

**Intellect's Response to Ofcom's Consultation 'Ensuring effective competition following the introduction of spectrum trading'.
Submission Date: 16th July 2004**

Answers to the 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?

Answer 1:

Intellect supports the overall conclusions reached re the adequacy of current legislation to prevent anti-competitive behaviour, at least once trading and liberalisation have been widely established.

In the early stages it may be important to take necessary steps to prevent trades where it can be predicted that there will be a significant adverse impact on competition.

If in the early stages ex ante regulations were implemented, then for some types of trades it is probable that Ofcom can give 'blanket approval' on the grounds that competition issues are unlikely (e.g. transfers of small amounts of PMR spectrum to other PMR users). On the other hand transfer of significant amounts of cellular mobile spectrum could very well give rise to competition concerns that would be more easily dealt with in advance. Indeed there would be no benefit to any party in allowing a trade to take place in the full knowledge that an ex-post remedy will be necessary. The current consultation does not appear to distinguish between these extremes, therefore it would seem that Ofcom should at least retain the power to prevent certain trades. Many trades could still progress without delay by 'class approval'. As experience is gained, the types of trade that require scrutiny can be modified if necessary.

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?

Answer 2:

Yes, but subject to our recommendations in Answer 1 being adopted. Note that one is examining competition *within markets*. So, the competition issue must always be considered for reasons separate from spectrum itself. And given that spectrum may in the future be used for radically different purposes from what it is used for now, clearly the adjudication of monopoly situations is likely to become increasingly complex.

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Ofcom: If you answer "no" to question 2:

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

Answer 3:

Intellect still considers that there should be a consultation on AIP.

In Intellect's response to Ofcom's November 2003 Consultation on Spectrum Trading we provided the following 2 paragraphs:

"Intellect: AIP (= an annual fee) is a necessary adjunct to Spectrum Trading and is seen as a useful tool in Spectrum Management. However, any change in AIP should be open to public comment. Trading itself should not require a change in AIP. Low/high AIP could also be used to encourage certain applications if there are external societal benefits/costs that would not impact the licensee directly. There is an argument for AIP being set at a level that discourages spectrum hoarding. There is also an argument for AIP being set at a level that will allow Ofcom to recover reasonable across-the-board costs of administering spectrum licensing & trading to fund relevant research. It is Intellect's understanding that although Ofcom will not normally be willing to buy back spectrum or participate in the spectrum after-market, AIP charges for any given spectrum can be ceased by returning the related licences to Ofcom without compensation.

As a footnote on AIP, what is required is stability & certainty/predictability of these fees. Generally, Intellect would expect fees to be decreased from current levels, however, once Spectrum Trading has released more spectrum."

In answer to the question, therefore, Intellect believes that AIP can have some value in persuading holders of inefficiently used spectrum to sell it, especially in the case of certain types of licensee less influenced by opportunity cost than by revenue budgets (e.g. public sector organisations.).

We also note that up-front fees in place of AIP will not extract the full value of the spectrum in the distant future.

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?

Answer 4:

Intellect believes that on occasion 'Use-it-or-lose-it' provisions could provide a useful incentive to use the spectrum and that any such provisions would be traded with the spectrum.

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

Answer 5:

Yes, unreservedly. Moreover, possible reasons for licence revocation should be clearly set out in advance of trading of all spectrum that might be affected.

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

Answer 6:

Intellect considers that the policy on Spectrum Caps cannot easily be cast in stone since market has never been defined as standalone market itself. Therefore it is not the way forward, at least once trading and liberalisation is established. However, in a competitive market it could be a useful tool to look at the potential use of spectrum caps. We would note that should Ofcom decide not to go for ex ante validation of all trades, the use of Spectrum Caps would be one obvious approach as an alternative.

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?

Answer 7:

In the early stages, ex-ante regulation may have a role to play but in the longer term, once trading and liberalisation are well established, the application of competition law ex-post may be satisfactory.

Clearly we should look carefully at how the secondary market takes up and evolves. Certainly, Intellect is aware that the effect of spectrum trading with liberalization may be significant, but overall it is the aim of secondary trading to achieve a better spectrum use that will benefit the economy and the consumers and citizens.

The 'SLC/Significant Lessening of Competition' test could be similar to that used by merger control. Also, the amount of spectrum held after a trade as a proportion of the total available could be used as a trigger for a more detailed examination, but not as a basis for preventing a trade.

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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?

Answer 8:

This compromise would be inappropriate to prevent competition distortions as required by the Framework Directive.

Endorsing what we have answered to Questions 1 and 2, we believe that the existing Competition Laws should be employed to deal with this matter. We would also make the additional comment that the context here must be that this issue is all to do with what the spectrum is to be used for.

(End of Intellect's 4-page response. Contact Name: Jim Munro. Contact Email Address: jim.munro@intellectuk.org; Contact 'Phone Number: 07958-664516)