

Ensuring effective competition following the introduction of spectrum trading

Statement

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Section 1

Summary

- 1.1 In August 2004 Ofcom published a statement setting out the process through which spectrum trading will be introduced in the UK and proposing a timetable for the phased introduction of trading to different licence classes. This was followed, in September 2004, by a consultation on spectrum liberalisation which considered the extent to which and how liberalisation should be implemented in the UK over the next 2-3 years. A key goal of the introduction of trading and liberalisation is that it should help to promote effective competition in the markets in which spectrum is used and thereby encourage efficient use of spectrum.
- 1.2 Under the EC 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. Ofcom published a consultation document in June 2004 which considered how Ofcom should ensure effective competition following the introduction of spectrum trading. This proposed that Ofcom should rely on existing competition law to deal with distortions of competition.
- 1.3 This statement sets out Ofcom's policy, having taken account of comments received from stakeholders in response to the June consultation. It confirms Ofcom's view that the existing legal framework – the Competition Act 1998, supplemented by the Communications Act 2003 and the Enterprise Act 2002 where applicable – is sufficient to ensure effective competition following the introduction of spectrum trading. As a result, Ofcom does not intend to introduce any form of ex ante competition check as part of the trading process.
- 1.4 Ofcom believes that the Competition Act will be effective at dealing with any anti-competitive behaviour that may arise in spectrum markets or related downstream markets to which spectrum is an input. Such behaviour may or may not follow a spectrum trade. Although the Competition Act can only be applied after anti-competitive behaviour has been detected, Ofcom considers that the ability to impose fines and, where appropriate, interim measures, is likely to prove a significant deterrent against companies engaging in anti-competitive activities in the first place.
- 1.5 In addition, the Enterprise Act may apply. First, the merger provisions of the Enterprise Act may be applicable in certain circumstances, although it seems likely that these may be limited to certain spectrum trades where revenue is attached to the spectrum being traded. Secondly, in relation to markets for goods or services to which spectrum is an input, Ofcom could refer the market to the Competition Commission for investigation if it had reasonable grounds for suspecting that any feature(s) of that market distorts competition in the supply of those goods or services.
- 1.6 Further, Ofcom has powers to impose obligations on undertakings found to have Significant Market Power under the Communications Act. However, such obligations are only likely to be applicable to certain markets to which spectrum is an input.
- 1.7 In addition to reliance on competition law, Ofcom considers that Administrative Incentive Pricing (AIP) will continue to play an important role following the introduction of spectrum trading. Although AIP is unlikely to be

effective at preventing anti-competitive hoarding, as the potential benefits of such behaviour are likely to be greater than the cost of the AIP, Ofcom believes that it will continue to be effective at encouraging efficient use of spectrum.

- 1.8 It is also open to Ofcom in certain circumstances to revoke licences. This is a severe action which would only be used in serious cases but it would, nonetheless, allow Ofcom to revoke a licence in order to fulfil its statutory duties, including the duty to ensure optimal use of the radio spectrum.
- 1.9 In the majority of cases Ofcom considers that the Competition Act should be sufficient to deal with any distortions of competition that may arise. Further, we believe that the remedies available under the Competition Act should provide a deterrent to prevent companies from behaving anti-competitively in the first place.
- 1.10 Ofcom does however realise that some spectrum users (particularly smaller users) may not be familiar with the detail of the Competition Act and consequently may feel vulnerable to the behaviour of their larger competitors. Ofcom is willing to liaise with spectrum users as necessary, to help them understand aspects of competition law, if they have concerns that competition is being distorted.
- 1.11 Finally, Ofcom will keep this issue under review in the light of experience following the roll-out of spectrum trading and liberalisation. Although we consider that it is unlikely to be necessary, if it does become apparent that some sort of competition check is necessary as part of the trading process, then we will introduce one. This would be done, following consultation, through amendment to the trading regulations.

