of spectrum where it can be shown to encourage efficient use of the spectrum. Widely used already.  | Ofcom is able to impose an incentive price to encourage efficient spectrum use.  |
| “Use-it-or-lose-it” licence conditions | Applied through licence conditions               | Could be applied by Ofcom as a licence condition at time of spectrum allocation or later by licence variation to try to prevent hoarding. Not widely used thus far by Ofcom as seen as interventionist and potentially difficult to apply. | Enforcement of licence condition requiring user to hand back spectrum if not used.   |
| Revocation of licence                  | Applied through licence conditions               | In certain cases, it may be possible for Ofcom to revoke licence where there is inefficient use of spectrum. Revocation would need to be in accordance with any relevant licence conditions, including time limits.                        | Revocation of license represents a very serious sanction which provides a significant deterrent against certain types of behaviour. Long notice period would however limit its usefulness. |
| Spectrum Caps                          | Applied through Trading Regulations <sup>3</sup> | Requirements could be set out in the Trading Regulations to prevent users acquiring more than  | Conditions on amount of spectrum and markets or frequency bands to which conditions relate would need  |

<sup>3</sup> Regulations which Ofcom is empowered to make under Section 168 of the Communications Act and which will permit the transfer of rights and obligations under a licence.



|  |                                |  |  |
|--|--------------------------------|--|--|
|  |                                | a set amount of spectrum in given markets or frequency bands.  | to be set out in advance. Ofcom would block trades which would lead to user exceeding cap.   |
| Specific ex ante power to block certain trades | Applied by Trading Regulations | Could allow Ofcom to block any spectrum trade which Ofcom considered would, for example, lead to a substantial lessening of competition. | Ofcom would be required to carry out a review of trades and block those which Ofcom considered would lead to a substantial lessening of competition. Ofcom would need to set out test and process for applying the test. |

### Administrative Incentive Pricing (AIP)

- 5.2 One option for Ofcom would be to rely on Administrative Incentive Pricing (AIP), combined with existing competition law powers, to encourage users to make the best use of spectrum. This could be effective as, depending on the level of the AIP, users might be discouraged from hoarding spectrum as they would have to pay an annual fee approximately equivalent to the opportunity cost of the spectrum they are holding. This approach gained considerable support from respondents to the Consultation Document, many of whom therefore considered that AIP should continue to be applied following the introduction of trading.
- 5.3 Not all respondents agreed however and there were some who felt that AIP would become unnecessary following the introduction of trading. A couple of respondents argued that spectrum trading would be sufficient to ensure efficient use of the spectrum and AIP was unnecessary because it would not increase efficiency over and above what could be achieved by spectrum trading. There was also a concern raised by some respondents that, if AIP was set too high for any licence classes, it would represent a barrier to the take-up of trading.
- 5.4 These concerns are not addressed directly in this document as they will be dealt with in the statement on spectrum trading which Ofcom will publish shortly. Nonetheless, while Ofcom believes that AIP may represent an effective means of preventing some hoarding, we believe it is unlikely to prevent hoarding which has anti-competitive intent or effect. This is because the potential rewards of such behaviour are likely to be greater than the AIP.

*Question 3: Do you think the continued use of AIP will help to prevent anti-competitive hoarding?*

### Use-it-or-lose-it provisions

- 5.5 In the November consultation document, Ofcom argued against the imposition of “use-it-or-lose-it” provisions as they can be very difficult to monitor. Moreover, they do not avoid issues as to how to identify whether spectrum is being hoarded and, if so, whether the hoarding is resulting in anti-competitive behaviour. As such, “use-it-or-lose-it” provisions do not appear to

Ofcom to add anything above reliance on existing competition law powers. However, some respondents argued that “use-it-or-lose-it” provisions should not be dismissed as they could provide Ofcom with a useful tool to deter hoarding resulting in anti-competitive behaviour.

- 5.6 An important factor in determining whether to impose “use-it-or-lose-it” provisions is consideration of how they should be applied within the spectrum trading process. One option would be to impose such a provision on all spectrum trades, but this seems overly cautious and might restrict innovation if it prevents users from purchasing spectrum with a view to using it at a later date for a new service. The other alternative would be to only impose the provisions on certain trades. However, this approach requires criteria to be developed to determine which trades should be considered and is likely to involve increased bureaucracy, increased uncertainty and longer timescales. Given these concerns, Ofcom remains of the view that use-it-or-lose-it provisions should not be imposed.

