Telecom Hotline

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TELCOS CAN NOW TRADE IN SPECTRUM

- Spectrum Trading finally permitted.
- Sharing of spectrum also permitted.
- Operators will be allowed to sell the spectrum after 2 years from the date of acquisition through auction or in case of administratively assigned spectrum, 2 years after conversion into tradable spectrum.

From a consumer's perspective, these regulations could improve the quality of mobile network service and lead to cheaper tariffs.

Efficient utilization is possibly the first step towards preserving scarce resources.[1] Spectrum has traditionally been subject to tight regulatory controls. However with the changing economic milieu, the speed of technological innovation and increasing market demands, there has been a requirement to lessen government control and let market forces determine spectrum utilization.

Considering, the economic worth of spectrum, the introduction of much awaited Guidelines for Trading of Access Spectrum by Access Service Providers, on 12th October, 2015 ("**Spectrum Trading Guidelines**" or **"Guidelines"**) is the latest in a series of reforms being introduced by the Government.

The Department of Telecom, Ministry of Communications and Information Technology ("**DoT**") released the Spectrum Trading Guidelines close on the heels of the Guidelines for Sharing of Access Spectrum by Access Service Providers ("**Spectrum Sharing Guidelines**"). The Spectrum Sharing Guidelines allow the sharing of spectrum between two licensees subject to the condition that two independent networks are provided in the band. These developments, coupled with the Guidelines for Transfer/Merger of various categories of Telecommunication service licences/authorisation under Unified Licence on compromises, arrangements and amalgamation of the companies (**"M&A Guidelines"**) should give a much needed boost to consolidation in the highly fragmented Indian telecom market.

Until 2013, the Telecom Regulator, i.e. the Telecom Regulatory Authority of India ("**TRAI**") was of the view that it was pre-mature to introduce spectrum sharing or spectrum trading guidelines. The TRAI in its recommendations on 'Spectrum Management and Licensing Framework' in 2010 as well as its recommendations on 'Auction of Spectrum' in 2012 had observed that in countries where spectrum trading was permitted, the spectrum is normally assigned through a market mechanism. However, in India except for 3G/BWA spectrum (which was auctioned), all other spectrum available with the operators had been obtained administratively without paying its market price.[2] As such since spectrum, has traditionally been assigned on a "right to use" basis for a fixed period to the service provider therefore licensee has no ownership right to enable it to 'trade' in it.

However, in light of the fact that the Government had decided that all spectrum holders will have to a pay one-time charge at a market-determined price for their existing spectrum held beyond 4.4 MHz/2.5MHz for GSM/CDMA license holders and thereby putting them on an equal footing with those holding auctioned spectrum, the TRAI in its 2013 recommendation on Valuation and Reserve Price of Spectrum suggested that spectrum trading should be permitted.

This recommendation was in line with the Government's National Telecom Policy, 2012 **("NTP")**, which anticipated the need to incorporate greater flexibility in spectrum management and envisaged the following:

"To move at the earliest towards liberalization of spectrum to enable use of spectrum in any band to provide any service in any technology as well as to permit spectrum pooling, sharing and later, trading to enable optimal utilization of spectrum through appropriate regulatory framework."

We now take a look at the key aspects of the Spectrum Trading Guidelines.

SALIENT FEATURES OF THE SPECTRUM TRADING GUIDELINES

1. *Trading allowed between Access Service Providers:* Spectrum trading has been permitted for spectrum earmarked for Access Services and which can be traded for the entire Licensed Service Area in which it was allotted in the following bands: 800, 900, 1800, 2100, 2300, 2500 MHz. Further, it has been clarified that spectrum trading will not alter the original validity period of spectrum assignment as applicable to the traded block spectrum.
2. *Trade only After 2 years:* The Spectrum Trading Guidelines specify that operators will be allowed to sell the spectrum after 2 years from the date of acquisition through auction or in case of administratively assigned

spectrum, 2 years after conversion into tradeable spectrum. This move appears to be in line with the Government's policy on preventing speculative trading in spectrum.