Section 2

Background

Introduction

- 2.1 This document forms one of a series setting out Ofcom's new approach to management of the radio spectrum, which is intended to promote innovation and competition in the provision of wireless services across the UK. It follows the recently published statement on spectrum trading which underlined Ofcom's commitment to continue the implementation of more dynamic and market oriented approaches to spectrum management. This statement explains the approach that Ofcom will follow to deal with any distortions of competition that may arise following the introduction of spectrum trading at the end of 2004.
- 2.2 This statement follows an earlier consultation on ensuring effective competition following the introduction of spectrum trading¹ published on 10 June 2004. Ofcom received 21 responses to this consultation which closed on 16 July 2004² – a list of those that responded is included at Annex A. This statement takes account of the views expressed by stakeholders in response to this consultation.

Spectrum trading, liberalisation and Ofcom's management of the radio spectrum

- 2.3 Spectrum trading will enable licence holders to transfer some or all the rights and associated obligations they hold under a Wireless Telegraphy (WT) licence to third parties³. The process through which this transfer will be effected and the steps that Ofcom will take to facilitate trading were set out in a statement on spectrum trading which was published on 6 August 2004⁴. This statement also set out the licence classes for which trading will be introduced in 2004 and outlined our plans for expanding the scope of trading in future years.
- 2.4 More recently, in September, Ofcom published a consultation document on spectrum liberalisation. This explained how Ofcom proposes to reduce licence restrictions on use, technology, application or technical parameters. Liberalisation is a separate development to spectrum trading. It is anticipated that liberalisation will provide the means by which companies that purchase spectrum can use it in the most effective way.
- 2.5 Spectrum trading and liberalisation are just two mechanisms that Ofcom will in future use in the management of the radio spectrum. They will compliment a number of other spectrum management processes, including assignment mechanisms, licence exemption and Administrative Incentive Pricing (AIP). Towards the end of 2004 Ofcom intends to publish a consultation reviewing

¹ http://www.ofcom.org.uk/consultations/past/sec/effective_competition/?a=87101

² <http://www.ofcom.org.uk/consultations/past/sec/180545/?a=87101>

³ Wireless telegraphy licences are granted by Ofcom under Section 1 of the Wireless Telegraphy Act 1949

⁴ http://www.ofcom.org.uk/consultations/past/spec_trad/statement/

the balance between the different processes and considering the expected implications of new technologies. This Spectrum Framework Review will take account of all factors relevant in Ofcom's management of the radio spectrum, including Ofcom's approach for dealing with distortions of competition as set out in this statement.

Preventing distortions 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 EC Framework Directive⁵, 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.
- 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 essential/necessary 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.

The June consultation document

- 2.9 In its consultation document, published in June 2004, Ofcom considered the types of behaviour that Ofcom should seek to prevent. In particular, we sought to distinguish between actual anti-competitive behaviour (by, for example, a company which has acquired rights to use spectrum through trading) and the potential for a trade to have an adverse effect on competition.

⁵ 2002/21/EC

- 2.10 We set out in the document the various mechanisms which could be available to Ofcom to prevent distortions of competition. These include existing legislation – namely the Competition Act, Enterprise Act and Communications Act – and new mechanisms which Ofcom could introduce. Ofcom considered the effectiveness of each of the various options and, based on its analysis, made some proposals as to the approach we considered was most appropriate. Ofcom sought the views of respondents on this proposed approach and on the other options which had been considered as part of the consultation.

Section 3

Responses to the consultation

Ensuring effective competition

- 3.1 In the consultation document published in June, Ofcom set out a detailed analysis of the advantages and disadvantages of a number of different approaches that might help to prevent distortions of competition. Ofcom's conclusion, from this analysis, was that existing legislation should be sufficient to prevent distortions of competition and that consequently imposing additional ex ante competition checks as part of the trading process was unnecessary.
- 3.2 Ofcom asked a series of questions in relation to this conclusion as part of the consultation. We sought views on whether it was sufficient for Ofcom to deal with any anti-competitive behaviour as it arises, or whether we should attempt to address the impact on competition at the time of a trade. We also asked respondents whether they considered that the existing legislative framework was sufficient to prevent distortions of competition following the introduction of spectrum trading. If not, respondents were asked to consider what sort of additional regulation might be appropriate.
- 3.3 A number of respondents agreed with Ofcom's conclusions that imposing an ex ante competition check as part of the trading process was unnecessary and would be disproportionate. Some respondents indicated that they considered it unlikely that spectrum trading would lead to a distortion of competition. A number of others emphasised their belief that existing competition law should be sufficient to deal with any distortions of competition that did arise. They therefore considered that there was no objective justification for the introduction of ex ante controls to address potential competition concerns.

