



Mobile License Renewal: What Are the Issues? What Is at Stake?¹

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Abstract

A major challenge facing regulators in developed and developing countries alike is the need to strike the right balance between ensuring certainty for market players and preserving flexibility of the regulatory process to accommodate the rapidly changing market, technological and policy conditions. This challenge applies across a wide range of regulatory instruments and vehicles including license renewal, which is the focus of this note.

This note provides an overview of mobile license renewal issues covering the legal regime of license renewal, the renewal process, the non-renewal context and the changes in licensing conditions including spectrum implications of the renewal process. It draws best practices that started to emerge in recent renewal practices, to ensure that the renewal process leads to the best outcome for all stakeholders. As much as possible, policy makers and regulators should strive to promote investors' confidence and give incentives for long-term investment. They can do this by favoring the principle of 'renewal expectancy', but also by promoting regulatory certainty and predictability through a fair, transparent and participatory renewal process. For example, by providing details for license renewal or reissue, clearly establishing what is the discretion offered to the licensing body, or ensuring sufficient lead-times and transitional arrangements in the event of non-renewal or changes in licensing conditions. Public consultation procedures and guaranteeing the right to appeal regulatory decisions maximizes the prospects for a successful renewal process. As technological changes and convergence and technologically neutral approaches gain importance, regulators and policy makers need to be ready to adapt and evolve licensing procedures and practices to the new environment.

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1. Introduction

As the first generation of mobile licenses is set to expire in the near future, issues related to their renewal are already a hot topic for policy discussion in many countries. This question came to the fore when the French regulator, Autorite de Regulation des Telecommunications (ART), launched a public consultation in July 2003 to initiate the renewal process for two GSM licenses scheduled to expire in 2006.² The Telecommunication Authority of Hong-Kong initiated a similar process for renewal of existing licenses for second generation mobile services.³ And in Pakistan, Pakistan Telecom Authority (PTA) is currently reviewing best practices for setting license fees for mobile license renewal and revalidation. The processes that arose from these cases illustrate the range of issues that need to be addressed to ensure an efficient renewal process. With the current international trend moving away from service specific licensing to technologically neutral approaches in response to the convergence phenomenon, these issues are likely to be debated heavily. Different approaches on how to handle the transition to level the playing field between operators licensed under different regimes will shape the renewal debate of this first major wave of renewal.

Licensing policies and procedures are guided by specific goals that differ from country to country. **License renewal approaches not only influence market entry but also -and most importantly- they influence the post-entry competitiveness of market players. They also have major implications for investors, lenders, consumers, and the development of the sector as a whole.**

The goal of this note is to provide an overview of mobile renewal issues and to catalogue best practices that have emerged, which will help to ensure that the renewal process leads to the best outcome for all stakeholders. This requires striking a balance between the need to preserve investor confidence and the importance of preserving the flexibility of the regulatory process to accommodate market and policy developments. Although this note is mainly concerned with renewal issues as they arise in the mobile sector, it is important to emphasize that similar issues and concerns also arise in the context of the renewal of other operator licenses. Examples from renewal practices in other sectors are used to the extent that they help to shape emerging best practices. Similarly, while focusing only on license renewal situations, issues raised in this note fit within the broader debate on the appropriate scope of regulatory discretion that applies across a range of partly or wholly substitutable regulatory instruments and vehicles—of which licensing is only one.⁴ Lessons learned and emerging best practices highlighted in this context offer an interesting case study for other regulatory vehicles.

2 Available in the Web site of See http://www.art-telecom.fr/publications/ref_autogsm/conspub-re-nouv-gsm.pdf

3 See: http://www.info.gov.hk/citb/ctb/english/paper/pdf/2nd_Consultation_Paper-2G_Review_FINAL.pdf

4 Other vehicles include regulatory decisions on tariffs, interconnection, universal service, and other regulatory levers.

While concerns underlying mobile license renewals are not fundamentally different from those of license awards or modifications, there are concerns that are specific to the renewal process that this note will highlight. In exploring some of the issues raised by licensing renewal practices, *Section 2* discusses the legal regime for renewal in several countries, and in particular, the ways these regimes have addressed the principle of renewal and procedure for renewal, *Section 3* looks at the procedural guarantees and possible remedies in the event of non-renewal. *Section 4* focuses on the change of licensing conditions resulting from the renewal process, exploring mainly changes in license fees and impacts on conditions and obligations for license holders. *Section 5* covers the spectrum specific implications of mobile license renewal, and *Section 6* concludes the note by summarizing key issues and best practices.

2. The Legal Regime for License Renewal: Renewal Principle and Procedures

The principle and procedures of license renewal are usually stipulated in the telecommunications legislation and regulatory instruments of each country. **In countries where the regulatory tradition has not yet matured, terms and conditions for renewal would be further detailed in the license.**⁵ In exceptional cases, some legal regimes do not refer to renewal—as in the case of Suriname where licenses are granted for an indefinite period subject only to withdrawal by presidential decision.⁶ While the legal regime for license renewal could embrace the process of automatic renewal,⁷ tacit renewal,⁸ or renewal at the express request of the licensee,⁹

⁵ In Mali, article 10 of Ordonnance n°99-043/P-RM of 30 September 1999 clearly stipulates that licenses are awarded for 15 years renewable in application of the rules and conditions as stipulated in the cahier des charges

⁶ In Suriname, according to the Telegraph and Telephone Act, there is no concept of license renewal as such, since concessions are granted for an indefinite time. Concessions are granted, by the president, “for an indefinite period of time and at any time, with due regard to a notice of one year, can met withdrawn by the president and that in this case, the works, achieved with the consent of the minister, shall be expropriated at a remuneration for the alteration and extension after writing-off for decrease in value”. (see <http://www.itu.int/ITU-D/treg/Legislation/Suriname/law.html>).

