"Selling the airwaves – Spectrum Trading in Nigeria"

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Introduction

Spectrum means the continuous range of electromagnetic wave frequencies up to and including a frequency of 420 terahertz.[1] It also refers to the radio frequencies allocated to the mobile communications industry and other sectors for communication over airwaves and it is the means through which wireless communication is realized.[2]

Radio spectrum is a critical but scarce and finite national resource that needs to be optimally and efficiently managed in order to support the drive for socio-economic developments. Increasing subscriber demands for faster internet, larger data capacity, higher quality video and an evolving array of services will continue to drive and exponentially increase the industry's appetite for both coverage and capacity spectrum and exert a lot of pressure on national regulators globally.

Regulators globally are now under a lot more pressure to not only release new spectrum bands to stakeholders in an affordable, timely, fair and transparent manner but also monitor and ensure the optimal use of already assigned spectrum. The prerequisite to ensure the optimal and efficient use of already assigned spectrum bands highlights the importance of having a defined framework for spectrum trading activities. The spectrum trading initiative being explored by the Nigerian Communications Commission (NCC) is therefore a laudable and welcome initiative as it permits the trading of assigned spectrum that is either not being utilized or is under-utilized to an operator that requires same.

[1] Section 157 Nigerian Communications Act 2003
[2] https://www.gsma.com/spectrum/what-is-spectrum/

The NCC is vested with the sole and exclusive power to grant licences, regulate, manage and administer the frequency spectrum for the telecommunications sector in Nigeria[3] and it is further empowered to make regulations on assignment of rights to spectrum.[4]Pursuant to its powers under the Nigerian Communications Act 2003, the NCC recently issued the draft Spectrum Trading Guidelines 2017 (the Draft Guidelines) and requested for stakeholders' comments on same. A public inquiry involving all industry stakeholders has also been held in this regard.[5]
The objective of the Draft Guidelines is to promote certainty and transparency in the trading of spectrum by outlining the detailed procedure and conditions for spectrum trading in Nigeria[6]. It however only applies to applications for the trade of access spectrum licences[7]. The Draft Guidelines acknowledges the importance of liberalizing the spectrum management policy of the NCC with a view to - an efficient and flexible transfer of spectrum to users who value it most; lessening the barriers to market entry by allowing flexible access to spectrum; deepening competition and promoting innovation by enabling entrepreneurs to acquire spectrum and offer new services.

The Draft Guidelines define Spectrum Trading as 'a spectrum management transaction which covers any or all of Spectrum Transfer, Spectrum leasing and Spectrum Sharing, in which a seller trades all or some of its Spectrum licence (rights and obligations) to a buyer, following a commercial transaction approved by the NCC.'[8] This allows spectrum assignees to enter into mutually beneficial commercial arrangements and derive financial benefits from unutilized or under-utilized spectrum and in the process make same available to other operators for the provisions of telecommunication services.

[3] Section 121 NCA
[4]Section 70 (1) (b NCA). The NCC is also required to assist the National Frequency Management (NFM) Council in developing a national frequency plan for Nigeria. Section 4 (J) NCA
[5] Spectrum trading is also permitted in the United Kingdom, European Union, Sweden, France and the United States of America
[6]Guideline 2
[7]Guideline 5.1
[8]Guideline 14 (xi)

Trading Eligibility

The Draft Guidelines provide that only a party that already holds a licence issued by the NCC can participate in spectrum trading. Trading may be permitted in either the entire licensed area or apart/parts of it and the existing rights and obligations of the seller will apply to the seller, depending on the type of trade. The tenure of the original licence will not be altered, the board of Directors of the seller and buyer must consent to the transaction and the seller must have held the spectrum for a minimum of two (2) years.

Where applicable, the seller must have achieved at least 25% of the roll-out obligation specified in the spectrum licence and the spectrum licence must still have a validity period of at least one (1) year before the expiration of its term. Both the seller and buyer must be in good regulatory and financial standing with the NCC, no notice of forfeiture of the spectrum must have been issued by the NCC and no breach of the licence terms must exist.[9]A buyer will be allowed to use the spectrum acquired through trading to deploy any technology.[10]The traded spectrum should be used without causing harmful interference to the parties or other users.