Concerns raised by respondents and Ofcom's response

- 3.4 However, not all respondents agreed with Ofcom's proposal and some considered that some sort of ex ante regulation would be necessary. There were different reasons as to why respondents reached this conclusion as described below.

Spectrum trading is an innovation

- 3.5 One concern raised by a couple of respondents was that spectrum trading was a new and untested area. As such, they considered that Ofcom should introduce trading cautiously by vetting trades in the first instance with scope to relax these procedures in future if it became clear that such vetting was unnecessary. They pointed out that spectrum is different to other products to which the Competition Act is applied and consequently considered that Ofcom might be wise to have other regulatory measures available, at least in the initial stages of trading.
- 3.6 Ofcom is committed to introducing trading through the least administratively burdensome process and with maximum flexibility. It is certainly not our

intention to impose heavy-handed regulation in the early stages of trading on the off-chance that it may prove necessary. This is particularly so given that at this stage it is not clear what, if any, market failures may arise. Ofcom is concerned that imposing excessive regulation may deter take-up of trading by slowing down the trading process, making it less transparent and raising uncertainty. This would risk undermining the benefits that Ofcom hopes to release from the introduction of trading. These points were emphasised by a number of respondents that supported Ofcom's proposals as set out in the June consultation.

- 3.7 The statement on spectrum trading published in August 2004 explained that Ofcom will be introducing trading through a phased approach, starting from the end of 2004. This will allow Ofcom to learn from experience as trading is rolled-out to further licence classes over the coming years. One key aspect of this will be to monitor the impact of trading on the development of competition in spectrum and related markets.
- 3.8 If at any point it becomes apparent that competition is being distorted and the Competition Act is not proving effective in enabling Ofcom to prohibit such distortions then Ofcom maintains the right to introduce additional regulation at a later date. Ofcom believes that it is unlikely that such intervention will be necessary though clearly we will be in a better position to judge once trading is underway. If, for any reason, Ofcom did consider that ex ante regulation was required, it could be introduced relatively quickly through amendment to the Trading Regulations. Such amendment would require consultation and clearly Ofcom would need to demonstrate that the regulatory intervention being proposed was justifiable and proportionate.
- 3.9 Some questions were asked as to how Ofcom will decide the circumstances as to which behaviour will be deemed anti-competitive. One respondent suggested that a monitoring body should be established within Ofcom, supported by manufacturers and users, which would monitor behaviour to assess what should be considered to be anti-competitive. Ofcom considers that Competition Act legislation, together with the relevant European and national jurisprudence, sets out the basis for Ofcom to consider whether there are distortions of competition.

Trading and liberalisation

- 3.10 Another argument put forward by some respondents was that trading and liberalisation may be slow to be taken up at first and that this may increase scope for anti-competitive behaviour. In particular, it was argued that if spectrum trading is introduced before liberalisation there may be opportunities for spectrum users to act anti-competitively.
- 3.11 This issue was considered in detail as part of the study undertaken by Analysys, DotEcon and Hogan & Hartson on the introduction of secondary trading of radio spectrum in the EC⁶. One of the conclusions of this study was that sufficiently rapid moves towards liberalisation should eliminate the need for ex ante rules to prevent distortions of competition. However, the study acknowledged that there may be an argument for prior screening of

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http://europa.eu.int/information_society/topics/radio_spectrum/useful_info/studies/secondtrad_study/index_en.htm

transactions on competition grounds in certain instances if trading is introduced without liberalisation.