⁷ In Denmark, mobile license other than for the provision of G-3 services have a duration of 10 years and are automatically renewed for another 10 years unless revoked by the regulator (NITA) one year before the expiry of the term. In Australia, the Radio-communications Consultative Council working group has also recommended that the Radio-communications Act 1992 be amended to include a presumption of renewal of apparatus licenses.

⁸ See article 31 of Mauritania Telecom law of 1999.

⁹ See for example Art. 7.2 Vodafone Public Mobile GSM license (Mozambique). The Telecommunications License may be renewed by the INCM at the request of the Licensee, provided the Licensee has (a) complied with the material terms and conditions of the Telecommunications License, including without limitation these License Terms and Conditions, (b) given written notice to the INCM of its intention to renew the

most legal and regulatory frameworks adopted a regime based on the "presumption of renewal"¹⁰ or "renewal expectancy." The United States, for instance, has adopted a "high renewal expectancy" standard for renewal of domestic public cellular radio telecommunications services. If the licensee meets certain standards in terms of using the spectrum for their intended purposes and complying with the rules and policies, they can file for renewal expectancy. The rationale behind such a regime is to guarantee a degree of regulatory discretion to allow the regulator to review the terms and conditions of the license, to reflect new technological developments in the general licensing policy, and to review the targets set in the original license.

Because license renewal results in the extension of the legal rights and obligations of the license holders, the authority that grants licenses is the same that is called upon for renewal. In countries where licensing is a joint decision between the ministry and the regulators, a similar regime is followed in the renewal process. In Morocco license renewal as license attribution is done by Ministerial Decree upon recommendation by ANRT.¹¹

In many developing countries there is a tendency to leave the renewal process to the discretion of the licensing authority without providing many details on the terms, criteria, and conditions for renewal.¹² A study of a sample of mobile licenses shows that conditions of renewal are usually loosely drafted.¹³ **Providing details for license renewal or reissue is an important guarantee for regulatory certainty, which is a prerequisite for attracting potential investors entering the market of developing and emerging economies (Box 1).**

Telecommunications License at least one year prior to the expiry of the then current Telecommunications License term, and (c) paid the applicable Telecommunications License renewal fee, if any.”

¹⁰ Sometimes referred to as rolling licenses

¹¹ See article 5.4 of the cahier des charges of Medi Telecom: « *Décret No 2-99-895 du 19 Rabi II 1420 (2 Août 1999) portant attribution de la licence d'établissement et d'exploitation du deuxième réseau public de téléphone cellulaire de norme GSM.* »

¹² See, article 7.2.2 of the License Agreement between the Telecom Regulatory Commission of Jordan and Jordan Telecom Company, "...the license shall always be renewed if the Licensee has operated successfully and in accordance with the laws and the License and if there are no reasons to refuse the renewal after successful negotiations. Available at: http://www.trc.gov.jo/Static_English/agreements.shtm.

¹³ In Liberia, a combination of increased investor's appetite to be a first comer to the market and the lack of adequate legal and regulatory framework has led to a proliferation of licenses with a wide variation of terms and conditions including those related to renewal. In some extreme cases, operators have succeeded to negotiate an automatic renewal policy independent from the licensing authorities, in other cases license renewal clauses give complete discretion to the licensing authorities without due process guarantees, and in other cases there is no clause at all on license renewal.

Box 1: License Renewal Regime and Process: Significant Determinants of the Operator's Attractiveness and Value for Current or Potential Investors.

In a note for potential investors in Sri Lanka Telecom, investors are advised to consider the risks relating to the company, and specifically identify as a significant risk, the lack of clear license renewal guarantees:

"The Company's telecommunications business is subject to governmental regulation regarding licensing, competition, and costs and arrangements pertaining to interconnection and tariffs. Changes in laws, regulation or governmental policy affecting the business activities of the Company could adversely affect its financial condition and company's operational results [...]. The initial term of the license expires on 8 August 2001. Neither the Telecommunications Act nor the company's license provide for the renewal of the license. Accordingly, the company may be required to comply with the new license issuance requirements provided by the Telecommunications Act at the expiration of the Company's license. If the company fails to renew its license on its existing terms or obtain a new license on terms favorable to the company, this would have material adverse consequences for the company's business, financial condition, results of operation and prospects."

(Source: http://www.slt.lk/section_two.pdf)

Where the regulators enjoy a discretionary power in areas of license modification and revocation, similar discretion is usually extended to the case of license renewals. In Kenya CCK, the regulator, is empowered to attach to the license any condition it considers appropriate, and to modify the conditions attached even after the license has been granted and the licensee has started its activities.¹⁴ This is a cause for concern, since it reduces the possibility to predict the future returns on private investments. In order to renew their licenses, both telecommunications and radio-communications licensees must follow the same procedure¹⁵ (and pay an application fee) as those

¹⁴ See <http://mkaccdb.eu.int/study/studies/22.doc>

¹⁵ This implies paying an application fee, and submitting a request, plus any information CCK finds appropriate, and releasing a public notice asking for objections regarding the proposed licensing.

followed for the initial license request.¹⁶ This is a time-consuming process and it gives the regulator a significant margin of discretionary appreciation in the renewal process.

For the sake of regulatory certainty, the discretion offered to the licensing body should be curtailed by conditions set in the regulatory framework or in the license itself, and be subject to checks and balances. The conditions requested for renewal and the methods for specifying them become minimum guarantees to ease investors concerns over arbitrary refusal to renew. They give a positive signal for operators to continue to invest in their networks and to fulfill their obligations, at least until the end of the license term. **Prospects for license renewal also offer needed assurance to operators to engage long-term financing for their network.**

Strategic and timely planning to resolve issues can give that positive signal to investors. Under the French Post and Telecom Code, the regulator has to initiate the renewal process at least two years before the expiry date of the license, and has to propose the new conditions for renewal to the Minister of Telecommunications, which then notifies the license holders of the new terms. In application of this legislative requirement, the ART launched a public consultation in July 2003.

