

Public consultation on secondary trading of rights to use radio spectrum

– Wind Telecomunicazioni comments –

Rome, 2 April 2004

Wind Telecomunicazioni Spa

Sede legale e operativa:

Via C.G. Viola, 48

00148 Roma

Sede operativa:

Via Lorenteggio, 257 - 20152 Milano

P.IVA C.F. e CCIAA di Roma 05410741002

Capitale sociale Euro 146.100.000,00 i.v

Direzione Studi e Affari Regolamentari

via C.G. Viola 48 - 00148 Roma

Tel. +39 06 83113816

Public consultation on secondary trading of rights to use radio spectrum

- Wind Telecomunicazioni comments -

Introduction

Wind Telecomunicazioni S.p.A. ("Wind") welcomes the opportunity to offer its views on this public consultation on secondary trading of rights to use the radio spectrum (consultation).

1 Do you consider secondary trading of rights to use radio spectrum to be beneficial to consumers, businesses and radio users? why/why not?

Wind considers the introduction of Secondary Spectrum Trading (SST) to be a particularly complex and delicate issue. At the same time, if appropriately implemented, it may yield great benefits to the radio spectrum stakeholders (both consumers and businesses) and more generally to the entire communications sector. Starting from this general consideration we would further add that by "appropriately implemented" we mean a gradual and regulated introduction of SST:

- This should be aimed at:
 - protecting the interests of both consumers and businesses through the promotion of open and competitive markets, at the same time preventing markets from being pre-empted or foreclosed;
 - promoting new investments and innovation but safeguarding those already in place (it is essential not to expose existing asset investments to risks of becoming stranded);
 - preserving freedom of speech and defending pluralism of information;
- and should take into account the non homogeneity of radio spectrum portions in terms of:
 - different propagation characteristics across the frequency range;
 - different legal basis and assignment procedures for rights to use spectrum;
 - different grant costs and economic values of the markets currently using distinct spectrum bands.

2 What types of transfer of rights to use radio spectrum (full, leasing, partial etc.) do you consider can be beneficial to consumers, businesses and radio users? why/why not?

Wind maintains that, as a general rule, all of these different types of trading arrangements can be beneficial to consumers, businesses and radio users. This belief is based on the theoretical assumption that allowing spectrum holders flexibility to decide what and how they should trade would boost the amount of traded spectrum. At the same time, Wind would remark that not any type of transfer may be appropriate or even possible for all radio

spectrum portions, due to the relevant differences which characterise each spectrum portion (see answer to question 1). Hence, Wind stresses the importance that SST be gradually and partially introduced by NRAs only after a case-by-case analysis of the pros and cons. A “one size fits all” approach, indeed, does not seem to be applicable to this complex issue.

For example, the implementation of SST for 3G services -by means of secondary trading or by reconfiguring the rights of spectrum portions currently used to provide other services (refarming of 2G frequency bands)- raises a number of concerns. Mobile operators acquired 3G spectrum portions and licenses in the context of public and transparent auctions; the (significant) price paid for the frequencies has been incorporated in current shares value. A full transfer of the rights to use 3G spectrum at prices which differ from those of primary assignment would dramatically affect all 3G operators' shares, due to the fact that all operators would be forced to appropriately modify their spectrum values (this resulting in a capital loss or gain for a not tangible asset).

3 What rights and associated obligations do you consider should be within the scope of secondary trading of rights to use radio spectrum

Once again, Wind maintains that NRAs should carefully evaluate these aspects in light of the specific market context related to each spectrum portion. For example, the strict obligations which Spectrum Management Authorities (in Italy, the Communications Ministry) have associated to spectrum licences (mandating the development of mobile networks through the definition of progressive and stricter ties on country coverage and QoS) have probably played a role in the success of the European mobile industry. These obligations greatly helped solving catch 22 situations of mobile operators not willing to invest until strong market demand arises and demand not arising due to the scarcity of network externalities due to lack of investments.

4 Would you want to see secondary trading of rights to use radio spectrum introduced in your country or in the countries of interest to you?

a) If yes – why, to what extent? when? frequency bands/services?

b) If no – why not, are there other tools that better suit your needs?

Community policy approach to the use of radio spectrum should be coordinated and harmonised at Community level in order to realize Community policy objectives efficiently. At the same time, SST implementation should be adapted to the specific economic, technical and legal contexts of each member State. Hence, Wind expects that, starting from a common and harmonised approach shared at EU level, it will be within the scope of national Authorities to pursue this objective, taking into account national markets peculiarities.

5) What information and electronic communication facilities should be made available to facilitate implementation of secondary trading of rights to use radio spectrum?

Implementing SST involves shifting spectrum management responsibilities from the Spectrum Management Authority (in Italy this role is played by the Communications Ministry) towards industry (this due to the impossibility to continue to use a centralised approach to spectrum management once spectrum rights and assignments will be no longer directly governed by a single body). Accordingly, given the importance that spectrum be safeguarded from interference (which could bring, in extreme cases, to both commercial and safety dramatic consequences), it is fundamental that the process of implementation of SST be carefully led by the introduction of a number of regulatory measures aimed at helping NRAs and the industry to share spectrum management responsibilities. This involves, for example:

- creating a public database of spectrum assignments with a core set of technical and location-based information;
- defining a number of procedures, which operators should carry out for any proposed change of use and/or trade of spectrum.

Nonetheless, there would be a continuous need for a central regulatory Authority, in order to monitor interference and ensure enforcement action against breaches of licence terms and illegal spectrum use.

6) Is the possibility to reconfigure rights important? If yes, what kinds of reconfiguration do you consider would benefit consumers, businesses and users of spectrum? (geography, frequency, time, other)

Wind maintains that reconfiguration of spectrum rights is one of the most crucial and sensible issue of the implementation of SST. It involves balancing the theoretical welfare gains of a more liberalised context against practical and real market failures, which could arise if an excessive fragmentation of spectrum in the market takes place. An excessive fragmentation could make very difficult to evaluate SMP positions or even dramatically complicate spectrum management. Accordingly, usage rights should be defined as clearly as possible in terms of frequency, bands, geographic area covered and duration. This is especially true, for instance, with respect to spectrum bands which are close to those used for air traffic control or for national security reasons. In this case, spectrum management tends to be crucially dependent on the possibility of rapid intervention. For example, in the specific market environment of mobile industry (2G and 3G), given the existing legal and economic legacies, it seems not possible to rapidly develop a SST foreseeing the ability for spectrum tenants to reconfigure spectrum use. Accordingly, further liberalisation of spectrum use would only be possible after EU and national Authorities have accurately evaluated, in light of market results, that liberalising spectrum use would bring great benefits in terms of both economic and technical efficiency.

7) Is the possibility to use the spectrum in a flexible way important? If yes, what kinds of flexibility do you consider would benefit consumers, business and users of spectrum (service, technical constraints, other)

Wind thinks that a flexible use of the spectrum should be favourably considered by all stakeholders. Inflexible allocations have artificially generated spectrum scarcities, limiting entry into spectrum-using industries. On the other hand, Wind points out that complete de-regulation of the use of spectrum may seriously affect competition. It must be noted that while all operators would share the same theoretical opportunities, only larger (probably the incumbents or SMPs) operators could effectively exercise such a possibility. In fact, to effectively change spectrum use, operators need availability of some dedicated equipment (both transmitting and receiving). We believe that only the largest operators (which benefit from a critical mass of clients) would be able to obtain from equipment producers dedicated equipment at economically viable prices.

8) To what extent is the tenure an important issue in assessing secondary trading? (indefinite, rolling, fixed, annual, other)

As previously remarked in relation to other important issues Wind maintains that different types of tenures may be appropriate and welfare enhancing for different spectrum portions, given the extreme variety of services/markets which insist on the whole of the spectrum. In particular, Wind remarks the importance that future and current investments be safeguarded and further promoted, hence defining tenures (with particular reference to the definition of expiring dates), which are compatible with an adequate remuneration of investments.

9) Should the same rules and regulations apply for the whole of the spectrum?

- a) Is there a need for different rules and regulations for different frequency bands? geographical areas? services? users?**
- b) If you see a need for different rules and regulations in question 8a above, please give examples?**

As previously stressed, Wind favours a gradual and controlled implementation of SST. This means that a case-by-case analysis should be carried out for each spectrum band.

This analysis should take into account:

- different policy objectives for competitive and technical issues, in order to adapt spectrum regulation to the different balance in the outcome to be pursued (e.g. pluralism of information for television and radio broadcasting, safety for air traffic control, etc.);
- different legal basis of spectrum rights which have already been assigned, in order to reduce risks of SST being hindered by legal disputes that may arise should SST be introduced in the market without taking into account both legal and economical legacies with the past;
- presence of operators not comparable with others, which have grown in former monopoly markets, in order to adapt spectrum regulation to the different competitive contexts.