*Question 4: Do you agree with Ofcom’s assessment that “use-it-or-lose-it” provisions should not be imposed on firms acquiring spectrum through a spectrum trade?*

## Revocation of licence

- 5.7 In certain cases involving inefficient use of spectrum it may be appropriate for Ofcom to consider, in the light of relevant considerations and its statutory duties, exercising its discretion to revoke wireless telegraphy licences. However, it is clear that revocation of a user’s licence is an ultimate sanction which should only be used as a last resort in the most serious of cases. Revocation would also have to be in accordance with any relevant licence conditions. The November consultation proposed that in many cases 5 years notice would be required for revocation. This is a lengthy period, but still represents a significant sanction.

*Question 5: Do you agree with Ofcom’s assessment that licence revocation should only be used as a last resort?*

## Spectrum caps

- 5.8 Another option would be to impose in the Trading Regulations some sort of spectrum cap which would apply set limits to the amount of spectrum which could be held by an operator. The main disadvantage of this approach is that it would prevent licensees from acquiring further spectrum even when they wanted to do so for perfectly legitimate reasons (e.g. increased efficiency). In particular, spectrum caps fail to take into account the fact that, in many cases, there are alternative ways of delivering the downstream service other than by using spectrum.
- 5.9 Spectrum caps could also prove controversial to apply, at least insofar as deciding to which markets the caps should be applied and at what level they should be set. It would require complex and resource intensive work by Ofcom to pre-define the spectrum markets and inevitably some degree of judgement by Ofcom as to the appropriate level of the cap. For these reasons, Ofcom does not favour the use of spectrum caps.

*Question 6: Do you agree with Ofcom's assessment that spectrum caps should not be imposed on firms acquiring spectrum through a spectrum trade?*

### **New legal regime to impose specific ex ante regulation through the trading regulations**

- 5.10 A more interventionist approach for ensuring that spectrum trading does not result in any distortions of competition would be to impose specific ex ante regulation to allow Ofcom to prevent trades which it considered might result in a substantial lessening of competition in relevant markets. Such an approach was outlined in the November consultation and received some support from respondents. However, Ofcom considers that there are major disadvantages with such an approach. In Ofcom's view, it would raise substantial legal and practical problems, would be a significant potential barrier to the efficiency of trading, and would not necessarily be effective in addressing the problems identified earlier.
- 5.11 Although a number of respondents to the November consultation were in favour of this proposal, a number of others raised doubts as to whether specific ex ante regulation was necessary. In particular, some questioned whether it would be proportionate for Ofcom to introduce a substantial lessening of competition test.
- 5.12 There is also a question as to how such an approach would sit with Ofcom's commitment to regulating only where necessary. Applying a test based around an assessment of the potential for a substantial lessening of competition would require Ofcom to make complex judgements about how we believe the market will develop. Such an approach would be interventionist, particularly as it relates to new markets, and suggests that Ofcom believed we could 'manage' the development of trading markets better than competition. Ofcom considers that this might be viewed as being inconsistent with Ofcom's deregulatory objectives and inconsistent with our aims for the introduction of spectrum trading.
- 5.13 Concerns were also expressed that the application of a test based on judgements about how the market will develop will raise regulatory uncertainty. Other concerns were more practical in nature, relating to the time it would take to apply the test and the amount of resource that would be required from Ofcom. Given these views, Ofcom is concerned that applying such a test would discourage take-up of trading.

*Question 7: Do you think it is necessary or appropriate for Ofcom to impose specific ex ante regulation through the Trading Regulations to prevent distortions of competition? If so, what would the test look like and how should it be enforced?*

### **The Cave Review**

- 5.14 Professor Martin Cave considered the issue of what controls would be required to prevent spectrum trading distorting competition in The Review of

Radio Spectrum Management<sup>4</sup> (“the Cave Review”) which he carried out on behalf of the UK Government. He concluded that a test to assess whether a trade created or strengthened a dominant position “may be unnecessarily restrictive in that it may prevent a dominant firm from increasing the amount of spectrum it possesses”. The review goes on to say that its “preference therefore is to use general competition law to prevent distortions to competition through spectrum trading”.