3. *Only Auctioned Spectrum can be acquired*: The Spectrum Trading Guidelines stipulate that only spectrum that has been bought through auction from 2010 onwards, or for which the market price has been paid can be traded between operators. This particular point seems to stem from the TRAI Recommendation[3] which noted that, allowing the operators to trade in administratively allocated spectrum could result in unearned windfall gains to such operators.
4. *Only Transfer no Lease*: The Spectrum Trading Guidelines specify that there is only a transfer of 'right to use' from the seller to the buyer. In addition, the leasing of spectrum has been prohibited under the Spectrum Trading Guidelines While it is not clear what would constitute lease of spectrum, from normal parlance it appears to be temporary spectrum trade where ownership is not transferred. Since spectrum sharing has already been allowed the DoT may have felt it unnecessary to allow spectrum leasing at this point.
5. *Carry over of Obligations*: With the transfer of spectrum, liabilities related to spectrum like network rollout and dues (inclusive of Spectrum Usage Charges) will get transferred to the buyer. The seller is required to clear its Spectrum Usage Charges (SUC) and its installment of payment due (in case seller had acquired the spectrum through auction and opted for deferred payment) till the effective date of trade and thereafter, the buyer has been made liable to clear all these dues. Notably, in case, only a part of the spectrum in a particular spectrum band is transferred, then both the buyer and the seller will have roll-out obligations
6. *Transfer Fee*: In order to cover the administrative charges incurred by the government, a transfer fee of 1% of the transaction amount of the trade or 1% of the prescribed market price whichever is higher would be payable by the buyer to the government. The transaction amount would be exclusively decided by the buyer and the seller. The Spectrum Trading Guidelines are silent on whether the buyer and the seller can commercially decide to share the transfer fee. Further, sellers should be aware of the fact the Guidelines mandated that the amount received as consideration for the spectrum trade will be included in the Adjusted Gross Revenue for the purpose of calculating license fees; as such the amount of license fees could be considerably higher.

ANALYSIS

India's mobile service space remains fragmented compared to international markets, however these guidelines along with the recent M&A Guidelines on Spectrum could be a move that will be beneficial for the bigger market players as they seek to consolidate their presence by acquiring spectrum from smaller companies. From a consumer's perspective, these regulations could bring about a major change as it could improve the quality of service in terms of call drops which the TRAI has been aggressively trying to address over the last few months[4], with the possibility also of better/new services being available to consumers at cheaper tariffs which could in turn also provide an incentive for innovation.

Since consolidation has been long overdue in this sector, it would be interesting to see if the Spectrum Trading Guidelines and Spectrum Sharing Guidelines eventually end up adversely affecting competition in the market. While the issue of possible anti-competitive conduct through consolidation/hoarding of spectrum or through a mandate precluding the newcomers from providing service by buying out the spectrum necessary for such services was recognized by the TRAI in its 2010 Recommendations on 'Spectrum Management and Licensing Framework'.[5] However, the Spectrum Trading Guidelines do not seem to specifically address this possibility. Nevertheless, the antitrust regulator, i.e. the Competition Commission of India is now expected to look at such arrangements / deals in detail. Therefore, spectrum trading or sharing transactions would need to be structured to also ensure compliance with competition laws.

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You can direct your queries or comments to the authors

[1] "Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilization". - para 64 of the judgment by the Supreme Court in WP No. 423/2010 and 10/2010

[2] 'Recommendations on the Working Guidelines For Spectrum Trading' available at http://www.trai.gov.in/WriteReadData/Recommendation/Documents/Recommendations_Final-28012014.pdf

[3] Id.

[4] http://timesofindia.indiatimes.com/tech/tech-news/Trai-to-punish-telcos-for-call-drops/articleshow/47096825.cms

[5] TRAI recommendations on "Spectrum Management and Licensing Framework", 11th May, 2010 available at http://www.trai.gov.in/WriteReadData/Recommendation/Documents/FINALRECOMENDATIONS952012.pdf

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996

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