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Competition

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Competition law and spectrum : a few issues

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Outline

- Pro-competitive allocation
- Pro-competitive licence conditions
- Spectrum markets?
- Art 101 TFEU
- Art 102 TFEU
- Merger control



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Pro-competitive allocation conditions

The Regulatory Framework provides for pro-competitive spectrum allocation: e.g. Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services

- Prohibits the granting of exclusive or special rights.
- Provides that the assignment of spectrum based on objective, transparent, non-discriminatory and proportionate criteria.



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Pro-competitive licence conditions

- “Use it or lose it” models – if properly monitored
- Rights fixed in time versus indefinite rights
- Possibility of transfer of rights
- Third parties access and spectrum sharing
- Administrative incentive pricing



Application of competition law: “Spectrum markets”?

- Product market definition
 - Behavior will usually have to be examined in (wholesale/retail) telecommunications markets, not in spectrum markets.
 - Relevant parameters: supply/ demand side substitutability (are there wireline alternatives?)
 - Where trading is allowed, trading markets may exist.
- Geographic market definition



Art. 101 TFEU

- Art 101(1) and 101(3).
- Need of case-by-case analysis.
- In spectrum assignment, difficult to establish collusion where the authority assigns.
- Where trading is allowed, collusion not to sell unused spectrum to new entrants, or to sell to new entrants at worse conditions?



Art. 102 TFEU - Dominance

- Single / joint dominance
- A small number of competitors in mobile communications does not suffice to establish joint dominance.
- *Airtours* conditions for joint dominance:
 - Transparency (ability to monitor whether common policy is being applied)
 - Retaliation possibilities (deterrents to ensure sustainability of tacit coordination over time)
 - Absence of external constraints (competitors or consumers will not jeopardize the results expected from the common policy)



Art. 102 TFEU – The abuse

- Anticompetitive foreclosure
- Types of abuse:
 - Refusal to supply and margin squeeze
 - Predation
 - Tying and bundling
 -



Possible abuses related to spectrum

- Spectrum hoarding can be an element of abusive behaviour with effects at wholesale or retail level.
- But can hoarding constitute an abuse on its own?
- Refusing access to unused spectrum?
- Excessive pricing?



EU Merger control

- Prospective analysis for concentrations of Community dimension.
- In recent T-Mobile/Orange merger, the Commission found that the transaction, as initially notified, could (a) threaten the viability of 3UK, the smallest MNO in the UK and (b) result in the new entity being the only MNO able to offer next-generation mobile data services through LTE in the medium term.
- To address these competition concerns, the parties concluded a revised agreement with 3UK securing its position as a competitor and offered to divest 15 MHz of spectrum in the 1800MHz frequency, which allowed the Commission to approve the merger.



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A note on spectrum trading

- Trading has many positive aspects.
- But is not the panacea.
- Competition law can apply to spectrum trading as trading develops.



Conclusions

- The Regulatory Framework (including the Competition Directive) provides for pro-competitive spectrum allocation.
- General competition law (both article 101 and 102 TFEU) can be used in relation to spectrum to avoid anticompetitive conducts in wholesale and retail telecommunications markets – but whether there are separate spectrum markets is questionable.
- Spectrum trading is likely to develop and competition law can also cover behaviour in trading.