- 5.15 The review does however go on to note that where spectrum is an input into a market which is subject to sector specific regulation, then Ofcom may prefer to adopt a more interventionist approach towards spectrum trading. One proposal, which is rejected by the review as being disproportionately onerous, is to prevent the acquisition of spectrum by an operator which is designated as having ‘significant market power’ (SMP) under the relevant EC Directives. Another, which is the preferred option by the review, is to assess whether a particular trade, by an operator designated as having SMP, is regarded as likely to lead to “a substantial lessening of competition”.
- 5.16 Thus, under such an approach, Ofcom would primarily rely on ex-post competition law to prevent a particular trade distorting competition. However, we would also maintain the option of intervention in the particular instance where there was a concern that a particular trade might lead to a substantial lessening of competition in a downstream market in which regulation has already been imposed.
- 5.17 The key advantage of such an approach is that intervention can be justified as it is intended to prevent the further distortion of competition in a market which is already subject to regulation. If Ofcom believes that the acquisition of spectrum in the upstream market would lead to a substantial lessening of competition in the downstream market then it would have powers to block the trade.
- 5.18 A possible disadvantage of this approach is that it could only be applied to markets which fall within the scope of the EC Framework Directive. Spectrum is an input to many markets which are not directly related to electronic communications networks and services and in which it would consequently not be possible to make a designation of SMP. Ofcom would in effect be applying a different set of trading rules to markets which were within the scope of the Directive to those which fall outside the scope of the Directive. Nonetheless, it seems fair to assume that it is those markets lying within the scope of the Directives which are of most concern.
- 5.19 Another potential disadvantage of this approach is that it does not address the acquisition of a dominant position. Thus a trade could be allowed between two non-dominant undertakings irrespective of the fact that it might result in one of them acquiring a dominant position as a result of the trade. The fact that a firm now held a dominant position would only be identified following a Communications Act market review or Competition Act investigation, at which point Ofcom would be able to take action to prevent anti-competitive behaviour .
- 5.20 Even where a trade falls within the relevant criteria, the application of a test to assess whether a trade could be expected to lead to a substantial lessening

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<sup>4</sup> Review of Radio Spectrum Management by Professor Martin Cave, March 2002

of competition will cause the same difficulties highlighted above, introducing a significant degree of uncertainty into the trading process. This risks discouraging take-up of trading.

- 5.21 It should also be noted that the number of such trades, involving an acquirer with SMP in a relevant market are likely to be very few as it will be limited to ECN or ECS markets to which spectrum is a direct input. Thus, although such an approach would theoretically seem to offer scope to allow Ofcom to focus on trades of particular concern in specific circumstances, there remain a number of disadvantages with the practical application of such a test.

*Question 8: Do you consider that it would be feasible to apply a competition test focused on trades involving spectrum users that are already subject to regulation as proposed by Professor Cave? Do you think there would be any value in applying such a test as part of the trading process? If so, how should such a test work?*

## Section 6

# Responses to the November consultation

## Introduction

- 6.1 Of the 114 submissions that Ofcom received in response to the November consultation document, about 70 covered competition issues within their response. The vast majority of those that responded on this topic considered that Ofcom has an important role to play in ensuring that competition in relevant markets is not distorted as a result of the introduction of spectrum trading. However, there was much less consensus as to how this could best be achieved.
- 6.2 A list of all those that responded to the November consultation document is enclosed at Annex 4. Annex 5 addresses all the substantive points that were raised by these respondents in relation to competition issues. Key points made by respondents are also considered below.

## Consideration of respondent's views

- 6.3 A key concern, raised by many respondents, was that spectrum trading may enable large organisations to hoard spectrum with the intent or effect of distorting competition. Some respondents were strongly in favour of relying entirely on ex post competition law to prevent such distortions of competition. This, it was argued, worked well in other markets and would simplify the trading process, thus utilising less Ofcom resources and providing more regulatory certainty. It was also noted that such an approach would be more in-line with Ofcom's commitment to light-touch regulation.
- 6.4 However, a number of respondents were supportive of the proposal in the consultation document that Ofcom should impose specific ex ante regulation and adopt a 'merger control type process' similar to that set out in the Enterprise Act. This, it was argued, would provide Ofcom with maximum scope to prevent distortions of competition. However, others were concerned about the level of resources that would be required to carry out such a test and a few respondents suggested that such a test would be disproportionate. Others suggested that further work was required to provide more clarity as to how such a test would work and to which trades it would be applied.
- 6.5 A few respondents argued that relying on the existing legislation was unlikely to be sufficient to prevent competition being distorted. Some of these argued that users with dominance in a retail market should not necessarily be prevented from acquiring spectrum unless there was clear evidence that it would lead to a substantial lessening of competition. Nor, they proposed, should a user that owns a large quantity of spectrum be prevented from acquiring additional spectrum unless there was clear evidence that it would lead to a substantial lessening of competition in retail markets.
- 6.6 One particular concern raised by a number of respondents to the November consultation was that large, well-financed firms might acquire rights to use

new spectrum introduced into the market. The fear seems to be that this will be at the expense of smaller users who will not be able to afford the prices paid by larger users. This, it was implied, would result in new spectrum ending up in the hands of the richest players, the further implication being that it might eventually lead to smaller users being forced to exit the market. Ofcom considers that the Competition Act should be effective in preventing this type of behaviour to the extent that it is anti-competitive.

