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Trade, Labor and EU Law Perspectives

Competition and 5G Spectrum Auctions: Chronicles from the Battlefield

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5G is the most advanced technology in mobile communications.

In fall 2018, at the forefront in Europe, Italy arranged a successful multi-billion euro auction for 5G spectrum.

On the side, the administration allowed a few operators to convert old WiMax licenses to 5G usage, for a few million euro. A legal battle arose.

In November 2019, an administrative court in Rome ruled that the conversion price was wrong. Parallel procedures to grant frequencies may be lawful. But WiMax licensees must pay fees in proportion to the auction award value of 5G frequencies, not the minimum reserve price.

Here is the story of the legal case. And a few lessons learned about equal access to 5G spectrum under EU law.

The story

As shown by the [5G observatory scoreboard](#), the new mobile standard is at an early stage in Europe. While trials for the new technology are many, EU countries have managed to assign only 14% of 5G spectrum. They seem unlikely to complete roll-out by the end of 2020 (as expected under Article 54 of the European Electronic Communications Code). Among the sought-after frequencies is the 3.4-3.8 GHz band, which is considered “[key for the success of 5G in Europe](#)”.

For historical reasons, Italy had split this frequency band in two. Thus, it had to assign each part differently.

Wimax license renewal

For over a decade, WiMax licensees used the lower end of the spectrum (3.4-3.6 GHz), without

commercial success. This technology soon became obsolete. As the licenses were nearing the end, the operators applied to extend them for six years until 2029. And to convert them to 5G.

At the end of last year, the regulator (AgCom) and the Ministry of Economic Development granted their requests. They applied modest fee increases ranging from 1 to 40 million euro. The chosen fee benchmark was the minimum reserve price set for the parallel auction, which at the time was ongoing for the upper-end 5G spectrum (3.6-3.8 GHz).

5G spectrum auction

Eventually, auction award prices for 5G spectrum peaked at around 1.7 billion euro for larger blocks (and about 500 million euro for smaller ones). So TIM, Vodafone, Wind Tre and Iliad ended up paying up to ten times more than WiMax operators for possibly comparable 5G spectrum rights. This was the highest price in Europe (See M. Cave, G. Solomon, *Optimizing spectrum assignments to deliver expansive 5G connectivity*).

Fastweb dropped out of the auction. It purchased operator Aria's renewed WiMax/5G license for a much smaller amount.

The auction winners went to court seeking the annulment of the WiMax license renewals.

The Judgment

The regional administrative court found that the renewed license fees were discriminatory. They breached EU rules.

Equal treatment

Under the EU regulatory framework, equal treatment is a legal cornerstone to ensure the sound progress of 5G. It is necessary to preserve undistorted competition.

National public authorities must anchor spectrum fees to market value, in a transparent manner, for all licensees. (See Directive 2002/20/EC, Recital 32, and Directive 2002/21/EC, Articles 8 and 13 (transposed into Articles 13.6-bis, 14.1 and 35 of the Italian Electronic Communications Code)).

As the EU courts stated in the *Bouygues case*, EU countries may freely “choose the procedure for the award of licenses”. But they must grant operators “the same treatment, in particular as regards fees”. Thus, for example, price discounts aimed at recreating the right balance among spectrum fees are not considered State aid. This is because the EU system for the assignment of usage rights “rests on equality of treatment between operators for the award of licenses”. The ECJ confirmed the General Court's findings.

Unfair prices

In the case concerned, the Rome court ruled that, to ensure equal treatment among licensees, public administrations should have based WiMax license renewal fees on the award prices of the parallel auction for 5G spectrum.

Instead, they had used as a parameter the auction's minimum reserve price. This was much lower

than the winning bids. So it obviously did not reflect market value.

As a result, licence fees unfairly penalized auction winners in favor of WiMax licensees. Nor had the public authorities pointed to any difference in spectrum quality justifying the steep price disparity.

According to the court, after the award, the Ministry and AgCom should have used their price adjustment powers to increase the WiMax license renewal fees. Establishing a fair balance among the various fees would have avoided discrimination and undue distortions of competition among 5G spectrum users.

The right proportion

This does not mean that prices need to be the same, the judges added.

The administration should increase spectrum fees for WiMax/5G license renewals. But they should also take into account the different scope of the licenses.

In particular, to maintain a fair proportion with 5G spectrum auction prices, license renewal fees should reflect the specific features of the WiMax license renewals, in terms of: (i) actual band quantity; (ii) smaller geographic coverage; (iii) shorter duration; (iv) differences in market potential; and (v) absence of further renewal rights.

Not least, the fees should factor in the economic impact of the renewed license's more limited scope and timeframe, on the perspectives for return on infrastructure investment.

A few comments

The ruling confirms that, if need be, public authorities can follow separate parallel paths to award 5G spectrum (e.g., auctions, negotiation and hybrids). Nonetheless, they should not abuse this power. Different license terms carry a great risk of distorting competition, as shown in the case concerned.

Stronger disparity

Separate award procedures may increase disparities among market players. Differences in license prices or terms can generate batches of second-rate 5G operators.

For instance, excessive spectrum payments following a successful auction may drain resources, which could otherwise flow to network deployment and coverage. An [economic study](#) found that higher spectrum prices may lead to less network coverage, download and upload speeds.

By the same token, shorter license duration or different geographic coverage in lower-density areas can cripple a licensee's plans for infrastructure investment. In this scenario, recoupment opportunities may be less, compared to other licensees.

In both instances, weakened licensees might be forced to offer lower quality, higher prices and less innovative services. But with parallel award procedures, they could find it much harder to stay in the market against not similarly burdened competitors.

This signals the importance of ensuring a level playing field from the outset, when setting license terms, at least within the same country. Rebalancing license fees after the auction or through negotiations is a difficult and possibly arbitrary exercise. Mostly, it might not suffice to compensate for disparities stemming from separate awards.

Auction sabotage

Shortcuts to 5G spectrum can also interfere with auctions. They can alter the competitive outcome of the auction, by giving third-parties preferential access to the same resource.

They can also distort bidding results. In the case concerned, Fastweb dropped out of the auction to seize Aria's license. The winning bids might have been lower because of this. They might have been even much lower, if other players had followed suit.

More room for mistakes

Auctions normally bring out market prices. Instead, public authorities set license renewal fees through negotiation: the room for mistakes – and for disparity among licensees – is broader.

For instance, under EU and Italian law, the original licensee must present a technical and financial plan to obtain a renewal. The terms of the renewal are supposed to be agreed with the administration, for example about network deployment and coverage.

In the case concerned, Aria presented the plan and got the renewal. But Fastweb later bought the license. This raises at least two issues. First, whether Fastweb's acquisition was envisaged in Aria's plan at the time of renewal. Secondly, under what conditions a renewal can benefit an operator which is not the original licensee.

Conclusions

Separate award procedures for 5G spectrum may lead to unfair discrimination. They may also alter competition in the market. These problems cannot always be solved by retroactive changes to the award price. EU countries should strive to assign 5G spectrum within a single framework planned in advance, to ensure a level playing field among licensees. The Italian case discussed in this note gives useful guidance on how to achieve this result.

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