10) Should there be specific competition rules in relation to implementing secondary trading of rights to use radio spectrum, or is general competition law enough?

In Wind's opinion, competition law is not sufficient to guarantee that implementation of SST takes place without major competitive or technical concerns; given the ex-post approach of competition law and the importance of the issue at stake, Wind believes that a close supervision by either the ministries or the NRAs over the implementation process and initial starting phase is needed, in order to prevent risks of market failures in spectrum management, due to interference or to SMP operators strategically buying spectrum to pre-empt markets or exclude rivals. Market failures would dramatically affect stakeholders' confidence that competition and market opening would bring benefits to both consumers and industry. Wind, therefore, stresses the importance that implementation of SST be led by specific ex-ante regulation, covering both competitive and technical aspects, and monitored under the applicable competition rules.

11) What do you see as the main responsibilities for a spectrum management authority in regards to secondary trading of rights to use radio spectrum?

In principle, the Spectrum Management Authority (SMA) should be able to avoid, through ex-ante regulation, any possible market failure related to spectrum trading. In particular, Wind underlines the importance of the definition of a comprehensive set of rules on spectrum bands. This set of rules should cover both technical and competitive issues, allowing for the organisation of the spectrum into a number of homogeneous "spectrum environments".

12) To what extent is spectrum management authority approval of trades a benefit or an impediment to the development of a market for secondary trading of rights to use radio spectrum? Under what circumstances do you consider it would be necessary for a spectrum management authority to refuse a trade?

From a theoretical point of view, in Wind's opinion, spectrum trading should be allowed whenever the transfer of licences increases economic efficiency; in practice, it would be important to define the criteria for measuring such economic efficiency and how and whether it is possible to define a systematic approach to this quantitative aleatory analysis. Given the complexity and innovative character of SST, regulatory authorities should initially decide on a case-by-case basis, leaving the creation of a more systematic approach only after having gained sufficient practical experience on market outcomes.

In particular, Authorities should carefully consider trades resulting in the concentration of spectrum in the hands of SMP operators. In those cases NRAs should make the approval conditional upon the acceptance of the appropriate regulatory measures by the undertaking concerned (similarly to conditioned approval in merger cases).

13) What specific measures could a spectrum management authority take to handle the issues if secondary trading is introduced? (ex ante approval procedures, ex

post notification, competition aspects, limit change of use, interference aspects, other)

As already remarked, Wind maintains that, given the peculiarities of spectrum employing industries, it is not possible to define a common and unique regulatory environment, nor to rigidly identify a set of specific measures.

14) To what extent should the national spectrum management authority actively facilitate secondary trading of rights to use radio spectrum?

Existing national spectrum management authorities should assist NRAs (e.g. creation of a public database of spectrum assignments and definition of procedures operators should carry out in order to safeguard spectrum from interference) in order to progressively move from centralised spectrum management towards an industry distributed one.

15) Do you consider that adoption of individual regimes by EU member states will cause problems for consumers, businesses and radio users? If yes, in what ways and to what extent?

In principle, the development of individual regimes at country level can be detrimental if it is not consistent, at an appropriate detailed level, with the European goal of harmonisation (see answer to the following question).

16) Do you consider that the EU should take measures to facilitate the implementation of secondary trading of rights to use radio spectrum? If so, in what areas and to what extent?

In principle harmonisation at EU level should be pursued, but practical implementation of SST will indeed require, in the starting phase, taking into account the country-specific conditions. Accordingly, EU should leave to NRAs the practical implementation, continuing to monitor the ongoing SST implementation process in each member State in order:

- to develop, where possible, best practices;
- to assure that different implementation of SST among member states does not affect competition at EU level.

17) To what extent is European harmonisation of frequencies an important issue in regards to secondary trading of rights to use radio spectrum?

Implementation of SST in EU member States may result in contrast with the harmonisation of frequencies, especially if SST gives spectrum holders the possibility to change the use of spectrum bands. On the other hand, once SST is implemented in the whole of EU with similar characteristics, this will result in a more general harmonisation of the spectrum use,

leaving to market players the possibility to harmonise frequencies by means of services or transmitting technologies.

Please note that Wind has no objection to the above comments being made public and that any question regarding these comments may be addressed to:

Giovanni Amendola

Giovanni.Amendola@mail.wind.it