- 6.7 It is however important to distinguish anti-competitive behaviour, such as where spectrum is hoarded with anti-competitive intent or effect, from the normal functioning of the market. While it is clear that Ofcom must act to prevent the former, any intervention in the normal functioning of the market will be likely to restrict the development of the markets and risks limiting realisation of the benefits of spectrum trading. Spectrum is a scarce resource and as such it is to be expected that a competitive market will result in spectrum being acquired by those that value it most, which may mean that some 'lower value' users will find it difficult to obtain access to the spectrum they seek. Whilst this is entirely consistent with our intentions for the introduction of spectrum trading, it is nonetheless to be recognised that this represents something of a departure from the past, where the allocation and assignment of spectrum was used much more as a tool to actively manage the market.
- 6.8 It is clear that the introduction of a trading market for spectrum will have implications for spectrum users. However, Ofcom believes that the increased flexibility that such a market will bring provides the potential to bring benefits to all types of user, both large and small. In particular, Ofcom believes that arrangements for leasing spectrum, introduced through trading, will provide a valuable new opportunity for users to gain access to spectrum.
- 6.9 It is also important to note that Ofcom is not intending to require existing licence holders to re-apply for their licences when they become tradable. Consequently existing licensees will continue to have access to the spectrum that they have now if they choose to do so.
- 6.10 Nonetheless, Ofcom accepts that the introduction of trading represents a significant change to the way in which spectrum is allocated and assigned. We will therefore monitor the development of the market and will act to prevent any market distortions. Furthermore, we will introduce trading through a gradual and evolutionary process which will enable Ofcom to monitor its impact and learn from experience as new license classes are liberalised. This should help to minimise the impact of any adverse effects from the introduction of trading on spectrum users.

## Section 7

# Summary and conclusions

## Introduction

- 7.1 Section 4 sets out the existing controls which Ofcom and OFT already have available to deal with distortions of competition. It explains that legislation already exists which can be applied to prevent distortions of competition. In particular, the Competition Act can be used to prohibit anti-competitive behaviour while the merger provisions of the Enterprise Act may be applicable to certain trades to control the acquisition of market power. However, the analysis raised some issues about the application of the Competition Act and Enterprise Act, most notably that:
- the Competition Act may be difficult to apply in some circumstances due to the nature of spectrum; and
  - the Enterprise Act is only likely to be applicable to a limited number of trades, meaning that in many cases it would not be possible to prevent the acquisition of a dominant position.
- 7.2 Section 5 considered some of the alternative mechanisms which could be available to Ofcom to prevent distortions of competition. It explained that a specific new legal regime could be imposed through the Trading Regulations which would enable Ofcom to prevent trades which we considered might raise competition concerns, although the knock-on impacts on the development of trading might be severe. The other types of control described in section 5 would address competition concerns with varying degrees of effectiveness.
- 7.3 Finally, section 6 addressed comments made by respondents to the November 2003 consultation document on spectrum trading.
- 7.4 This section builds on this previous analysis to make a proposal as to how Ofcom should proceed. It concludes by comparing this proposal with the findings of a recent report on the introduction of spectrum trading which was prepared for the European Commission.

## Aim of regulation

- 7.5 Any regulation imposed by Ofcom must be fit for purpose which, in this context, means that it must provide sufficient protection against anti-competitive behaviour in relevant markets. It must also be proportionate, should not impose an unreasonable burden on industry and should facilitate the introduction of spectrum trading. This is an important issue as any competition controls imposed through the Trading Regulations could have a significant impact on those wishing to participate in spectrum trading. In particular, the inclusion of a competition control within the Trading Regulations would significantly slow down the trading process and make the outcome less certain



## Ofcom's proposal for ensuring effective competition

- 7.6 Having reviewed all the responses to the November Consultation, and considered the advantages and disadvantages of the options available, Ofcom believes that existing legislation is the best approach to prevent distortions of competition.
- 7.7 Ofcom believes that the application of the Competition Act will be sufficient to fulfil the commitment under Article 9(4) of the Framework Directive to ensure that competition is not distorted as a result of any trading transaction. We also believe that such an approach will help to simplify the trading process and maximise transparency as no competition check will need to be included within the Trading Regulations. This should maximise the benefits that can be achieved through trading.
- 7.8 Ofcom has made this proposal based on our best assumptions about how the spectrum market will develop following the introduction of trading. However, it is clear that there are arguments both for and against the introduction of competition controls within the trading process and that the strength of these arguments will vary depending upon how the market develops. Ofcom therefore intends to monitor the development of the market carefully to ensure we have sufficient regulatory tools available to prevent distortions of competition.
- 7.9 Should any gaps in the regulatory framework become apparent, Ofcom will act quickly to fill them. Ofcom maintains the option of introducing ex ante competition controls into the trading process at a later date, should they prove necessary. However, any such controls would not work retrospectively and so would only be effective in relation to future trades.