In the same context, the example of license renewal of apparatus licenses in Australia offers important insights. In Australia in 2002, a Radio-communications Consultative Council (RCC) Working Group conducted a review of the apparatus license tenure and associated issues, and identified measures to ease investor's potential concerns. The "forward review" of the market and spectrum needs was conducted well in advance of license expiry or renewal - with sufficient time for government and investors to plan ahead and to adjust plans going forward. The same working group suggests that licensees that hold licenses with maximum terms (five to 10 years) would be offered the opportunity to extend their license up to three years after the publication of each forward review. This offer would not be made if the forward review identified the band in which the license is held has a reasonable expectation of being re-planned, before or within, the additional three years. In general, if a spectrum licensee is offered the re-issue of a license, then that offer should be made at least five years prior to the expiry date of the relevant spectrum license.¹⁷

Public consultation is an important process for engaging stakeholders in the decision-making process, and it reinforces the perception of a transparent process (Box 2).¹⁸ It also allows the new license terms and conditions to take into account the concerns of the operators and reflect on the needs of consumers. Ultimately, this process **maximizes the prospects for a successful renewal process.**

¹⁶ When the CCK refuses to renew the license, it has to notify the applicant of the reasons for refusal within 30 days. If aggrieved, the latter can appeal to the Tribunal.

¹⁷ See: auction.aca.gov.au/tenure/tenure_report.pdf.

¹⁸ See "How will Ofcom consult? A guide to our consultation process": http://www.ofcom.org.uk/consult/consult_method/consult_guide.pdf

Box 2: The Importance of Public Consultation in the Licensing Process

Engaging in public consultation is an important good practice for regulators—especially in the licensing process. Consultation with stakeholders reinforces the perception of a transparent process and allows the regulator to learn the views of the proposed initiative directly from consumers, existing operators, and other interested parties. Consultation also promotes the fine-tuning of proposed initiatives (early consultations will allow interested parties to comment on structure of the process), and ensures that the regulator is made aware of issues relevant to the process (including any potential ground for legal challenges). In the case of licensing attribution, for example, consultation will maximize the prospects for a successful bidding/licensing process. For Ofcom (the regulator in the United Kingdom) “...consultation is an essential part of regulatory accountability—the means by which those people and organizations affected by our decisions can judge what we do and why we do it.”

Consultation can be formal and informal. Through informal consultations regulators learn about the concerns of people and organizations; while informal consultations are useful to provide a snapshot of industry and consumer views and to “test the ground” before issuing formal consultation documents, they are not a substitute a formal process. Whenever possible, consultations should be formal, with proceedings and written materials made available to the public (or at least to all applicants). During, for example, a licensing process, regulators can publish a notice stating its proposed approach, and inviting comments on different options considered and any related issues.

Notices of this kind should be sent to all interested parties, including prospective applicants, existing licensees, and consumer and industry interest groups.

Ofcom provides some details on how it expects to implement consultation processes effectively by trying to:

- involve, as much as possible, all the voices that need to be heard, whether they belong to big or small companies, industries, consumer and community groups, or individuals (whenever possible regulators should reach out to all interested parties, with a special concern for those who are less likely to respond);
- explain fully the different options under consideration before making the final decision;
- help those with views to respond fully and in an informed way; and
- listen to the views and provide explanations as to the effect of any action .

It will also try to:

- do this clearly and openly so all are aware of what, when, and why it is happening;
- deliver value for money by ensuring the reasonable cost of the consultation process; and
- avoid taking too much time with the consultations, as markets change quickly.

Source: Adapted from Telecommunication Regulation Handbook, H. Intven, M. Tetrault, infoDev, 2000, available at http://www.infodev.org/files/1081_file_module2.pdf; Trends in Telecommunications Reform 2004/2005 – Licensing in an era of convergence, ITU, and “How will Ofcom consult? A guide to our consultation process”, available at : http://www.ofcom.org.uk/consult/consult_method/consult_guide.pdf

3. Dealing with Non-renewal: Procedural Guarantees and Possible Remedies

In many cases refusal to grant renewal can have serious financial implications for operators. It is important that the legislative and regulatory frameworks clearly stipulate the reasons for non-renewal and that justifications for non-renewal should be made publicly available. These guarantees protect investors against arbitrary refusal to renew and provide the grounds for challenging the decision before the appeals body. These procedural guarantees are treated in the WTO reference paper on regulatory principles as minimum guarantees for transparent licensing which should be extended beyond license attribution to license renewal and renegotiation.

Box 3: Licensing Under Reference Paper

The Reference Paper represents the regulatory component of the Basic Telecommunications Agreement. It is a set of common guidelines for a regulatory framework to guarantee effective market access and foreign investment commitments. The Reference Paper deals with six regulatory principles including competitive safeguards, interconnection, universal service, licensing, allocation and use of scarce resource, and creation of independent regulator.

To avoid distortions created by licensing conditions, the Reference Paper introduced a set of guiding principles to be applied by Members. Applicants should know the terms, conditions, criteria and the length of time needed to reach a decision on their application. The paper also insists that the applicant should be informed of the reasons for being denied a license.

“4. Public Availability of Licensing Criteria

Where a license is required, the following will be made publicly available:

(a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license; and

(b) the terms and conditions of individual licenses.

The reasons for the denial of a license will be made known to the applicant upon request.”

The French Code of Post and Telecommunications restricts the possibility of refusal to four specific cases: (a) public order, national defense and national security concerns, (b) good use of spectrum resources, (c) technical or financial incapacity of the licensee to sustain its obligations under the license, and (d) operators that have been sanctioned for specific serious breaches and violations (as explained in article L.42 of the code). Australia’s afore-mentioned “forward review” emphasizes the need to include in the relevant legislation the provisions that require the regulator to explain the reasons for non-renewal.

