

## All we hear is radio spectrum--what's new?

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**IP & IT analysis: What are the challenges facing the UK spectrum trading regime? Mark Simpson and Oliver Stacey, partners, and Amanda Town, associate, at Norton Rose Fulbright LLP, take a look at the legal issues surrounding spectrum trading and the benefits it can bring to consumers and the mobile sector.**

### What are the challenges relating to spectrum trading in the UK?

Spectrum trading has not been embraced in the UK, with only a handful of mobile sector trades taking place in the last five years--the majority of which appear to be the result of corporate consolidation rather than trades between independent businesses.

In recent years, the government and Ofcom have consulted to find solutions to improve the trading environment, as a means to ensure efficient use of spectrum in light of ever-increasing data use.

The trading procedure is outlined in Ofcom's 2011 trading guidance notes. Trading applications are subject to Ofcom's assessment, including a competition review--it can block transactions which it considers are likely to distort competition--to ensure suitability and to prevent undue concentrations of spectrum.

In this respect, trading applications are reviewed in a manner akin to a merger control assessment. Ofcom aims to complete all trades within 42 calendar days of receipt of the proposed transfer.

In the Department for Culture, Media and Sport's (DCMS) Communications Review in 2012, it suggested that companies have been slow to trade spectrum due to the relative novelty of the rules and potential regulatory barriers. Some concerns were noted about spectrum holders being reluctant to trade with their competitors. Although the existing process allows Ofcom to prohibit trades that would result in anti-competitive spectrum hoarding, DCMS has suggested that further clarity could be necessary.

### How does the position in the UK fit compare to other jurisdictions?

At the European level, the changes to the EU Electronic Communications Framework Directive 2009/140/EC, which came into force in May 2011, formally require all EU member states to introduce spectrum trading.

However, member states were only obliged to do so after the European Commission had produced 'implementing measures'. These measures were adopted in March 2012 and require member states to allow spectrum transfers and leasing for the key bands used for mobile telecommunications in Europe--this includes the 800, 900, 1700 and 1800 MHz and 2.1, 2.5-2.6 and 3.4-3.8 GHz bands--by July 2015.

The UK has been relatively enthusiastic in implementing spectrum liberalisation. However, it is clear that the level of trading actually undertaken in the UK is less than in a number of member states. For example, Sweden, Austria, Denmark, France and Norway have reported regular trading transactions to the CEPT's Electronic Communications Committee (ECC Report-Description of Practices Relative to Trading of Spectrum Rights Of Use, May 2011).

Spectrum leasing has been possible since 2011 in the UK. The spectrum leasing route reflects the US's approach to leasing in secondary spectrum markets, resulting in a simpler transaction process and a streamlined regulatory process.

The use of leasing in the UK is, however, behind the US, where several significant spectrum trades have been approved--see, for example, the sale by Qualcomm of its 700 MHz D and E Block (Channel 55 and 56) unpaired U.S. spectrum licences to AT&T for \$1.925bn.

### What lessons have been learnt from the last round of spectrum trading?

Spectrum trading is an ongoing possibility in the UK, rather than consisting of mandated rounds of trades. The government and Ofcom are continuing to refine the trading process based on consultations on spectrum proposals, feedback from industry participants and challenges identified in trading.

To alleviate some of the burden of the trading process, in 2011 Ofcom simplified the trading process and introduced a leasing option. This option is available where a licence explicitly allows it. Leasing is a far less complex route compared to spectrum trading, although the lessee does not acquire a separate spectrum licence.

In its April 2014 Spectrum Management Strategy Report, Ofcom noted that it was working on improving the regulatory environment for user-led spectrum recycling. To do so, Ofcom intends to remove barriers to the transfer of spectrum access rights through the extension of trading and leasing, and provide further flexibility in licence conditions to liberalise spectrum use, minimising the need for licence variations.

In April 2015, Ofcom consulted on its proposed inclusion of further spectrum bands within the trading regulations (See the consultation [here](#)).