## European Commission Report

- 7.10 The issue of whether spectrum trading might facilitate anti-competitive behaviour was considered in a recent report by Analysys Consulting Ltd, DotEcon Ltd, and Hogan & Hartson LLP which was prepared for the European Commission<sup>5</sup>. The report concluded that competition law (including merger regulations) should, in general, be a sufficiently powerful instrument to deal with anti-competitive behaviour in relation to spectrum markets.
- 7.11 The report goes on to say that the case for ex ante competition rules for spectrum trading is very weak and should only be considered if significant delay is anticipated in moving from trading without change of use to a liberalised regime, or if no liberalisation is considered. The report explains that ex ante sector-specific rules would not have the necessary flexibility to discriminate anti-competitive transactions from other transactions. Instead, it proposes that competition law is ideally suited to providing the case-by-case analysis that is needed.

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[http://europa.eu.int/information\\_society/topics/radio\\_spectrum/useful\\_info/studies/secondtrad\\_study/index\\_en.htm](http://europa.eu.int/information_society/topics/radio_spectrum/useful_info/studies/secondtrad_study/index_en.htm)

## Section 8

# Responding to this consultation

## How to respond

- 8.1 Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on Friday 16 July**.
- 8.2 Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, 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 2) to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.
- 8.3 Please send your response to [chris.woolford@ofcom.org.uk](mailto:chris.woolford@ofcom.org.uk)
- 8.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Chris Woolford  
Competition and Markets  
Fourth floor  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
Fax: 020 7783 4103
- 8.5 Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.
- 8.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 3. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

## Further information

- 8.7 If you have any questions about the issues raised in this consultation, or need advice on the appropriate form of response, please contact Chris Woolford on 020 7783 4185.

## Confidentiality

- 8.8 Ofcom thinks 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](http://www.ofcom.org.uk), as soon as possible after the consultation period has ended.
- 8.9 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any

confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

- 8.10 Please also note that copyright in responses will be assumed to be relinquished unless specifically retained.

## Next steps

- 8.11 Following the end of the consultation period, Ofcom will consider all responses and take account of the views expressed. Ofcom will then publish a statement at the end of August 2004 which will set out the approach that Ofcom will follow to prevent distortion of competition.
- 8.12 Note that you can register to get automatic notifications of when Ofcom documents are published, at [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm).

## Ofcom's consultation processes

- 8.13 Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 1) which it seeks to follow, including on the length of consultations.
- 8.14 This consultation is shorter than Ofcom's standard 10 week period because, following the November 2003 document, it represents a second consultation on this issue meaning that respondents have already had the opportunity to provide comments. In addition, this consultation is focused on a relatively narrow field and consequently Ofcom considers that a 5 week period should be sufficient.
- 8.15 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](mailto: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, whose views are less likely to be obtained in a formal consultation.
- 8.16 If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Philip Rutnam, Partner, Competition and Strategic Resources, who is Ofcom's consultation champion:

Philip Rutnam  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
Tel: 020 7981 3585  
Fax: 020 7981 3333  
E-mail: [philip.rutnam@ofcom.org.uk](mailto:philip.rutnam@ofcom.org.uk)

## **Annex 1**

# **Ofcom's consultation principles**

A1.1 Ofcom has published the following seven principles that it will follow for each written consultation:

### **Before the consultation**

A1.2 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**

A1.3 We will be clear about who we are consulting, why, on what questions and for how long.

A1.4 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 version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A1.5 We will normally allow ten weeks for responses, other than on dispute resolution.

A1.6 There will be a person within Ofcom who 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. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A1.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### **After the consultation**

A1.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 2

# Consultation response cover sheet

A2.1 In the interests of transparency, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), as soon as possible after the consultation period has ended, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, unless we are asked not to.

A2.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you do not want to be published. We will keep your completed cover sheets confidential.

A2.3 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.

A2.4 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, contact details, or job title to remain confidential, please provide them in your cover sheet only so that we do not 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

What do you want Ofcom to keep confidential?

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 to be confidential, 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)?

Yes

☐

No

☐

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet. If I have sent my response by email, Ofcom can disregard any standard email text about not disclosing email contents and attachments.