Requirements for Spectrum Trading

No Spectrum shall be traded without the parties having obtained the prior, written approval of the NCC.[11]It is expected that unless there are compelling reasons, approval should be granted. The NCC may at its discretion conduct a public or private inquiry, if in its opinion a proposed transaction will negatively impact competition[12]. This is important in order to prevent the concentration of a spectrum in high demand in the hands of one operator. The NCC may cancel any approved spectrum trade and or impose further sanctions, if it discovers any misrepresentation or collusion between the parties that would negatively impact, on competition and market structure.[13] Spectrum trading as envisaged by the Draft Guidelines could be spectrum lease, spectrum sharing or spectrum

[9]Guideline 4
[10]Guideline 11.1
[11] Guideline 5.6
[12] Guideline 5.5
[13] Guideline 9.2

transfer. It is therefore important for the acquiring party in a spectrum trading transaction to conduct extensive due diligence to ensure these eligibility requirements are met and specifically that there are no outstanding financial, regulatory or licence obligations on the part of the seller. It is noted that the Guideline neither specifies nor does it limit the frequency bands that can be the subject of spectrum trading in Nigeria.

Spectrum Lease

Spectrum Leasing is a spectrum trading transaction in which a licensee sublets a portion of its licensed spectrum in time, geography or quantum to another licensee following a commercial agreement approved by the NCC.[14] Upon the expiration of a spectrum lease agreement and on the submission of a request to renew by the buyer, the seller is obligated to renew the agreement. Any dispute between the seller and buyer regarding the renewal or non-renewal of the spectrum lease agreement which cannot be resolved by the parties, is to be referred to the NCC for resolution.[15]

A spectrum licence cannot be leased in whole (quantum of Spectrum holding and licensed area). However, a seller can lease a part of its spectrum holding in the entire licensed area or a whole of the spectrum holding in a part of the licensed area.[16] Where a buyer is leasing the spectrum holding of a seller in a spectrum licence, the seller will still be responsible for the roll-out obligations under the licence. The seller’s roll out obligations under the licence will not change, even if it is holding a lesser part of the spectrum in that licence after the trade.[17]

In a spectrum leasing arrangement, the duration of the lease is critical as it will determine the level of investment by the lessor in equipment and other facilities and the estimated timelines for the return on its investments. The geographical area covered by the arrangements must also be clearly defined. Parties must agree whether the leasing fee will be a one off payment, in installments or on a monthly basis. The responsibility for the payment of renewal fees payable to the regulator must also be specified in the agreement. A clause for an outright purchase/transfer of the leased spectrum on certain conditions might also be considered in a transaction of this nature.

Spectrum sharing

Spectrum sharing involves a transaction in which a spectrum licensee jointly uses its spectrum holding right in a spectrum licence with another licensee of the NCC following a commercial agreement approved by the NCC. The original licensee retains the roll-out obligation.[18] In a spectrum sharing arrangement there is a simultaneous usage of the radio frequency band in the geographical area covered by the spectrum licence by more than one operator.

Upon expiration of a spectrum sharing agreement and on the submission of a request to renew by the buyer, the seller is obligated to renew the agreement. Any dispute between the seller and buyer regarding the renewal or non-renewal of a spectrum sharing agreement which cannot be resolved by the parties, is to be referred to the NCC for resolution.[19]

If a buyer is sharing the spectrum holding of a seller in a spectrum licence, the seller will still remain responsible for the roll-out obligations in the licence area. The seller’s roll out obligations under the licence will not change, even if it is holding a lesser part of the spectrum in that licence area after the trade.[20]

There is however the view, that lower frequencies are less likely to be suitable for sharing. Spectrum sharing will require close cooperation between the parties to the transaction given the likelihood of interference and quality issues from the operations of the parties.[21]There should therefore, in transactions of this nature, be specific provisions on the how to expeditiously resolve interference issues. In entering into a spectrum sharing arrangement, the duration of the arrangement is important as the original licensee, might be looking for some flexibility in the use of the licence whilst the other party might be concerned about certainty and definitive time frame for it to recoup its investments. Appropriate notice periods for termination and