- 3.12 Liberalisation will enable holders of relevant spectrum licences to change the use to which their spectrum is put. This will potentially encourage competition by allowing users to provide services outside of those previously permitted under their licence.
- 3.13 Ofcom is currently consulting on the extent to which and how liberalisation should be implemented in the UK over the next 2-3 years. The proposals, as set out in the consultation document, are that liberalisation should be introduced to licence classes at roughly the same time as they are opened up to trading.
- 3.14 However, for the reasons set out in this statement, Ofcom does not consider that reliance on competition law is dependent upon liberalisation, although clearly our arguments are strengthened if liberalisation is introduced with trading. Consequently, Ofcom does not believe it would be appropriate to impose ex ante competition controls at this stage. As described above, we will review this position if it becomes apparent that trading is leading to excessive concentration in particular markets and that liberalisation is failing to address these distortions. Ofcom believes that such an outcome is unlikely.

Prevention of certain 'big' trades

- 3.15 A couple of respondents agreed with Ofcom's proposals to a certain extent. In particular, they considered that it would be unnecessary to impose any competition check on the vast majority of trades and that in some licence classes it was highly unlikely that competition concerns would arise. However, they considered that Ofcom should maintain some mechanism to prevent certain 'big' trades where there was a genuine risk that competition would be distorted at some future point.
- 3.16 A difficulty with this approach is the need to identify those trades which are likely to raise competition concerns. This would probably require Ofcom to identify criteria in advance making it clear which types of trade would be subject to such scrutiny. The alternative would be to not specify criteria in advance but this lacks transparency and risks deterring take-up of trading.
- 3.17 A key disadvantage with such an approach is that it would slow down the trading process. Determining appropriate criteria, possibly on a licence class by licence class basis, and then determining whether trades meet these criteria, is potentially extremely time consuming. The threat of such ex ante check and the complexity it would add to the trading process may deter genuine trades which would otherwise result in increased efficiency and/or promote competition and innovation.
- 3.18 It is also highly questionable whether such a check is necessary. As explained in the June consultation document, if a spectrum user behaves anti-competitively then Ofcom has powers under the Competition Act to deal with the abuse. The ability to impose fines and, where appropriate, interim measures, are likely to prove a significant deterrent against engaging in anti-competitive activities in the first place.

- 3.19 Reliance on ex post competition law also removes the need for Ofcom to try to predict the likely impact on competition of a particular trade as would be necessary if an ex ante competition check was in place. Such an assessment would effectively be a judgement as to how the market will develop and what future competitive pressures may materialise. This would be subjective and would reduce transparency which risks reducing the benefits of trading. It would suggest that Ofcom believes that we understand the market better than market forces which would be at odds with the principles of light touch regulation.
- 3.20 Consequently, Ofcom is not in favour of imposing any ex ante competition check, even if it was limited to certain 'larger' trades which appeared most likely to raise competition concerns. As explained above, Ofcom believes that the Competition Act should provide a deterrent against anti-competitive behaviour and will minimise the risk that firms will enter into trades with the intention of behaving anti-competitively at some future point. Therefore we do not consider that any competition check is necessary.

Application of the Competition Act 1998

- 3.21 A few respondents were concerned that reliance on the Competition Act may disadvantage smaller users who were less expert in the application of competition law. In particular, a couple of respondents pointed to Ofcom's new guidelines on complaints and disputes investigation⁷ which set out our commitment to regulate with a bias against intervention. The concern is that this new approach may make it more difficult for small users to refer cases to Ofcom, even if they are genuine victims of anti-competitive behaviour.
- 3.22 The purpose of the guidelines is to make it clear when Ofcom would expect to open competition complaints or dispute investigations and set out the information we would expect to receive in each case. This is intended to reduce the number of trivial and unsubstantiated complaints and disputes that are referred to Ofcom and will enable us to focus our resources in the most effective way. The guidelines are certainly not intended to make it more difficult for small spectrum users to access Ofcom's competition complaint procedures in legitimate cases. In particular, Ofcom explained in the guidelines that, while the general principles will apply, the precise details may need to be adapted to deal with complaints and disputes arising in relation to spectrum.
- 3.23 Spectrum trading is a new initiative and Ofcom will be prepared to review the regulations in place if we receive evidence of a problem. One aspect to which we will pay careful attention is the impact of trading on competition and the potential for anti-competitive behaviour. Ofcom provides assurance that it will take accusations of anti-competitive behaviour seriously and will investigate thoroughly where there is evidence that competition is being distorted. In addition, Ofcom will, in certain instances, be willing to assist smaller users that may be less familiar with the application of competition law to understand whether they have been the victim of anti-competitive behaviour⁸.