Name

Signed (if hard copy)

## Annex 3

# Consultation questions

**Question 1:** *Is it sufficient for Ofcom to deal with any anti-competitive behaviour as it arises, or should we attempt to predict the impact on competition at the time of a trade and have the power to prevent certain trades?*

**Question 2:** *Do you believe that the existing legislative framework (based around existing competition law) will be sufficient to prevent distortion of competition following the introduction of spectrum trading? If not, why not?*

**If you answer “no” to question 2:**

**Question 3:** *Do you think the continued use of AIP will help to prevent anti-competitive hoarding?*

**Question 4:** *Do you agree with Ofcom’s assessment that “use-it-or-lose-it” provisions should not be imposed on firms acquiring spectrum through a spectrum trade?*

**Question 5:** *Do you agree with Ofcom’s assessment that licence revocation should only be used as a last resort?*

**Question 6:** *Do you agree with Ofcom’s assessment that spectrum caps should not be imposed on firms acquiring spectrum through a spectrum trade?*

**Question 7:** *Do you think it is necessary or appropriate for Ofcom to impose specific ex ante regulation through the Trading Regulations to prevent distortion of competition? If so, what would the test look like and how should it be enforced?*

**Question 8:** *Do you consider that it would be feasible to apply a competition test focused on trades involving spectrum users that are already subject to regulation as proposed by Professor Cave? Do you think there would be any value in applying such a test as part of the trading process? If so, how should such a test work?*

## **Annex 4**

# List of respondents to the November 2003 Consultation on Spectrum Trading

A4.1 Responses to the consultation document were received from large organisations, small medium-sized enterprises (SMEs), individuals, advisory committees, trade and similar associations and government departments.

**Aerial Facilities Limited**  
**AirRadio Ltd**  
**AMS (RSD & CSD Divisions)**  
**Arup Communications**  
**Audio Ltd**  
**Autograph Sound Recording Ltd**  
**BAA plc**  
**Barclay Associates Ltd**  
**BBC**  
**Better Sound Limited**  
**British Microlight Aircraft Association**  
**BT Group Plc**  
**Cable & Wireless**  
**CACFOA**  
**Capital Radio plc**  
**CDMA Development Group (CDG)**  
**Chrysalis Radio**  
**Civil Aviation Authority**  
**CLRC-Rutherford Appleton Laboratory**  
**Cogent**  
**Colin Bowman**  
**Commercial Radio Companies Association**  
**Communications Management Association**  
**Crown Castle UK Ltd**  
**David Hall Systems Ltd**  
**DETI (Northern Ireland)**  
**Digital 3 and 4 Limited**  
**DJ Consulting Services Limited**  
**Dr. David Rudd**  
**Dr. Stewart Bryant**  
**Emap Performance**  
**Energis Communications Ltd**  
**Ericsson Limited**  
**European Satellite Operators Association (ESOA)**  
**Eutelsat S.A.**  
**FCS Ltd**  
**Five**



**FuturePace Solutions, Australia**  
**Gould Electronics Twoway Radio Limited**  
**GWR Group plc**  
**Hand Held Audio Ltd**  
**Hospital Broadcasting Association (HBA)**  
**Hutchison 3G Limited**  
**Independent Televisions News Limited (ITN)**  
**Inmarsat**  
**Institute of Broadcast Sound**  
**Institute of Electrical Engineers (IEE)**  
**Intellect UK**  
**IT IS Holdings Plc**  
**ITV Network**  
**JFMG**  
**John Turnock**  
**Joint Radio Company Limited**  
**Kingston Communications (Hull) plc**  
**London Underground**  
**Lucent Technologies**  
**Maritime and Coastguard Agency (MCA)**  
**Mason Communications Ltd**  
**Members of the Spectrum Management Advisory Group (SMAG)**  
**Ministry of Defence**  
**MLL Telecom Ltd**  
**Mr. & Mrs. Eldridge**  
**National Air Traffic Services Ltd**  
**National Radiological Protection Board**  
**Nigel Hitchman**  
**Nokia UK Ltd**  
**O2 UK Limited**  
**Olswang**  
**Orange**  
**Peter Helm**  
**PIPEX Communications**  
**Pro Consulting Services Ltd**  
**Procom Communication Services**  
**QVC**  
**Radio Research Advisory Committee (RRAC)**  
**Radio Society**  
**Satellite Action Plan Regulatory Group (SAP REG)**  
**Satellite and Cable Broadcasters Group**  
**Scope Communications UK Limited**  
**Scottish Executive (Energy & Telccoms Division)**  
**Sennheiser UK Ltd**  
**SES ASTRA**  
**SIBC**  
**Siemens AG**  
**SMG plc**

**St Helens College**  
**Telecommunications Advisory Committee (TAC)**  
**The On Site Communications Association (OSCA)**  
**T-Mobile (UK) Ltd**  
**Transfinite Systems Ltd**  
**Transplan UK**  
**UK Broadband Limited**  
**UK-UWB Association**  
**UMTS Forum**  
**Visions Ltd**  
**Vodafone Ltd**  
**Welsh Assembly Government**  
**Wireless Messaging Association**

**Plus 16 confidential responses**

## Annex 5

# Summary of responses and Ofcom comments

A5.1 Ofcom received a wide range of views from respondents to the November 2003 consultation in relation to the approach we should follow to prevent distortion of competition. Ofcom has taken account of these comments in developing the proposals set out in this document.