In many cases, refusal to renew licenses has been grounded on the incumbent's failure to honor license conditions.¹⁹ In Peru in June 2004, the government announced that it would not extend Telefónica Del Peru's fixed-line license beyond 2019, its expiry date, despite its request for a five-year extension. The decision (contested by some) followed the release of a report by Osiptel, the regulator, in which it was revealed that Telefónica del Peru had breached tariff, interconnection, and general competition rules between 1999 and 2003.²⁰ In Hong Kong the regulator OFTA has proposed to close Hutchinson's CDMA and CSL's TTDMA networks next year, because they have failed to attract enough subscribers. Striking the right balance between regulatory certainty, preservation of investor confidence, and consumer interests is not an easy task (Box 4).

Box 4: Striking the Right Balance: A Difficult Task

In Hong Kong OFTA is proposing to renew the current 2G GSM mobile licenses but close Hutchinson's CDMA and CSL's TTDMA networks next year, because they have failed to attract enough subscribers. The reclaimed CDMA spectrum would then be auctioned for a new network using the 3G version of CDMA, currently deployed in Japan and Korea. Hutchinson believes OFTA has not considered whether it has given investors a fair chance to break-even on their investment

Some believe that OFTA spectrum management is unpredictable,. "all investors who have made or are thinking of making an investment in Hong Kong must now be asking themselves: 'what if OFTA pulls the plug on me too?'" In comparable telecommunications regulatory regimes, the regulator's right to withdraw spectrum is subject to checks and balances. Ofta has acknowledged the need for regulatory stability by granting the current GSM licensees a "right of refusal," but it failed to apply the same principle to the CDMA and TDMA spectrum.

(Sources:

<http://www.wirelessweek.com/article/NEa0509268.0iw?verticalID=223&vertical=Technology> http://www.thestandard.com.hk/news_detail_frame.cfm?articleid=46188&intcatid=1)

For purposes of regulatory certainty, and in order to give the operators another chance to protect their investment, there should be a guarantee to the right to challenge the refusal through an appeal in a court of law or other appeal

¹⁹ See, Bahrain Telecommunications Law (Decree No. 48, October 2002)

The authority may refuse to renew an individual license if discovers that the licensee is, or has been, in material breach of the conditions of the license, whether or not the authority took action to obligate the licensee to comply with the provisions of section 35 of this law, Saudi Arabia Telecommunications Act Art. 20. The Board has the right not to renew, amend, suspend or revoke the license according to the rules, procedures and reasons stated in the Bylaws including the following reasons: (a) repeated violation of a basic licensing condition; (b) failure to pay licensing or other fees required by the Commission; (c) repeated failure to comply with duly issued decisions of the Commission....

²⁰ See <http://www.osiptel.gob.pe/Index.ASP?T=P&P=2748>, in Spanish

mechanisms. In Kenya, for example, if the CCK refuses to renew a license, within 30 days it must notify the applicant of the reasons for refusal, and if aggrieved, the latter can appeal to the court.

Refusal to renew raises the difficult question of whether the license holders should be entitled to compensation, and if so, how to calculate such compensation. Similar issues arise in the context of license revocation and license modification, for instance, if a given spectrum band is to be vacated and operators are mandated to relocate to another band.

In the French code, for example, because spectrum is part of the public domain, the authority has total discretion to refuse a renewal, and spectrum-related refusals do not allow for the right to compensation. This issue has been discussed in Australia, where the RCC Working Group recommended licensees to be eligible for compensation only if they were required to relocate with less than three-years notice and had paid a premium for their licenses. Similarly, in the case of Morocco, the *cahier de charge* for the second mobile operator, Medi telecom, clearly stipulates that refusal to renew does not entitle the license holder to compensation. This disposition applies only to the case where refusal is due to a serious violation of the license conditions. It is unclear, however, if compensation is required if refusal is due to other causes.

As an alternative to explicit financial compensation—for example in cases where a spectrum band is to be vacated—other options may be applied, such as giving operators a minimum notice period for clearance. This would give operators enough time to adopt new strategies and to provide appropriate exit strategies. In the United Kingdom the regulator gave a seven-year notice of its intention to close the AMPS (1G) mobile networks, in order to give enough time to the incumbent to plan its future after expiry.

Whether operators are allowed to *voluntarily exit* the market is a different matter and relates mostly to license (early) termination. In general, the rationale for not allowing exit is unclear. Resources should be allocated to those who value it the most, and not allowing exit may result, for example, in spectrum lying fallow, and remaining inaccessible to those who could use it more efficiently.

This is particularly relevant in the case of 3G licenses, where operators in some countries have been faced with difficulties in the rollout and take-up of services, partly due to delays in the availability of equipment. The question of whether operators are allowed to give back their licenses and be exempt from license obligations—along with the potential associated penalties for doing so—has been addressed differently in different countries in Europe. The general trend is to allow operators to give back their licenses but penalties vary.²¹

²¹ In Denmark, for example, licenses can be given back to authorities for a fee of 22.5 percent of the license price. In Spain, licenses may be given back but would lose the bank guarantees and the auction fees. In the United Kingdom, licenses may be surrendered—although licenses do contain provision for refund of license fees, this is unlikely to happen if license is being voluntarily surrendered by operator. In Portugal and Sweden licenses may be returned to the

When a license is not renewed (either on the regulator's or operator's initiative) and operators exit the market, there are issues to consider and **it is important to ensure that appropriate exit strategies are pursued**. Defining transitional arrangements for consumers is key to successful license renewal. Other issues are tied to the reallocation of licenses or potential vacated resources—such as spectrum. As an example, in Hong Kong, if a licensee declines to accept the right of first refusal, the vacated frequency allocation is reserved for future use, and licensees will need to provide reasonable "exit arrangements" to all their subscribers.

4. License Renewal and Change in License Conditions

The presumption of renewal and the codification of the renewal procedures do guarantee a degree of certainty for the operators, but do not guarantee that the conditions of renewal will follow those of the original license.²² These guarantees can be regarded as a legitimate expectation for renewal, subject to the prescribed degree of discretion from the authority entrusted with the renewal. In this respect, it is important that the legal and regulatory regime has general guidelines to follow when there are circumstances where the regulator (or other authority) is entitled to vary the terms and conditions of a renewed license. **The major challenge, in this context, is how to achieve a balance between the need for certainty for the operators and investors, and the importance of preserving regulatory flexibility to ensure that the license conditions could be updated to reflect technological and market developments, as well as to respond to consumer needs, and changes in spectrum policies.**

4.1 License Renewal and Review of License Fees

The first condition likely to undergo changes during the license renewal is the license fee. The term "license fee" covers two types of payments: (a) the up front fees paid by the new entrant in form of a lump sum payment, and (b) recurrent annual payments that operators are required to pay to cover regulatory expenses associated with the provision of their services, and in some cases spectrum annual fees. In the case of mobile licenses involving the use of scarce resources, different approaches have been used to determine the up front fee²³ and the annual spectrum fees. It is increasingly recognized by policy

authorities at no cost involved; and in the Netherlands the situation is not considered in the legislation. Available at:

http://europa.eu.int/information_society/topics/telecoms/radiospec/doc/pdf/mobiles/mckinsey_study/annex_final_report.pdf

²² In some cases the license stipulates that renewal is eventually associated with modification of license condition (See article 5.4 of cahier des charges of Medi telecom)

²³ In general, different approaches can be used for setting those fees: (a) administrative pricing mechanism based on the economic value of the spectrum to encourage its efficient use; (b) market based mechanisms (auctions and beauty contest), and (c) cost recovery approaches.

makers and regulators that whatever method used, the up front payment needs to reflect the economic value of the spectrum and to ensure its efficient use.

License fees and their calculation apply to license attribution but at the time of renewal a myriad of complex issues is likely to arise, such as: the level of the renewal fee, the implications of changes in the method of calculation, and the level of new recurring fees.

A major concern when renewing a license in determining the renewal fee and the new recurring fees is that the fees do not result in negative impacts on sector development. **High license fees (whether at license attribution or license renewal) might impact the financial stability of the operators and reduce the possibility of further investment.** Indeed, license renewal fees can be strategically important to investors. In Nepal, as an incentive for operators to enter the rural market, the government provides guarantees that the license renewal fees will not exceed 4 percent of the operator's annual gross revenues.

In addition, high license fees would result in a substantial tax on consumers to the extent that the fees are passed on to them. Higher than reasonable licensing fees levied on operators may, in practice, translate into rent-extracting behavior, or constitute a barrier to competition. In 1999 Nigerian NCC has raised the license fee for private GSM to \$100 million dollars—a level that many applicants would be unable to risk.²⁴ It also restricted the number of licenses, their areas of service, and it banned private operators from providing international services.

In this context, **it is important to establish models for licensing and spectrum pricing, and to ensure openness and transparency of the methods applied.** Wherever possible, regulators should publish guidelines for pricing, detailing for example cost methodology, unit price, spectrum licensing policy, and classification of the country into various licensing tiers.

Determining the new license fees in the process of license renewal is likely to trigger tension between the licensing authority and the license holder. However, license renewal does not necessarily mean an increase in license fees. In Hong Kong for instance, the government has recently declared its intention to adopt a reduction of the license fee to reflect the decrease in the cost of administering mobile stations. This is a direct result of the development of competition, the growth in mobile subscribers, and the use of prepaid SIM cards.²⁵

In France, in the context of GSM license renewal, the issue of determining the license fees involved delicate decision-making. The first figure that was publicized was a 5 percent progressive levy on annual turnover.²⁶ The fee was considered too high with

²⁴ http://library.lp.findlaw.com/articles/file/00343/005267/title/Subject/topic/Government_Franchises/filename/government_2_3632

²⁵ http://www.ofta.gov.hk/frameset/home_index_eng.html

²⁶ Published in local newspapers (Le Figaro et les Echos)

potential negative impact on the operators' ability to improve service and coverage. The figure was then abandoned in favor of a fee that consists of two components: a fixed annual fee of EUR 25 million and a 1 percent annual levy on GSM service revenues of license holders; this new figure was welcomed by operators as being less onerous than the initial proposal. Commentators particularly appreciated that the additional 1 percent levy is the same as the fees for the use of spectrum for 3G networks which both operator are expected to launch in the coming months.²⁷

The methods for calculating licensee fees are often complex. Recently in India there was a dispute about the modification of the license fee. The case was presented before the Telecom Appeal body of India (Box 5).

²⁷ As mentioned by ART in March 2004, this approach favors technological neutrality between 2G and 3G technologies and is investment-friendly because it is set at a level allowing license holders to improve their networks and services to the benefit of consumers.

Box 5: Dispute On License Fee Calculation Method in India

In 1995, India issued a notice inviting tender for introducing mobile service in specified telecom territorial circles. Several companies submitted their bids and some companies were awarded licenses for their circles. All licenses were initially granted a period of 10 years commencing from an effective date and with annual license fee payable by the licensees. The first-year fee was to be paid in a lump sum and subsequent year payments to be paid by quarterly installments in advance. Later, the cellular players who obtained the licenses from the governments ran into difficulties and realized that they had made unrealistic bids. Negotiations took place with the government to salvage the situation and ultimately the government evolved a migration package under which petitioners were enabled to migrate from the annual license regime to a revenue sharing regime.

Under the new package the licensees were required to pay a one-time entry fee and a license fee as a percentage of the gross revenue under the license. The chargeable entry fee would be the license fee dues payable by existing licenses up to July 1999, calculated up to the current date, duly adjusted, consequent upon notional extension of effective date: among other conditions, and for the purpose of calculation of outstanding license fee up to July 1999, the effective date of all the licenses were to be notionally extended by six months.

A dispute arose because the cellular licensees defended that the consequence of notional extension of the “effective date of all the licenses” was not only to reduce the amount of license fee payable but also to reduce the quantum interest payable on outstanding license fees. Meanwhile the government defended that by notionally extending the effective date its intention was to reduce the quantum of license fee, but that the interest payable as of July 1999 had remained intact—i.e., there was no diminution of the amount of outstanding interest

This case is a good example of the complexity license condition negotiations, and the importance of appropriately defining all terms and conditions. The case went to the telecom disputes settlement and appellate tribunal.

(Source : <http://tdsat.nic.in/Petition%20No.10%20of%202001.htm>).

An important challenge that faces developing countries in the mobile license renewal exercise is how to allow financial flexibility for license holders to honor the other conditions inscribed in their licenses, to introduce innovative services, and to foster competition.

4.2 License Renewal and Review of Obligations of License Holders

Network obligations—in terms of investment commitments by license holders—are often imposed in the license. The network obligations are closely linked to the overall policy of the sector, in general, and to universal service goals in particular. In many cases, the license contains penalty clauses for non-fulfillment of the obligations.

In the license renewal process, the conditions and obligations of license holders are likely to undergo a significant change to reflect the changes in telecommunications policy and the moving target of universal service. Any changes in conditions would

entail investment commitments from the operators. In many cases the governments prefer to accept a trade-off, with lower license fees in exchange for wider commitments in terms of coverage, and rollout obligations from the wireless operators.

For example, with the renewal of the French GSM license, a series of performance requirements have been included in the renewal package in order to improve the service to the GSM users. Examples of these requirements include an obligation to extend territorial coverage obligations to “white zones,”²⁸ to increase access to mobile communications to those with special needs; and to extend the minimum service to introduce new and advanced services, and a commitment to reduce charges for short text messages. In this case, no major objections to the new conditions have been reported. In Hong Kong, the obligation to provide coverage to specified locations proposed in the consultation paper has triggered mounting criticism from mobile operators, who point to technical concerns and financial burdens stemming from the proposal. In the case of license renewal, the new mandatory service obligations need to be tested for efficacy. It is generally agreed that **ineffective mandatory service obligations can have anticompetitive impacts if the burden is not kept at a manageable level for the license holders.**

The same concerns for regulatory certainty apply to changing license conditions and obligations. In Kenya the CCK controls the universal service provision through the obligations it imposes on licensees. As noted earlier, CCK is entitled to attach to the telecommunications license (and to the radio communications license) any condition it considers fit. Thus, for example, the Radio Telecom Operators and mobile operators have received the obligations to provide public pay phone services.

As for the licensing renewal process in general, **when changing license conditions and obligations, regulators and policymakers should ensure a transparent and participatory process, establish specific criteria as to what is or is not allowed, and establish procedures for appeal** (Box 6).

28 White zones are areas without GSM coverage.

Box 6: Need some guarantees in the process of changing/ amending license conditions

According to the Communications Act, the CCK can, "...from time to time modify any conditions attached to the license." Before making any modification, the CCK shall publish a notice in the Gazette, specifying the purposes and reasons for the modifications and inviting the licensee or any interested party to present written objections within sixty days.

The applicant can appeal to the Tribunal within 15 days from the date of the publishing of the notice in the Gazette. The Tribunal has to cause the decision concerning any appeal received in this way also within a 15-day period. Nevertheless, the CCK can enforce the license modifications and simply inform the operator in writing about the new set of conditions, if it intends to "remedy or prevent matters which operate (...) against the public interest."

(Source <http://mkaccdb.eu.int/study/studies/22.doc>)

5. Spectrum Implications in the Licensing Renewal Process

In addition to the issues highlighted in this paper, and that surface from the renewal of telecommunications operator licenses, the renewal of mobile licenses presents additional challenges because they involve scarce and finite resources. Therefore licensing regimes and renewals need to take into account these challenges, and manage the distribution of resources in a manner that minimizes waste and promotes practices for the efficient use of resources.

5.1 Renewal and Possible Reattribution

Since spectrum is a finite resource, the number of licenses—and therefore of entrants—is limited. At the time of license expiration, should new entrants be allowed to re-compete for resources? Or should incumbents be allowed to claim the right to preserve their frequencies? In Morocco, for instance, the license of Medi Telecom clearly stipulates that renewal of mobile license will not be subject to competitive tendering. What impact will this have on competition? How to negotiate exit strategies and/or compensation for operators when these are required to exit the market? Many regulators in African countries found these questions to be controversial, and they were forced to change the rules of the game and modify spectrum allocation and spectrum fees to accommodate new entrants and to reflect the economic value of the spectrum even before the term of the license. Similar problems in the context of license renewal are to be expected, and a clear approach to these issues could become a determining factor for picky investors taking entry decisions.

A balance is needed between protecting ongoing investment, and optimal exploitation of the spectrum resources. In general, regulators tend to favor

existing operators. However in Australia, ACA (the regulator) has consistently advised prospective spectrum licensees to adopt a cautious view and assume that the spectrum licenses would be reallocated by a further auction process upon expiry.²⁹

The situation where different operators have entered the market in different ways—e.g., government attribution to incumbent, and competitive processes such as beauty contest or auctions—constitute a particular issue, and regulators have taken steps to level the playing field at license renewal. In Pakistan (in April 2004), Norway's Telenor and Space Telecom won two GSM licenses. The company's winning bids of \$291 secures a 15-year license, renewable on application. At the same time, however, existing operators will also have to pay the same license fee on renewal of their licenses: both Paktel and Orascom (existing operators) agreed to pay \$291 million for license renewal for 15 years. As part of the deal, Paktel obtained the authorization to migrate from AMPS to GSM.³⁰ This issue of change of service is particularly relevant in the context of countries that have started the migration from service specific licensing to technology neutral licenses.

5.2. Refarming: Moving from 2G to 3G Mobile Services

In the coming years the expected wave of mobile license renewal comes against the backdrop of important developments in the mobile sector. The introduction of third-generation wireless technologies which allow wireless carriers to provide data capabilities and IP interfaces, makes it necessary to clarify the management of spectrum used for 2G services, and the methods to be used to migrate current second generation services to third generation services for current 2G license holders. The reason for this is that both generations will coexist until a significant number of mobile customers consider migrating to the new generation of services, and until the current license holders (interested in offering next generation mobile) develop strategies to evolve their networks to 3G. **In crafting the rules for transition, a leading principle is to ensure continuity of the service for the consumers.**

Among the issues likely to arise in the renewal process is whether the license holders will be allowed to reuse their second generation spectrum and refarm it to support next generation services. Another option, if 2G is to be discontinued, is to have operators return their spectrum at expiry period of redistribution. Licenses may then be given to the same, or to other operators. The transition from 2G to 3G is likely to be gradual, and 2G will (possibly) still be used in parallel for lower bandwidth services such as voice.

²⁹ In Australia, as no spectrum licenses have yet expired, provisions for the re-allocation of spectrum licenses and for spectrum licenses to be re-issued to the same licensees, without any further price-based process, have yet to be tested or applied in practice. Available at: http://auction.aca.gov.au/tenure/tenure_report.pdf

³⁰ See: <http://pakobserver.net/200410/24/news/business01.asp>, http://pakobserver.net/200410/24/news/business_01.asp. More on technology migration below

Automatic refarming ensures stable and continuous provision of existing services and minimizes disturbance to the network operators and the mobile users. In Mauritius, the regulator has decided to allow 2G operators to also operate 3G services (Box 7). In many countries, however, the issue of transitional arrangements to accommodate current 2G license holders raised concerns among industry players. They argued that such a treatment gives mobile incumbents unfair competitive advantage over new entrants, as they are guaranteed to offer a range of 3-G compatible services, even if they do not apply for a license.

This issue was debated in Hong Kong, and OFTA issued a consultation on license renewal to be concluded in June 2004. It was decided that 2G spectrum could be used for 2G and 3G services³¹. In France, allowing for a smooth transition period was also a key item in the public consultation initiated for the renewal of the GSM license. The key concern was that transition to 3G services needed to be progressive to ensure continuous territorial coverage by mobile networks. The ART recognized that a major concern in the transition period is the question of reutilization of the spectrum assigned for GSM. As for the case of license renewal without change of service, the question becomes sensitive when the process for allocating spectrum for 3G services and the fees for license are different from those of the 2G services—which raises significant issues with windfall gains.

In cases where 2G operators (who are not also 3G operators) are allowed to use their spectrum for 3G spectrum one possibility to avoid windfall gains is to require these operators to pay a reconversion or license upgrade fee. In the above mentioned example of Pakistan where Paktel was authorized to migrate from AMPS to GSM, the regulator PTA had requested \$38.8 million for license modification, but the company had opposed the request. Also in Hong Kong, when, in November 2004 OFTA announced it would renew the GSM and PCS licenses, it required the licensees to pay a spectrum utilization fee consistent with that for the 3G licensees³²

³¹ See http://www.ofta.gov.hk/en/speech-presentation/ofta_20040615.pdf

³² See http://www.ofta.gov.hk/en/press_rel/2004/Nov_2004_r2.html

Box 7: the Case of Mauritius—Allowing 2G Operators to Migrate to 3G

The government has issued a consultation in July 2004 on the introduction/licensing of 3G services in Mauritius. In its consultation paper the regulator has proposed to undertake a spectrum re-farming exercise in order to make spectrum available for IMT-2000 (3G). The paper notes that the licensing structure defined in the ICT regulations 2003 is technologically neutral and the PLMN license does in no case specify the technology to be used.

It notes that in the case of 3G however, some considerations should be taken into account: (a) the current standard for 2G is for GSM900 and GSM1800, (b) the migration proposed for these 2G standards, (c) the interoperability among the different 3G standards, (d) whether all standards can offer the same types and quality of service, (e) the standards that are being adopted worldwide so that roaming is possible, and (f) the availability of multi-mode handsets.

The consultation paper further identifies the need to— determine whether 3G will be the concern of new entrants as well as incumbents (or incumbents only) and notes that an incumbent will be able to implement 3G in a phased manner by migrating from 2G to 2.5G and finally to 3G and even beyond whereas a new entrant introducing 3G will have to start from scratch. This implies that the capital investment for the new entrant is much more than for the incumbents. One other factor to take into account is that incumbents also have their customer base whereas a new entrant will have to build its own. In that respect, there is the possibility that there is no proper level playing field.

As a consequence of the above, the ICT authority proposes to (a) apply the licensing regime currently in force for 3G; (b) consider 3G systems as being an evolution of current mobile networks, and thus falling under the scope of the existing PLMN license; (c) apply the spectrum fees as currently obtained under the regulations for IMT-2000 spectrum usage

(Source: “Consultation paper on the implementation of 3G Mobile in Mauritius”, accessible at <http://www.icta.mu/newsroom/newsfile/publica/3g-paper.pdf>).

With the trend towards technology neutrality, this problem will potentially become less of an issue. Mobile operators should increasingly have the potential to manage, in a flexible way, the technology used in their assigned frequency bands to allow the best spectrum efficiency, to optimize the network capacity according to traffic needs and implemented services, and to compete in their national markets.

5.3. Spectrum Trading and Its Impact on License Renewal

One issue that is particularly relevant to this note is *spectrum trading*, i.e., the possibility of spectrum holders to trade usage right in a secondary market. The licensing and license renewal issue and refarming debates take a new form in the light of the secondary trading debate.

If trading and liberalization are introduced, the main purpose of imposing expiry dates—and therefore the concept of license renewal—fades away. Except in cases of

market failure, the secondary market may facilitate efficient reallocation and reassignment of usage rights without the need for regulatory intervention. Indeed, the presence of an expiry date may distort the market, as it creates investment uncertainty that may unduly reduce the value of usage rights towards the end of their duration. Indeterminate or vague durations are particularly inappropriate with spectrum trading, because the risk of the usage rights being terminated (or not renewed) can severely depress the value of the tradable right throughout its lifetime. That said, putting in place safeguards or guarantees to avoid the risk of strategic behavior to obtain monopoly rents may be appropriate, particularly when creating a spectrum market in environments of weak governance.