⁷ http://www.ofcom.org.uk/bulletins/comp_bull_index/eu_directives/guidelines.pdf

⁸ See paragraph 35 of the guidelines which explain that Ofcom may be willing to provide guidance to less experienced complainants.

- 3.24 Ofcom reiterates that it is committed to dealing decisively and quickly with anti-competitive behaviour. If any spectrum user is being harmed by anti-competitive practices we will take appropriate measures to prevent the abuse.

Users designated with 'SMP' under the Communications Act

- 3.25 A couple of respondents expressed support for the view that Ofcom should conduct a competition check in relation to those trades involving a firm designated as having 'Significant Market Power' (SMP) in a relevant market. The rationale for this is that such companies have already been found to hold a dominant position in a relevant market and consequently it would be easier for such a firm to distort competition through trading.
- 3.26 A number of respondents disagreed with this approach, however, as it requires Ofcom to make judgements about the development of the market and assessments as to how firms will behave in future. It was also suggested that such an approach was potentially discriminatory as SMP can only be applied to markets for electronic communications networks and services and consequently dominant firms operating outside of these markets would not be covered. Ofcom explained in the June consultation that we considered it doubtful that an SMP determination could be applied to spectrum markets, although it could possibly be applicable to certain downstream markets to which spectrum is an input.
- 3.27 In any event, and as pointed out by at least one respondent, obligations on firms with SMP could only be imposed following a market review carried out under the Communications Act. Ofcom could not impose such conditions directly as a result of a spectrum trade. Any market review would need to be conducted by Ofcom according to the criteria set out in the EC Framework Directive.
- 3.28 For these reasons, Ofcom does not believe that it would be appropriate to impose specific competition checks as part of the trading process on firms designated as having SMP. We do however maintain the option of conducting a market review, if appropriate, of those markets falling within the scope of the Framework Directive to identify whether any SMP obligations should be imposed.

The Enterprise Act 2002

- 3.29 Ofcom did not ask a specific question in the June consultation in relation to the Enterprise Act and consequently we did not receive many comments from respondents in relation to its use. 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. However, it is clear that many trades will not fall within the scope of the Act, either because revenue is not attached to the spectrum being traded or because the share of supply threshold as set out in the Act is not met.

Alternative regulatory mechanisms

- 3.30 As explained above, Ofcom proposed in the consultation document that existing legislative powers would be sufficient to prevent distortions of competition following the introduction of spectrum trading. However, as part of our analysis we considered and consulted on some of the alternative

regulatory mechanisms that could be available to Ofcom. Some of these mechanisms, such as Administrative Incentive Pricing, are already in use while others, such as spectrum caps, would represent new regulation to be applied in addition to the existing framework.

- 3.31 The alternative regulatory mechanisms which were considered as part of the consultation were:
- Administrative Incentive Pricing (AIP);
 - “use-it-or-lose-it” provisions;
 - revocation of WT Act licences; and
 - spectrum caps.
- 3.32 The consultation document explained that additional mechanisms would only be used if it was considered that existing legislative powers were not sufficient to deal with distortions of competition and that the additional intervention was justifiable and proportionate. The sections below describe the comments received from respondents in relation to the usefulness of each mechanism and set out Ofcom’s response.