A5.2 A detailed summary of the points raised by respondents and Ofcom's comments on these is set out in the table below. Full copies of the consultation responses provided by stakeholders are available on the Ofcom website at [http://www.ofcom.org.uk/consultations/past/spec\\_trad/spec\\_responses/?a=87101](http://www.ofcom.org.uk/consultations/past/spec_trad/spec_responses/?a=87101)

| Issue raised  | Ofcom comment  |
|---|--|
| Concern that Ofcom will not have the will nor the resources to implement the various checks outlined in the document, particularly if trading becomes popular. Concerns that the trading process could become expensive and long-winded which would have a negative impact on take-up of trading. | Ofcom believes it is essential that the trading process be transparent, speedy and as straightforward as possible. Ofcom's proposals seek to achieve this while also securing sufficient protection for all spectrum users.                      |
| Ofcom's decisions must be transparent, precise, timely and provide a high degree of regulatory certainty.   | Ofcom fully agrees.  |
| The trading process, as described in the consultation document, makes no provision for details of a prospective trade to be publicised beforehand in order to allow interested third parties to comment.  | Ofcom believes there is no need to allow third parties to comment in relation to competition concerns that may arise in advance of a specific trade and that such arrangements would unnecessarily complicate and slow down the trading process. |
| Ofcom is oversimplifying the spectrum trading process and should, for example, carry out a technical evaluation of all trades.<br>On the other hand, other respondents considered that the process described was already unnecessarily burdensome on Ofcom.                                       | Ofcom's aim is to impose the minimal level of regulation necessary, while ensuring that spectrum users are sufficiently protected from anti-competitive behaviour.   |
| Ofcom should provide informal guidance as to whether a trade is likely to be rejected for competition reasons.  | No guidance necessary if there is no competition check as part of the trading process.   |

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| It is unrealistic of Ofcom to anticipate that the advent of a market mechanism will replace the detailed work previously performed by the RA without some sort of competition check being put in place.   | Ofcom believes the Competition Act provides the most appropriate means to deal with anti-competitive behaviour. Including a competition check in the trading process could increase uncertainty and reduce the benefits that can be achieved through trading.  |
| Efficient spectrum management is best obtained by a market mechanism, rather than regulatory micromanagement. Ex ante regulation should be the exception rather than the rule and regulatory intervention should be kept to an absolute minimum. Ofcom's approach should be technology neutral. | Ofcom intends to impose the least necessary regulatory controls and the minimum administrative burdens required to support the effective functioning of a trading market for spectrum.   |
| Spectrum trading is operating in other countries (Australia and New Zealand) without the need for regulatory intervention.  | Ofcom has discussed their experience of trading with representatives of the Australian and New Zealand regulators.   |
| Certain users should be prevented from acquiring further spectrum because of their market power.  | Ofcom is opposed to the use of spectrum caps as they may prevent the licensee from acquiring further spectrum for perfectly legitimate reasons (e.g. increased efficiency). Spectrum caps are entirely arbitrary.  |
| Ofcom should impose rules on certain spectrum so that it can only be used for specific purposes.  | Ofcom believes that such intervention would undermine the introduction of trading by reducing the benefits that can be achieved.   |
| Spectrum trading may result in spectrum becoming unavailable for certain services as competition has made the use of frequencies unaffordable or unobtainable for that service. Certain users should not be permitted to sell spectrum because of the effect on public services.                | <p>Ofcom believes that the introduction of trading will result in spectrum being used for its 'highest value' use and that the establishment of such a market will bring maximum benefit to society.</p> <p>No user will be 'forced' to sell spectrum so will still be able to provide the same services as before.</p> <p>The statement on spectrum trading, scheduled for publication at the beginning of July, will set out how spectrum trading will be introduced in each relevant licence class.</p> |
| Market makers will require regulation to ensure that hoarding is minimised.   | Ofcom will apply the Competition Act to deal with any evidence of anti-competitive hoarding by market makers.  |
| Non-utilisation of spectrum should be a legitimate reason for losing spectrum.  | There may be perfectly valid reason for holding but not using spectrum, for example to meet future growth in   |

