

BEREC's views on duration, on renewal of rights and on coordinated timing of assignments

Articles 49, 50 and 53

BEREC takes note of the Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (EECC). As far as spectrum is concerned BEREC would like to express its view on Articles 49, 50 and 53 on the market related aspects below.

This does not preclude either BEREC's future positioning regarding other elements of the proposal, nor does this mean other articles are supported or are of less importance, nor the necessity of a horizontal examination of the spectrum provisions in their entirety. Rather – as already expressed in its Opinion on the Framework review proposal – the specific proposals on duration and renewal of rights together with co-ordinated timings needs to be examined holistically.

Proposals of the Commission

The European Commission (hereinafter: Commission) is seeking to enhance consistency in Member States regarding key aspects of spectrum authorisation, in particular by proposing a minimum licence term of 25 years for all ECS¹ harmonised spectrum (30 years in the recently published ITRE draft report on the EECC). The Commission argues that this is sufficient time to allow operators to recoup their investment and will pave the way to a more fluid secondary market of spectrum rights.

In conjunction with this, the Commission also proposes to introduce a harmonised process around the renewal and expiry of rights, where Member States and/or NRAs must take a decision on the renewal between 3 and 5 years prior to the expiry of those rights according to a set of prescribed conditions.

Finally, the Commission seeks powers to set a binding timetable for coordinated spectrum awards, together with powers to limit or extend existing national licences to bring them into line with their deadline. These could – in the Commission's view – improve consistency and predictability for operators.

Analysis of BEREC

Duration of rights (Article 49)

BEREC agrees with the principles embedded in Article 49 (1) of the proposed Directive that a licence duration should take into account “the need to ensure effective and efficient use” of spectrum “and promote efficient investments” in order to allow operators to recoup their investment. However, this will vary from band to band and from Member State to Member State. There is no one period that is suitable to all circumstances – what is appropriate for one Member State may not be appropriate for the national circumstances in another Member State

¹ Electronic communications services

and what is appropriate for mobile broadband in one country will not be appropriate for PMSE² in another. Further to this, it is BEREC's view that any harmonised duration of rights in a directive exceeds the limits set by Article 288 of the TFEU³.

Under the Radio Spectrum Decision⁴ technical implementing measures have not only been established for spectrum used for mobile broadband wireless access but also for other applications such as SRDs and RLAN, and could in the future cover other services and applications. The current proposal of Article 49 within the draft Directive means that a minimum licence duration could also apply for frequency usages other than mobile broadband wireless access, which would in most cases be inappropriate.

A minimum licence duration for all harmonised spectrum risks constraining competition, stifling innovation and stagnating spectrum management. While we recognise that the Commission is trying to achieve a pan-European norm, harmonisation *per se* should not be the objective. The primary objective of the draft Directive should be to ensure that spectrum is effectively and efficiently managed and used in a way that maximises the benefit to EU citizens and consumers, while promoting competition. Setting a harmonised minimum licence duration across Member States risks hindering the achievement of the primary objective: efficient and effective spectrum management and use.

BEREC is of the opinion that the Impact Assessment provides no evidence to support the proposed intervention of the Commission to, firstly, set a harmonised minimum licence duration and, further, to set this at 25 years. In addition, the Impact Assessment fails to assess the problems that could arise with setting a minimum licence duration, noting what could have happened within the market if such an intervention was introduced 25 years ago, a period akin almost to the entire life of the World Wide Web.

BEREC sees the following draw-backs in setting minimum licence duration in all harmonised bands throughout Europe:

- The award of spectrum is a tool for Member States and/or NRAs to structure their market. BEREC believes that setting a minimum licence duration may result in entrenching market structures and limit the potential for market entry. For example, the process of re-awarding spectrum at regular intervals can allow for the possibility of new entrants to enter the market, which is particularly important if markets across the Union face structural competition problems. Even the "threat" of new market entry has positive impacts on competition. This is especially the case in markets where the number of operators is limited or where there is no longer effective competition.
- Spectrum licences establish technical parameters, such as requirements to avoid harmful interference with users in the adjacent bands. These conditions already reflect appropriate harmonised technical conditions in Radio Spectrum Committee Decisions and CEPT studies. This includes criteria such as bandwidth, channelling arrangements and duplexing systems (e.g. FDD, TDD, SDL band plans). These technical conditions will evolve over time, especially where technologies change and new technologies take their place. Consequently, it is not appropriate in the long-term to set a minimum

² Programme making and special events

³ (...) A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. (...)

⁴ Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)

licence duration which could potentially hinder innovation. For example, 3.5 GHz licences were awarded between 2000 and 2010 with 15 MHz duplex (FDD) often on regional basis. Today, some years since these licences were awarded, nationwide 80 MHz or 100 MHz simplex (TDD) licences are now needed to facilitate new technologies such as 5G in this band. In order to use new and innovative technologies like 5G in this band, the reassignment of the spectrum may be required in order to guarantee efficient use. The re-award of spectrum provides an opportunity for existing licensees to adapt their spectrum assignments in anticipation of new technologies and changing demand/market shares, as well as providing for the possibility of new market entry.