Administrative Incentive Pricing (AIP)

- 3.33 AIP is an annual fee, payable by spectrum users to Ofcom, the level of which is approximately equivalent to the opportunity cost of the spectrum they are holding. This encourages users to make efficient use of spectrum, not least as it can deter users from hoarding spectrum as there is a cost associated with the hoarding. However, Ofcom explained in the consultation document that we considered that AIP was unlikely to prevent hoarding which had anti-competitive intent or effect, as the potential rewards of such behaviour are likely to be greater than the cost of the AIP.
- 3.34 The majority of the respondents agreed with Ofcom that AIP was unlikely to be effective as a means of preventing anti-competitive hoarding. A few however disagreed and were in favour of an AIP regime that would deter anti-competitive hoarding. A number of others acknowledged that AIP could have some value in persuading holders of inefficiently used spectrum to sell it.
- 3.35 There was however some concern, especially from the mobile operators, that an AIP regime could not be justified alongside spectrum trading. In the statement on spectrum trading, published on 6 August 2004⁹, Ofcom explains that we remain of the view that AIP should continue to apply after spectrum trading and liberalisation are introduced later this year. This is because Ofcom believes that spectrum trading and liberalisation alone, while an important aid to promoting more optimal use of the spectrum, may not be fully effective at promoting efficiency.
- 3.36 Another respondent was concerned that the continuation of AIP could create entry barriers. However, Ofcom believes that, as long as AIP is set conservatively, it will not act as an impediment to market entry and cannot have any harmful effects on the efficient use of spectrum. A more detailed discussion of the economic fundamentals of Ofcom’s approach to AIP, the policy issues involved in setting AIP and estimates of the marginal valuation of spectrum by band is set out in a consultation document on spectrum

⁹ http://www.ofcom.org.uk/consultations/past/spec_trad/statement/

pricing, which is also being published in September.

- 3.37 Thus, having considered the responses, Ofcom remains of the view that AIP has an important role to play in encouraging efficient use of spectrum and that it may be effective at discouraging certain types of hoarding. However, it seems clear that AIP set at reasonable levels is unlikely to be effective at preventing anti-competitive hoarding as the potential benefits of such behaviour are likely to be greater than the AIP.

“Use-it-or-lose-it” provisions

- 3.38 In the consultation document Ofcom deliberated on whether “use-it-or-lose-it” provisions could be effective at preventing anti-competitive hoarding. We also considered how such provisions could be applied within the spectrum trading process (i.e. general provisions on all trades or provisions on *ad hoc* basis). We concluded that “use-it-or-lose-it” provisions were unlikely to be helpful in encouraging efficient use of spectrum and as such should not be imposed on firms acquiring rights to use spectrum through a spectrum trade.
- 3.39 Ofcom received a mixed response on this issue. A number of respondents agreed with Ofcom’s view that “use-it-or-lose-it” provisions should not be imposed on firms acquiring rights to use spectrum through a spectrum trade. They argued that such conditions would be difficult to interpret and apply and would create uncertainty in the market.
- 3.40 Other respondents however disagreed and thought that, on occasion, “use-it-or-lose-it” provisions could provide a useful incentive to use spectrum and prevent anti-competitive hoarding. One or two respondents saw value in imposing such provisions on all trades while a number of others were of the view that they should be available in particular circumstances or as a ‘last resort’. There was a suggestion that “use-it-or-lose-it” conditions may be useful during the roll-out of trading and liberalisation in order to prevent a user attempting to acquire spectrum with the intention of blocking new entrants.
- 3.41 Having taken account of the responses, Ofcom remains of the view that “use-it-or-lose-it” provisions are unlikely to be effective at encouraging efficient use of spectrum. Such conditions can be extremely difficult to monitor, not least due to the problem of identifying whether or not spectrum is actually being hoarded or used inefficiently. Consequently, we will not routinely impose general “use-it-or-lose-it” provisions on users acquiring rights to use spectrum through trading.
- 3.42 However, there is no need to completely rule out the possibility of ever imposing a “use-it-or-lose-it” or similar provision on a particular user should the circumstances dictate. Ofcom therefore maintains the option of imposing “use-it-or-lose-it” provisions through licence conditions, if such action can be shown to be justifiable and proportionate. As implied above, Ofcom expects such situations to be rare.