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|   | <p>demand. Where the hoarding is anti-competitive then Ofcom will be able to apply the Competition Act.</p>  |
| <p>It is unlikely that the Enterprise Act and Competition Act will provide Ofcom with sufficient powers to prevent competition being distorted.</p> <p>Alternatively, others stated that the Competition Act and Enterprise Act will provide sufficient protection and that the imposition of further controls would be disproportionate.</p> | <p>Ofcom agrees that spectrum poses particular challenges for the application of competition law and the Enterprise Act will clearly not be applicable to all spectrum trades. However, they do still provide a powerful mechanism to deal with anti-competitive behaviour and the Competition Act, in particular, is applicable across all markets. Ofcom believes it would be disproportionate to impose competition controls as part of the trading process as they would largely be trying to replicate the role of the Competition Act. Further, such controls would reduce the benefits that can be achieved from trading.</p> <p>Nonetheless, Ofcom will closely monitor the market as it develops and will be ready to impose additional controls through the trading regulations if it transpires they are necessary.</p> |
| <p>Any detrimental effects arising from anti-competitive behaviour would manifest themselves in a downstream market. Ofcom has sufficient powers under both the Communications Act (and the Competition Act) to address such concerns.</p>  | <p>The Communications Act enables Ofcom to prevent distortion of competition by dominant firms in ECN/ECS – this will cover many downstream markets to which spectrum is an input. However, it does not apply to upstream markets or non ECN/ECS markets (unless they can be shown to be associated facilities).</p>   |
| <p>An ex ante competition approval process would needlessly duplicate existing competition law and Communications Act powers to protect and promote competition.</p>  | <p>Ofcom believes that existing regulatory controls are sufficient to prevent distortion of competition. Imposing additional ex ante controls may not be proportionate or objectively justifiable.</p>   |
| <p>Acquisition of spectrum by a dominant firm should not be a concern for Ofcom provided it has the necessary powers to deal with anti-competitive behaviour.</p>   | <p>Ofcom believes that it would be very difficult to justify intervention on the basis that we believed that a firm was going to distort competition at some future date. This would greatly increase uncertainty in the trading market.</p>   |
| <p>A large company may buy-up all the spectrum currently used for programme making and only provide access to the spectrum to those also purchasing other products from it.</p>   | <p>Such 'bundling' of products by a dominant undertaking is best addressed under the Competition Act. This could also be used to address excessive pricing which is a similar problem.</p>   |
| <p>The Competition Act only comes into</p>  | <p>Whilst it is true that the Competition Act</p>  |

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| effect once the damage has been done. This may be too late. Ofcom needs to be able to intervene beforehand  | is an ex post mechanism, the fines that can be imposed under the Act provide a significant incentive not to breach it. Ofcom also has powers to impose interim measures which would take immediate effect.  |
| The concept of 'use-it-or-lose-it' should be adapted to prevent spectrum hoarding.  | Ofcom should only prevent anti-competitive hoarding by dominant users. The Competition Act is applicable in such situations.  |
| Ofcom should impose an 'obligation to trade' on spectrum users to prevent hoarding. Those acquiring spectrum through trading should be required to utilise a minimum percentage of the spectrum.                | AIP should provide an incentive not to hoard spectrum while any anti-competitive hoarding can be addressed under the Competition Act. It is unclear what advantages an 'obligation to trade' or a 'minimum utilisation requirement' would bring and they may prove unwieldy to enforce.                                   |
| An SLC test should potentially be applicable to all trades which could lead to a distortion of competition. The application of thresholds might leave smaller users vulnerable and without adequate protection. | Ofcom believes that the Competition Act is sufficient to provide adequate protection to all sizes of user. Further, it is very difficult to see how an SLC test could be applied without greatly increasing uncertainty and complicating the process, thus undermining the benefits that can be achieved through trading. |
| Ofcom should carry out competition reviews of spectrum markets prior to the introduction of trading.  | Unclear how such market reviews would be consistent with EC Directives.   |
| Larger operators may retain unused spectrum in order to barter with other large users in future, rather than pay high transfer fees to a third party.   | The emergence of SMOs should facilitate the trading process and lead to lower transaction costs. Anti-competitive hoarding will be dealt with under the Competition Act.  |
| Continued use of AIP should help to prevent under-utilisation of spectrum. Others stated that they believed that the continuation of AIP was unnecessary once trading was operational.                          | Ofcom believes that AIP is a useful mechanism to prevent under utilisation of spectrum. It may not however be that effective in preventing anti-competitive hoarding. This issue will be dealt with further in the statement on spectrum trading which Ofcom expects to publish at the beginning of July.                 |
| Competition remedies must apply to all market participants, including intermediaries.   | All those participating in trading will be required to comply with the Trading Regulations. The Competition Act, Enterprise Act and Communications Act will also all apply as stated. This applies to intermediaries as much as any other   |

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|   | spectrum user.  |
| Emergence of intermediaries should be closely monitored to ensure they do not behave anti-competitively | Ofcom will carefully monitor all aspects of the spectrum market and will act quickly to impose any additional controls should they prove necessary. |