

Crafting Spectrum Auctions to Comply with EU Policies

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3 June 2011

EETT 6th International Conference

Advanced Communication Infrastructures as a Cornerstone for Europe's Digital Agenda

Athens, DAIS Conference Centre, June 2nd – 3rd 2011

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1. EU COMMERCIAL SPECTRUM LANDSCAPE

Existing 900 and 1800 MHz Bands

Traditional frequency bands to be re-assigned via auctions or beauty contests

800 MHz Band

‘Digital Dividend’ allows new entrants to roll out view networks into lower density areas in a cost-efficient way

2.6 GHz Band

Much lower coverage possibilities, but can support far more data (urban areas)

And later??...

1.5 and 2.3 GHz Bands

Available for mobile broadband after 2013; to reach 1200 MHz by 2015

700 MHz Band

Possibility of opening up to new services

2. COMPLIANCE ISSUES

Compliance with Revised EU Regulatory Framework by 25 May 2011 for new licences. Existing licences to comply with new rules by May 2016 (to cater for legitimate expectations/legal certainty/long term investments)

Requirements under the *Framework Directive* and under the *Authorization Directive*

Requirements under spectrum-specific legal instruments

2002 Spectrum Decision (harmonized conditions re availability and use of radio spectrum)

2002 Radio Spectrum Policy Group formation

Reforms relating to technology neutrality and service neutrality, secondary trading possibilities, introduction of the “use it or lose it” model

Introduction of Radio Spectrum Policy Programmes (Article 8a of the *Framework Directive*)

3. LIMITS TO GENERAL PRINCIPLE OF MEMBER STATE DISCRETION

No “exclusive” or “special” rights to spectrum

* Need to respect the principles of technology neutrality and service neutrality

* Need for all authorizations to satisfy the four criteria of: (i) Objectivity; (ii) Transparency; (iii) Non-discrimination; and (iv) Proportionality

* Need to foster the development of innovative services and competition

3.1 TECHNOLOGY NEUTRALITY & SERVICES NEUTRALITY

Subject to public health and safety exceptions

Subject to:

- (i) technical quality concerns;
- (ii) frequency sharing maximization goals;
- (iii) need to prevent inefficient use; and
- (iv) pursuits of SGEI objectives.

3.2 FOUR-FOLD CRITERIA OF:

- (i) **Objectivity**
- (ii) **Transparency**
- (iii) **Non-discrimination**
- (iv) **Proportionality**

Principles apply with equal effect to *de novo* licensing and to renewals.

Principles also apply in parallel to SGEI goals (where specified).

Principles must not conflict with broad liberalization principles.

Information in the authorization process must be accessible to all market players.

Administrative fees must relate to the four key elements of the authorization process, namely: (i) issue; (ii) management; (iii) control; and (iv) enforcement.

Reference period for authorization must be reasonable in light of investment cycle.

Actual differences in treatment can be justified by the existence of substantial objective factors (*i.e.*, not “like” cases).

Economic value of a licence needs to be considered over its full life.

Licences originally obtained for free may be subject to other rights of lease or transfer.

3.3 FOSTERING THE DEVELOPMENT OF INNOVATIVE SERVICES AND COMPETITION

General principle of “levelling the playing field”.

NRAs must foster new entry while seeking to avoid incumbents entrenching their dominant position (need to ensure effective competition).

Extent to which fostering of competition could override other principles is a “grey” area, but non-discrimination rule should be interpreted as a tool to protect new entrants from incumbents.

Development of a “use it or lose it” model suggests that competitive market goal can override the non-discrimination goal.

“Use it or lose it” model reflects the efficiency goal. There is a need to prevent “spectrum hoarding” or “spectrum warehousing”.

Greater scope for NRA monitoring role.

Spectrum trading and 3rd party access rules are also designed to introduce greater competition.

4. REQUIREMENTS OF SPECTRUM-SPECIFIC INSTRUMENTS

New Decision adopted on 18 April 2011 setting out technical rules for reforming of GSM spectrum in the 900 MHz and 1800 MHz bands for use by 4G services so that they can co-exist with GSM and 3G services.

Earlier October 2009 Decision set out technical parameters for UMTS in the bands to be implemented by Member States by May 2010. Latest Decision sets out technical parameters for LTE (Long Term Evolution) and WIMAX (Worldwide Interoperability for Microwave Access) systems, to be implemented by 31 December 2011.

Directive 2009/114/EC of 16 September 2009, amending Directive 87/372/EEC, provides that the 900 MHz band should be available to all technology that can co-exist with GSM. Moreover, where objectively justified and proportionate, Member States can amend the rights of use of 900 MHz operators in order to address distortions of competition in mobile market in accordance with Article 14 of the *Authorization Directive*.

5. THE ALLOCATION PROCESS

Allocation through either the auction or the “beauty contest” mechanisms (the latter can be a simple licence renewal).

European Courts emphasize freedom to choose licence awards procedures, subject to general principles (especially non-discrimination and freedom of competition principles).

Advisory role of BEREC, alongside the RSPG.

Auction process most likely to yield best results where demand exceeds supply. Beauty contests facilitate the imposition of non-price obligations. Minimising essential amounts of spectrum might be assigned in a preliminary “non-competition” phase.

Re-farming processes may be necessary through State intervention to facilitate efficient migrations to more efficient frequency bands.

Problematic nature of applications for service “bundles” of spectrum if this leads to more consolidation and to less niche market entry.

Importance of guarding against lower prices so as not to be considered State aid for some licences.

Considerations of allocative vs. technical efficiency. Getting the balance and timing right between renewals of existing licenses and allocations in new bands.

Allocation Mechanism to be Driven by Five (5) Guiding Principles:

1. Build spectrum assignment on the notion of a “sustainable market”
2. Allow for gradual introduction of a new technology and/or capacity
3. Design the process for spectrum assignment so as to minimize competitive distortions
4. Align conditions and other regulatory levers to allow for financial stability
5. Support the take-up of market demand