Revocation of licences

- 3.43 Ofcom explained in the earlier consultation that, in certain cases where spectrum is not efficiently used, it may be appropriate for Ofcom to exercise its discretion to revoke wireless telegraphy licences. Any such action would

be taken in the light of relevant considerations and Ofcom's statutory duties and would only be used in serious cases.

- 3.44 With the exception of one respondent, who thought that if trading was to benefit the public interest then licence revocation should not need to be used at all, the vast majority of the respondents agreed with Ofcom that licence revocation should only be used as a final option once other options have been explored. However, although it should only be used as a last resort, a few pointed out that Ofcom should not be afraid to take such action if circumstances required.
- 3.45 Having considered the responses, Ofcom remains of the view that revocation of a wireless telegraphy licence should only be used in serious cases. However, we emphasise that we view revocation as a valuable regulatory tool which we would be willing to use if circumstances require. Where licence revocation is being contemplated, it will be done in accordance with any relevant licence conditions and Ofcom's spectrum management duties under the Communications Act. This includes Ofcom's duty to ensure the optimal use of the radio spectrum in order to further the interests of citizens and consumers.

Spectrum caps

- 3.46 The application of spectrum caps would enable Ofcom to impose limits on the amount of spectrum which could be held by an operator. However, in the June consultation document, Ofcom explained that we did not favour the use of spectrum caps as we felt they could inhibit market growth. There was also concern that they could 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, and that they could deter trading.
- 3.47 Most respondents agreed with Ofcom's view that spectrum caps should not be imposed on firms acquiring rights to use spectrum through a trade and only a couple saw potential benefits in the application of spectrum caps. Nevertheless, some respondents thought that, especially during the roll-out period of trading and liberalisation, Ofcom should retain its powers to refuse to consent to a trade that could lead to unacceptable concentration in the control of spectrum in a particular market.
- 3.48 Ofcom has considered the above points and continues to be of the view that spectrum caps are unlikely to be effective in preventing anti-competitive behaviour. In particular, spectrum caps fail to take account of the level of market power and the fact that, in many cases, there may be alternative ways of delivering the downstream service other than by using spectrum.
- 3.49 Ofcom notes respondents' concerns about the potential for spectrum trading to lead to excessive concentration in spectrum markets. However, as explained previously, Ofcom believes that the Competition Act provides a sufficient framework to deal with distortions of competition. Further, if Ofcom does have concerns that a particular market is not functioning effectively, for example because it has become excessively concentrated, then we can make a market investigation reference under the Enterprise Act.

Section 4

Conclusion and next steps

- 4.1 Having considered the responses to the consultation, Ofcom remains of the view that the existing legal framework – namely the Competition Act 1998, supplemented by the Communications Act 2003 and the Enterprise Act 2002 where applicable – is sufficient to ensure effective competition following the introduction of spectrum trading.
- 4.2 Although Ofcom believes that this framework is sufficient to deal with any anti-competitive behaviour that may arise, we nonetheless note the concerns raised by some respondents that the introduction of trading may provide opportunities for firms to distort competition in spectrum or related markets. We are also aware that these concerns may increase if there is any delay to the timetable for the introduction of spectrum liberalisation, as set out in the recent consultation document.
- 4.3 It is currently Ofcom's intention that spectrum trading and liberalisation will be introduced to approximately the same timetable, starting in December 2004 with certain licence classes¹⁰. Trading and liberalisation will then be extended to new licence classes in future years through a phased programme, thus enabling Ofcom to learn from experience as they are rolled out. Ofcom will review the situation and the regulations in place if we receive evidence of any problem.
- 4.4 Ofcom will pay particularly close attention to the development of markets in the initial stages of trading and will be alert to any signs of market failure or inefficient use of spectrum. Ofcom would urge spectrum users to discuss with Ofcom any evidence they have that spectrum users or third parties are behaving anti-competitively.
- 4.5 Ofcom believes that existing legislation will be sufficient to prevent distortions of competition. If, at any point, it becomes apparent that a firm is behaving anti-competitively or that a market is failing to function then Ofcom will take swift and appropriate action. This is most likely to be through application of the Competition Act.
- 4.6 Ofcom will keep this issue under review in the light of experience from the roll-out of spectrum trading and liberalisation. Although we consider that it is unlikely to be necessary, if it does become apparent that some sort of competition check is necessary as part of the trading process, then we will introduce one. This would be done, following consultation, through amendment to the Trading Regulations.

Next steps

- 4.7 Ofcom has today published draft Trading and Register Regulations for consultation. These regulations provide the legal framework for the introduction of spectrum trading and the publication of a spectrum register which will hold details of spectrum licences and trades. Following a one

¹⁰ See spectrum trading statement (published August 2004) and liberalisation consultation (published September 2004) for description of the licence classes

month statutory consultation it is anticipated that both sets of regulations will be made in November in order that they can come into force and allow spectrum trading from December 2004.

- 4.8 The draft Trading Regulations do not include provision for any competition check as part of the trading process. This is in line with the policy set out in this statement to rely on existing legislation, particularly the Competition Act, to deal with any distortions of competition that arise following the introduction of spectrum trading.
- 4.9 In December, Ofcom expects to publish a statement on spectrum liberalisation. This will build on the proposals set out in the recent consultation on this topic and will, it is anticipated, enable spectrum liberalisation to be introduced according to approximately the same timetable as trading.

Annex 1

List of respondents to the June consultation

A1.1 Responses to the consultation document were received from large organisations, small medium-sized enterprises (SMEs) and trade and similar associations.

British Telecommunications plc (BT)

Civil Aviation Authority (CAA)

Federation of Communication Services (FCS)

Intellect UK

ITIS Holdings plc

Joint Radio Company Limited (JRC)

Kingston Communications (Hull) plc

MLL telecom

Nokia

ntl

O2 (UK) Limited

Orange

On Site Communications Association (OSCA)

SMG plc

Spectrum Trading Associates (STA)

T-Mobile (UK) Limited

Vodafone Limited

The Wireless Messaging Association (WMA)

Plus 3 confidential responses and 1 informal response

Annex 2

Responses to the June consultation

A2.1 The June consultation document on 'Ensuring effective competition following the introduction of spectrum trading' contained 8 questions on which Ofcom sought the views of stakeholders. These questions are set out in the table below.

<u>Questions from the June consultation on ensuring effective competition</u>
<p>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?</p>
<p>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?</p> <p>If you answer “no” to question 2:</p>
<p>Question 3: Do you think the continued use of AIP will help to prevent anti-competitive hoarding?</p>
<p>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?</p>
<p>Question 5: Do you agree with Ofcom’s assessment that licence revocation should only be used as a last resort?</p>
<p>Question 6: Do you agree with Ofcom’s assessment that spectrum caps should not be imposed on firms acquiring spectrum through a spectrum trade?</p>
<p>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?</p>
<p>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?</p>

A2.2 Ofcom received 21 responses to this consultation of which 3 were confidential. The non-confidential responses can be viewed at <http://www.ofcom.org.uk/consultations/past/sec/180545/?a=87101>

A2.3 Just under half of those that responded were fully supportive of the approach which Ofcom had proposed in the consultation. There were a small number that did not address the specific questions and about 7 respondents that expressed some reservations with the proposed approach. The key points raised by respondents, particularly in relation to concerns identified with Ofcom’s approach, are addressed in the main body of this statement

A2.4 In addition, a few respondents raised additional points outside the scope of the consultation, focusing on issues such as pricing, liberalisation, and the spectrum trading process. In the main, Ofcom has not attempted to address these points in this statement as they have been dealt with in other documents, notably the spectrum trading statement (published in August 04) and the liberalisation consultation (published in September 04). Further information on pricing is provided in a consultation on spectrum pricing published in September 04.