[14]Guideline 14 (ix)
[15] Guideline 8.2
[16] Guideline 5.7
[17] Guideline 10.3

[18]Guideline 14 (x)
[19] Guideline 8.2
[20] Guideline10.3
[21]https://www.slideshare.net/TechUK/licensed-shared-access-a-report-for-the-uk-spectrum-policy-forum

remediation of breaches are also critical in a spectrum sharing arrangement. The agreement must include a provision requiring the sharing party to ensure compliance with all licence obligations as stipulated in the licence, including a clause for recovery of any fines paid or imposed on one party by the regulator as a result of any action or omission of the other sharing party.

Spectrum Transfer

Spectrum transfer involves a transaction in which a spectrum licensee reassigns a portion or the whole of its licence holding in a Spectrum licence in time, geography or quantum to another licensee following a commercial agreement approved by the NCC [22] Where the whole of the licence holding is transferred the Guideline is silent as to whether or not a new licence will be issued to the buyer. Given this omission in the Guideline, the assumption is that a new licence is not required to be issued. Where an application is for spectrum transfer and such spectrum is the subject of pending litigation, the seller is required to disclose its rights and liabilities to the buyer and the NCC and ensure that such rights and liabilities are transferred to the buyer based on the procedure prescribed under law

In the event that a buyer is acquiring only a part of the spectrum holding of the seller, each of parties will be responsible for the roll-out obligations in their respective parts of the licensed area. Accordingly, there will be a restructuring of the roll-out obligations initially prescribed for the seller in the original licence and an appropriate portion of the roll-out obligations will be prescribed for the buyer by the NCC.[23]

In creating a spectrum transfer arrangement, parties (and the regulator) need to be sure that the transfer would not end up concentrating a particularly desired frequency in the hands of one operator and possibly impacting competition negatively. It is expected that in reviewing a spectrum transfer application, the NCC will scrutinize the arrangement as if the transaction were a merger. As the transfer arrangement involves an outright sale/transfer of rights and obligations to the buyer, a detailed and comprehensive due diligence is essential. Indemnities should also be procured from the seller, particularly in relation to any outstanding financial or regulatory obligations in respect of the transferred spectrum and any possible third party obligations.

Fees

Applications that have received approval from the NCC are subject to the payment of an administrative fee of 1% of the gross proceeds of the transaction. In respect of trading of spectrum acquired through administrative process, the seller shall in addition, pay to the NCC 60% of the net proceeds of the transaction.[24] At any time after the transaction has been approved, the NCC shall be entitled to recover from a buyer and or a Seller any fee that was not paid on a transaction on account of non-disclosure of gross proceeds and/or net proceeds.[25]

Like most commercial arrangements, the fee payable to the original licensee will be determined by several factors including the initial acquisition fee paid to the regulator, the level of demand for the spectrum, availability of the spectrum, whether or not the parties are competitors, whether the transaction is a lease, transfer or sharing arrangement and so on.

Conclusion

The continuing increase and apparently insatiable demand for faster internet and larger data capacity to meet new wireless services can be met by not only the release of more spectrum by the regulator, but also by the efficient and optimal use of already assigned spectrum by operators. By recognizing and providing a framework for spectrum trading in Nigeria, the NCC will encourage spectrum assignees to release unutilized or under –utilized spectrum to other stakeholders for the deployment of services thereby ensuring the optimal use of the limited spectrum resource. With the regulatory framework for Spectrum trading, the government is further able to retain a measure of control over how spectrum is used and traded and also lay the foundation for a more efficient spectrum management process in the telecoms industry in Nigeria. In addition, it is projected that permitting spectrum trading, would further support the achievement of the targeted 30% broadband

[22] Guideline 14 (xii)
[23] Guideline 10.2
[24] Guideline 7.1
[25] Guideline 7.2

penetration by the end of 2018[26]. We look forward to the swift finalization and issuance of the Spectrum Trading Guidelines by the NCC.

[26] Presently broadband penetration in Nigerian is estimated at 21%