Box 8: Spectrum Trading in Guatemala

Critics of spectrum trading have observed that it has been adopted in countries with no land borders (Australia, New Zealand) or by countries (the United States) that are so economically powerful as to be able to disregard land borders. Guatemala is an interesting case because it fits neither category. It is economically small and has land borders and still operates successfully—possibly the most liberal system of radio spectrum management in the world.

Spectrum management in Guatemala is built around the assignment of property rights for specific spectrum. The rights are for 15 years and are renewable. In addition they are fully transferable and may be disaggregated. They also are based on six variables: frequency, location, hours of operation, maximum power transmitted, maximum emitted at the border of adjacent frequencies, and duration of right.

Two interference limits apply. A "maximum effective radiation power" and a "maximum potency admissible in the coverage area." The radio regulator can investigate ex-post cases of alleged interference, and can impose fines in cases of repeated abuse. The harmed user can also pursue damages.

In parallel with orientations towards "presumption of renewal" or "renewal expectancy" clauses in more traditional licensing regimes, in trading regimes the trend is to extend usage rights over time. Options go as far as granting usage rights in perpetuity. New Zealand is currently considering this option. It previously adopted a system of 20-year tradable rights.³³ With the earliest rights now approaching expiry, the Ministry of Economic Development has launched a consultation exercise on arrangements for

³³ In New Zealand, the government successfully instituted a framework for opening up the 2.0GHz band to commercial mobile, even though the band was already partially occupied by fixed-link operators. It instituted a two-stage process to allow the market to determine future usage rights. By primary auction, it sold nationwide 20-year management rights for the whole band. Existing users were given two years' notice and could compete with others in the auction for the right to extend their usage rights by a further three years. Following the auction, some fixed-link users have approached management right holders to extend licenses for the full 20 years, while other owners of management rights have bought out fixed link users, effectively paying for them to relocate. Thus, two very different types of users have been accommodated alongside each other, with the market addressing any interference issues.

renewing licenses. It is widely recognized that lack of clarity in renewal rights in the original framework has undermined the value of rights and depressed investment. However, and **as granting usage rights in perpetuity may limit the flexibility of the government to intervene, an alternative may be to fall short of perpetuity by favoring lengthy duration of rights with a strong prospect of renewal.**³⁴

6. Conclusion

Although not exhaustive, this note has provided an overview of renewal issues and best practices, providing examples of how these issues have been addressed in countries both in their legal/regulatory regimes and in their recent renewal practice.

As mentioned at the beginning of this note, the major challenge when defining the license renewal policy is to strike the right balance between two principles: (a) the need for regulatory certainty, preserving investors' confidence; and (b) the importance of preserving regulatory flexibility, to ensure that licensing can reflect technological and market developments, and to respond to consumer needs and to changes in spectrum policies. By way of conclusion, Table 1 summarizes key issues and best practices.

As technology evolves and convergence and technologically neutral approaches gain importance, it is important to closely monitor developments and be prepared to adapt and to evolve the regulatory frameworks that govern licensing procedures—and licensing renewal in particular. Issues of renewal as catalogued in this paper are likely to become less relevant in context of general authorizations and class licensing, but still relevant concerning individual rights to use radio frequencies and numbers.

³⁴ In May 2004 a Report to the European Commission on secondary trading: (a) recommended that member states adopt orderly and transparent approaches towards renewal of usage rights; (b) suggested that best practice is likely to involve the award of usage rights that have an expectation of continuation (e.g., perpetual rights, expectation of automatic renewal or expiry or rolling notice periods), (c) advised Member States to retain powers to reclaim usage rights when necessary (e.g., in response to an EU decision to harmonize a band, or in extremes to address undesirable fragmentation), and added that the Commission should use technical implementation measures to set parameters for such powers and the circumstances under which they can be used. See 'Study on conditions and options in introducing secondary trading of radio spectrum in the European Community', http://www.dotecon.com/images/reports/secontrad_final.pdf

| Issue/Situation | Table 1: Best Practice |
|--|---|
| Ensure regulatory certainty and ease investors' concerns | <ul style="list-style-type: none"> • Codify a clear regime of license renewal in the telecommunication legislation, including renewal procedures, reasons for refusal to renew and appeals to regulatory decisions • Provide further details in the license itself where the legislative framework is not comprehensive • Adopt some varying degree of the principle of renewal expectancy • Strike the right balance between certainty in the renewal process and regulatory flexibility, and engage in forward thinking and planning • Subject regulatory discretion to clear parameters of license renewal with appropriate checks and balances |
| Procedures for license renewal | <ul style="list-style-type: none"> • Initiate renewal process well in advance of expiry • Perform periodic forward review of market and needs • Disclose and publish reasons for non renewal • Adopt public consultation process • Guarantee a right to appeal |
| In the event of non-renewal | <ul style="list-style-type: none"> • Provide a minimum notice period • Delay vacancy of spectrum to give enough time for operators to adapt strategies • Ensure exit strategies for operators • Ensure continuity of service to consumers |
| License renewal fees | <ul style="list-style-type: none"> • Beware that heavy license fee burdens reduce possibilities of making further investment • Establish models for licensing and spectrum pricing, ensure openness, transparency and the right to appeal from the methods applied |
| Change in license conditions and obligations | <ul style="list-style-type: none"> • Renewal process is a good occasion to review license conditions (e.g. those related to the moving target of universal service.) • Ineffective mandatory service obligations can have anti-competitive impacts if the burden is not kept at a manageable level for the license holders |
| Spectrum implications of license renewal | <ul style="list-style-type: none"> • Strike a balance between protecting ongoing investment and optimal exploitation of the spectrum resources • Leveling the playing field at license renewal between operators entering the market under different regimes (e.g., auction vs. beauty contest) to avoid windfall gains |
| Migration to technology neutral licensing | <ul style="list-style-type: none"> • Continuity of the service for the consumers as a leading principle for transition • Leveling the playing field at license renewal between operators entering the market having followed different technology migrating paths to avoid windfall gains |