- Spectrum awards or re-awards are very useful and efficient tools for Member States and/or NRAs to promote their national policy objectives. For example, when awarding spectrum, Member States and/or NRAs design licence conditions, including coverage and quality of service obligations, to promote the connectivity needs of their citizens throughout the licence duration.

The Commission argues that setting a minimum licence duration of 25 years will contribute to reinvigorating the secondary market for spectrum rights of use. Spectrum trades which have taken place across Member States have mostly been as a consequence of mergers among operators and so far a spectrum trade has not resulted in a new market entrant. Spectrum markets are extremely “thin” markets with only a few potential buyers and sellers who are also already competitors in their own right on the downstream markets. For example, a licence-holder who plans to remain in the market is unlikely to trade harmonised spectrum to its potential competitors: indeed, the incentives are the exact opposite, particularly in a highly concentrated market with a finite supply of the essential resource: radio spectrum. BEREC believes that setting a pan-European minimum licence duration risks cutting-off the supply of radio spectrum.

BEREC considers spectrum trading as an important complementary, market-based spectrum management tool. It allows the market itself to correct potentially inefficient results of spectrum awards and it can support – to a certain extent – dynamic efficiency as market conditions change over time. However, spectrum trading should not be a spectrum management objective. The pursuit of efficient and effective spectrum management which will ensure the supply of spectrum to meet the ever-growing demand across the European Union should be the primary objective of the draft Directive. Delivering on this objective – while safeguarding conditions for a competitive market – will ensure that European citizens and consumers will be able to access goods and services at competitive prices. Spectrum trading is one of many such tools we now have to enable Member States to deliver on this objective.

Member States should be given sufficient flexibility to adjust the duration of licences issued in the context of national circumstances. This should not prevent Member States setting a minimum licence duration – where national circumstances allow and justify same. There are inevitably compromises between harmonisation and flexibility and Member States and/or NRAs need to find the right balance on a case-by-case basis to achieve the overall objective: effective and efficient spectrum management and use. Moreover, to achieve this objective, it is necessary to ensure that NRAs have the ability – where necessary and proportionate – to modify and/or withdraw the spectrum rights. This can ensure that spectrum is used effectively and efficiently throughout the license duration.

Renewal of rights (Article 50)

In BEREC's view, the reassignment of rights of use that are due to expire is a complex and legally demanding matter. Further to this, the possibility to withdraw or limit the duration of rights to those rights holders which do not fulfil properly their obligations, with a view to its reassignment is a key tool for effective spectrum management. The best mechanism to reassign spectrum rights of use depends on the specific national circumstances and not only on trying to encourage new market entrants. Furthermore, BEREC is of the opinion that the framework should be flexible enough so that Member States could take specific national circumstances into account when deciding about renewals of rights of use and their modalities.

A strict provision in the Framework, that a public consultation must take place several years before the expiry of a licence may not be an appropriate mechanism to have a reliable indication on the potential demand for spectrum. There are information asymmetries between incumbents and potential new market entrants. Consulting too early on the possibility of the renewal of spectrum rights may also open the field for speculation and gaming.

Greater certainty should be fostered for all stakeholders and spectrum rights holders. In the absence of a clear review clause well in advance of the expiration of a licence, opportunities for new entrants to enter the market would be reduced which in turn would also dampen potential competition and increase the probability of collusion (walled garden). The legal framework should not prevent Member States and/or NRAs from running a licence regime with clear and rigid licence durations (fixed terms and re-awards only by means of an open, objective, transparent and non-discriminatory award procedure) in order to ensure the efficient use of spectrum and minimise uncertainties and legal risks.

The time frame of 3 and 5 years, as proposed in the draft Directive, where a Member State and/or an NRA is to take a decision on a licence renewal is not appropriate in all cases and runs the risk of introducing uncertainty with respect to the licence renewal process and has the potential to undermine the licence itself. It should also be clarified whether Articles 50.3 and 50.4 are only applicable to harmonised radio spectrum.

BEREC shares the objectives regarding providing greater certainty and transparency to rights holders. However, BEREC does not believe the Commission's proposed mechanism is practical. In summary, BEREC is of the opinion that there should be enough flexibility for Member States and/or NRAs with regard to the renewal of rights of use. BEREC suggests that a clause enabling Member States and/or NRAs to be more explicit at the point of issuing a licence about the process for expiry/renewal would be a better solution not only for Member States and/or NRAs, but would give certainty to spectrum rights holders, potential new market entrants and other stakeholders.

Coordinated timing of assignments (Article 53)

The establishment of maximum dates of assignments for spectrum across the European Union may be particularly relevant where authorising the use of harmonised spectrum that has recently been cleared to be made available for electronic communication networks and services.

However, this is already achieved under the current Framework through the ordinary legislative procedure, e.g. for the 800MHz band, where a deadline for carrying out the

authorisation process was set in the EU RSPP Decision⁵ and for the 700MHz band a deadline to allow the use of the band for wireless broadband services is proposed and expected to be adopted shortly in an EU Decision. Further to this, the Commission has not provided evidence to support such an intervention as set out in Article 53. Therefore, BEREC sees no need to further extend the Commission's powers in this area.

⁵ Decision No 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme