

Consumer Panel: advice to Ofcom

CONSUMER
PANEL

Ofcom
OFFICE OF COMMUNICATIONS

Title of Ofcom Project:	Ofcom's Digital Dividend Review Consultation
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Background

1. The Panel has engaged with Ofcom on the Digital Dividend Review (DDR) for over a year. Ofcom first presented its thoughts on its DDR policy to the Panel in May 2006. Panel members had engaged with Ofcom staff before this date and subsequently as its policy developed. We have therefore noted the development of this policy from its early stages to Ofcom's current thinking. We recognise that this policy is "work in progress" and propose to remain closely engaged with it as it develops further.
2. We believe the DDR is one of the most important policies that Ofcom has undertaken, for all the strong reasons set out in the consultation document. We concur with the basic proposition that the development of a regulatory framework for the utilisation of the digital dividend is one of the most important and difficult tasks Ofcom has faced.
3. Recognising that this is still "work in progress", the Panel's response is essentially an articulated list of questions which it suggests as areas of focus for Ofcom in the next phase of its work on DDR. The main point we wish to raise is this: Ofcom has, in this consultation, presented a very large amount of well-argued work around the design and execution of an auction process for the release of this large amount of spectrum. Ofcom has also

undertaken significant consumer research – although Ofcom, like the Panel, recognises that it is extremely difficult to ascertain consumer views about services and delivery mechanisms that are as yet not in existence. We believe that Ofcom should, in the next phase of its work on DDR devote even more thought to how possible outcomes – either positive or negative - for consumers and citizens might develop, and how they might be addressed. Ofcom will, we believe, have to be prepared to take a more proactive role in ensuring that certain outcomes for consumers and citizens are at least made possible. The points we make below expand on this.

Scale – and communication

4. We recognise that Ofcom has previously auctioned parts of the UK spectrum but the proposed release is on a much larger scale than before. So although the proposition that the newly-released spectrum made available should be auctioned is not itself a departure for the UK, we think the sheer scale of what is proposed does raise a number of new issues, which we touch on below. We raise this point because we think that the whole principle of spectrum auction, and the fact that it has already occurred, may not be clearly visible to the UK public. This suggests to us that there is an issue to be considered carefully by Ofcom, about how and when the issues around the proposed spectrum auction are put up for debate in an accessible form.

Universality

5. It is important to note people in the UK value the notion of universality in the sense of social inclusivity. This is borne out in Ofcom's consumer research, produced by Holden Pearmain and ORC International, for the DDR.
6. On page 8 and 57 respectively it states:

“Universal coverage and access were seen by consumers to be the main criteria in deciding whether new services have potential additional value to society

2.17 ...A major finding from this research was the importance of the principles of universal coverage and universal access. These were widely held principles, commonly seen as a starting point in discussion about the additional value to society of digital services. It was strongly

believed that for services to have additional value to society, no one should be prevented from using them because of financial, geographical or other reasons.

How do consumers feel spectrum should be allocated to maximise the value to society?

8.12 There was universal agreement in the groups that some sort of intervention was necessary to ensure that services that are valuable to society are made available to the maximum number of people. Respondents felt that the private sector alone, being motivated by profit, would not necessarily deliver services that are valuable to society.”

7. These issues, about the impact on “citizens” of the availability or otherwise of particular services seem to us to be amongst the most difficult in this process of policy formation – and should in due course form a major part of the process of public debate to which we have just referred. We understand that Ofcom, rightly, does not want to specify what the licence conditions for the auctioned spectrum to be. This would pre-determine, or force Ofcom to determine, what technologies could use the released spectrum. Additionally it would be contrary to a technology neutral principle. However, we would want Ofcom to set out its thinking on what may happen if a service was deemed to be central to a person’s social inclusivity but geographical access was not possible; and how Ofcom, or others, could help provide conditions for such a service to be delivered.
8. An example of what we have in mind is this: some groups in the population (for example, those living in remote and some rural areas, or in low income urban neighbourhoods) may be severely disadvantaged by the outcome of a process in which all spectrum that is cleared as a result of digital switchover is auctioned. This is because successful bidders and subsequent resale buyers may not consider that it is an economic proposition to extend their services nationally to all parts of the UK. Cherry picking is a distinct possibility. The problem is exacerbated by the fact that those groups denied access on economic grounds to new services on auctioned spectrum are likely also to have no or limited access to services provided in other ways (for example, cable).

Spectrum Bank

9. It is true that no matter what moment in time we are in there is always more market and social information available in the future. And more technological advances to take account of as each day, month, or year progresses – with each technology having in some sense a valid claim to parts of the UK spectrum. Ofcom’s position that it cannot predict what products or services will be delivered by future markets is understandable - and hence its reluctance to try to do what used to be called picking ‘winners’ or create an innovation reserve. Also, we recognise that a delay in releasing spectrum not only has an economic cost to the UK, but that it stops onward / secondary trading that could resolve the inefficient allocation of spectrum. And we recognise that secondary trading could resolve some of our concerns for the delivery of services to rural areas or for other public valued services.

10. However, we have, as a Panel, concerns with the stance: ‘we don’t know the future therefore to maximise value to the UK all the spectrum should be released into the market’. Releasing the entire spectrum and not knowing the future could result in unforeseen or unintended consequences that are unable to be rectified once the policy has been implemented.

11. We would like Ofcom to think more broadly on this issue and perhaps rather than hold spectrum back for innovation hold spectrum back as a reserve for socially beneficial circumstances. We refer Ofcom to its consumer research at paragraph 8.12:

“Respondents felt that the private sector alone, being motivated by profit, would not necessarily deliver services that are valuable to society”.

12. One concern, for example, is that after the spectrum is auctioned rural areas will not have access to services due to low populated areas not being financially viable for service delivery. And organisations that could deliver services in rural areas are likely to be small and may not have the financial depth to be successful at auction. Yet the released spectrum could be used to deliver high socially-valued services, i.e. the use of Wimax to deliver a high speed data link in rural areas. Thus, if services failed to be delivered and the public value of these services was deemed high enough, market failure could occur.

13. We note that Ofcom states that high socially-valued services could be delivered over other platforms but it should be noted that this may not be possible in all circumstances and that people in rural locations can face multiple forms of communication deprivation. For example, the delivery of services over a fixed broadband network may not be possible to those in rural areas due to poor network infrastructure that results in low speeds or no connection at all.

14. Therefore, we strongly recommend to Ofcom to set out in its next consultation document some thinking and evaluation on the above points. Importantly, the analysis would include how a spectrum allocation process for high socially-valued services could be administered. We would also be very interested to see if Ofcom can take forward the idea of a contingent reserve of spectrum – and if so, which part of the spectrum could best be used for such a reserve.

Auction Process

15. The first step to liberalise and re-release the UK's spectrum back into the market will be at auction. It is of course of the utmost importance that the auction process is designed not only to minimise any possibility of the market failure that Ofcom refers to at page 22 of the consultation annex:

“A744 there is the possibility of market failure because bids at an auction generally reflect only on element of total value, namely the producer value or profit that the supplier expects to earn”.

16. But it is also important to help minimise the mis-allocation of resources that may have downstream consequences for the consumer. While an organisation that overestimated the cost of purchased spectrum at auction to its financial and operational detriment could onward trade – helping maximise the value to society. One possible outcome is that because spectrum is a finite resource and thus a high economic value, organisations may wait until it is able to afford to rollout its services or a new network. Consequently, the benefit of releasing the spectrum to the market may not be seen by UK consumers for a number of years.

17. Ofcom touches briefly on what potential remedies there are to avoid the risk of market failure at auction at page 26 of the consultation annex:

A7.67 “The range of intervention options which typically exist when resolving market failures in relation to spectrum allocations range from direct grants of spectrum, to intervention within an award (such as bidder credits or the provision of subsidies), to auction design changes (such as alterations to packaging and auction rules to equalise the opportunities for different bidders)”.

18. We note that Ofcom is designing the spectrum packages for auction to enable local television to purchase spectrum in order to deliver a service highly valued by consumers. Thus, while recognising Ofcom is first and foremost an economic regulator there are broader citizen issues for Ofcom to help deliver. As we previously mentioned we would particularly welcome further analysis on creating a financial framework that could enable smaller organisations to have the financial capacity to compete at auction, which could deliver services of a high, but dispersed, public value.

Market Failure

19. There are obvious benefits to a process that will lead to a liberalising of the spectrum market, and for secondary trading to correct market failure more efficiently than a regulator. And while Ofcom sets out what the causes of market failure are and what the key messages it can take from its work in this area is; we ask Ofcom to clearly set out what regulatory tools it has to correct a possible market failure, if it should occur.

20. Also, the social value of a service is continually being re-evaluated due to market developments and technological advances. We understand it is difficult to quantify social value accurately, but we do look to Ofcom to set out clearly in the next consultation whether, and if so how, it would rectify the possible outcome that the social value of a service was not being maximised in the marketplace.

21. With this in mind, we ask Ofcom if it has thought about devising a regulatory technique, and if not that it should, which enables it to revisit the outcome of spectrum allocation (by whatever method) in the light of later and unknowable events. Thus, could it design a contingent or modifiable outcome that could re-visit a spectrum allocation question after twelve or twenty-four months?

Spectrum hoarding & Anti - Competitive Behaviour

22. The emergence of cartel or oligopolistic behaviour may not solely affect consumers in terms of higher prices - it can also cause barriers to entry for other companies that could deliver innovative or high-valued services to consumers or citizens. We understand that Ofcom is undertaking work to review its powers to ensure spectrum hoarding and anti-competitive behaviour can be stopped. Some of these powers fall under the Communications Act, the Competition Act, the Enterprise Act and EU sectoral regulation. We look forward to seeing Ofcom's work in this area. It is these powers that will be essential in ensuring the markets work to their optimum, producing the highest total value to the UK as a whole.
23. Our concern here is that the ability to react quickly to anti-competitive behaviour is key to ensuring that consumer detriment is minimised and market efficiency is maximised. Accordingly we do have concerns that any reliance on the Competition Act may prove to be a slow and difficult route – and by the time an outcome has been achieved the detriment to consumers and citizens may already have occurred.
24. In this connection, we wonder whether at least initially Ofcom has considered capping total allocations of spectrum to any individual corporate group (assuming that this can be done within existing powers).

Conclusion

25. We have set out above a number of areas for further consideration, from the standpoint of ensuring that the process of allocating the digital dividend works to the greatest benefit of UK consumers and citizens. Our concerns can be summarised as being about: how to ensure that available spectrum will be used to deliver products and services that bring real quality and innovation to UK consumers; that try to meet the needs of UK citizens wherever and whoever they may be; and that can give us all enough breathing space to ensure that innovation can flourish.
26. We recognise that this is a tough challenge and that we have posed questions rather than provided answers. But we think these are the right questions at this stage and look forward to working with Ofcom to try to find answers as we go through this year.