In May 2015, Ofcom published its decision (see LNB News 29/05/2015 116) to include three further bands (1452-1492 MHz, 2350-2390 MHz and 3410-3600 MHz) in the Wireless Telegraphy (Mobile Trading) Regulations 2011, SI 2011/1507 by way of amendment implemented by the Wireless Telegraphy (Spectrum Trading) (Amendment) Regulations 2015, SI 2015/1401 and the Wireless Telegraphy (Mobile Spectrum Trading) (Amendment) Regulations 2015, SI 2015/1339 which took effect on 19 June 2015.

### **Are there plans to change the trading system to address any of these challenges?**

Ofcom continuously revises its spectrum strategy in light of market conditions, attempting to achieve a balance between releasing sufficient spectrum and reserving certain blocks for later release. This strategy will eventually have a knock-on effect on the trading system as further spectrum bands are included within the trading regulations.

In its latest annual plan, Ofcom stated that its spectrum-related priorities are to work towards the award of spectrum-- initially by auction-- in the 2.3 GHz, 3.4 GHz and 700 MHz bands. The 700 MHz band is currently used for digital terrestrial television and programme making and special events; Ofcom proposes to repurpose, or 'refarm', this band for mobile data and move elsewhere the services currently on this band.

Ofcom is yet to decide the appropriate amount of spectrum that will be available for award in the upcoming 2.3 GHz and 3.4 GHz auction. In May 2015, Ofcom published a statement and consultation (see LNB News 26/05/2015 67) regarding public sector spectrum release in these bands, and among other things asked potential bidders for their views on how best to proceed with the auction.

The timing of the auction, the rules that apply, and the volume of spectrum to be released, may be affected by the outcome of the merger investigations concerning the recently announced BT/EE and Hutchison/Telefónica UK transactions.

### **Is the current approach future proof?**

Insofar as the UK's policies on spectrum trading and leasing are based on EU law, the current approach is technology-neutral and future proof.

Ofcom continues to refine its approach by looking into other ways to promote investment and innovation in emerging technologies, and includes in its reviews spectrum availability, sharing, trading and liberalisation. For example, in January 2015 Ofcom published the responses received (see LNB News 27/01/2015 134) and proposed steps in its consultation regarding promoting investment and innovation in the Internet of Things.

As regards infrastructure, while spectrum is regulated on a national level in the EU rather than an EU-wide level, the possibility of a true single telecoms market remains unachieved. Ofcom recognises in its spectrum strategy that further spectrum will need to be released as part of a suite of solutions to meet growing mobile data demands and foster growth of emerging technologies.

Cross-border use of consolidated, Europe-wide spectrum would allow more efficient use of spectrum, but this cannot be put into effect while spectrum is regulated by member states at the national level. Ofcom states in its spectrum management strategy that it aims to lead the debate on key international spectrum issues.

### **If you could alter the trading system in one way, what would it be?**

The UK spectrum trading regime, in particular as it applies to mobile spectrum, undoubtedly provides a permissive framework for the reallocation of spectrum to more efficient uses.

The problem is that spectrum holders are not strongly motivated to take positive steps to engage in trading with their competitors. This could result in a situation where spectrum holdings are imbalanced and potentially more-efficient uses for otherwise 'warehoused' holdings, including discontinuous blocks, are not realised.

In order to encourage spectrum trading in the UK, further regulatory intervention may be required. This should be 'light-touch' to give market mechanisms a helping hand. A 'use it or lose it' approach might be considered, as hinted at in the government's 2012 communications review. This could motivate spectrum users to use their allocated spectrum to its capacity, take advantage of spectrum liberalisation where possible to innovate to find uses for their excess spectrum, or release it back to the market for reuse or repurpose--via trading, leasing or auction.

The government has suggested that Ofcom could review the use of spectrum five years after it has been assigned. Such a timescale might encourage innovation and roll-out of new technology, ultimately benefiting consumers and stimulating the secondary spectrum market.

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*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor*



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