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# Considerations regarding the potential refarming process for the 3.5 GHz band in Chile

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## Introduction

After nearly three years in the making, Chile is finally in the implementation phase of rolling out 5G technology, the first stage of which is expected to be complete by the end of 2022.

The 5G rollout process began with the assignment and award of mobile telephony/data transmission telecommunications (telecom) concessions for 700 MHz, AWS, 3.5 GHz and 26 GHz frequency bands. This was conducted through a series of public bids, contests and tie-breaking auction procedures, which generated \$450m in earnings for the state.

In recent months particular attention has been paid to the 3.5 GHz range, specifically the link between the telecom concessions granted in the early 2000s to provide public fixed wireless telephone services and a late 2019 ruling by the Chilean Antitrust Court, further reviewed by the Chilean Supreme Court. Along with several other measures, the ruling provided standards and rules for the effective and efficient use of the radioelectric spectrum.

Within this context, in December 2021, the Ministry of Transportation and Telecommunications (SUBTEL) called for a public consultation process (which concluded in January 2022) to garner the market and public's opinion on a potential refarming of frequency bands in the 3.4-3.6 GHz range. According to its consultation document, refarming would generate a series of advantages for the use of the radioelectric spectrum from both an effectiveness and efficiency standpoint.

This article argues that the potential refarming should only be carried out following an in-depth analysis by SUBTEL, as it might involve a series of exceptional measures that could affect the telecom market structure and the rights and obligations of telecom concessionaires, which must comply with the legal and regulatory framework at all times.

## Fundamentals of the radioelectric spectrum management and the status of the 3.5 GHz band

In order to understand the significance of a potential spectrum refarming in Chile, it is important to consider the stipulation set out in the General Telecommunications Law (GTL). According to the GTL, everyone has a right to free and equal access to telecom services. Any individual may apply for a concession and or permit to supply telecom services in the form and conditions established by the law. The GTL also outlines that the radioelectric spectrum is a national asset and that its use shall be granted by means of free and equal access through what are essentially temporary concessions, permits or licences granted by the Chilean state.

Moreover, the GTL provides that SUBTEL is obliged to call for a public bid in order to grant concessions or permits for the provision of telecom services. This is in case there is a technical rule issued by SUBTEL and published in the Official Gazette that only grants a limited number of concessions or permits.

The 3.5 GHz band is currently regulated by two main technical rules on: (i) 5G (or superior) wireless services within the 3.3–3.4 GHz and 3.6–3.65 GHz bands; and (ii) public fixed wireless telephone services within the 3.4–3.6 GHz band, both of which require a public bid process in order to grant concessions to provide such services.

## Reasons for the refarming and considerations regarding its potential implementation

During the 5G public bids, when tie-breaking auctions took place over 2020 and 2021, SUBTEL meant to assign and award all the available 5G (or superior) wireless service concessions in the 3.3–3.4 and 3.6–3.65 GHz bands. SUBTEL did not consider the 3.4–3.6 GHz range because at that time such bands were the subject of several judicial and regulatory procedures and analyses by the courts and the regulator.

Concessions for the provision of fixed wireless telephone services in such bands, granted in the early 2000s,

were still valid and in force at this time. In addition, some incumbent telecom providers were performing the divestment of frequency blocks in this band in order to comply with the aforementioned Supreme Court ruling. This procedure ended with free frequency blocks being subject to public bid for 5G services, but unfortunately such blocks were too limited from a technical standpoint to provide these services.

Finally, existing 3.4–3.6 GHz band concessionaires deduced that their technical framework was obsolete and therefore requested SUBTEL to review the technical rule looking to provide technical updates and improvements to the same.

Based on these matters and considering its legal mandate to efficiently and effectively manage the radioelectric spectrum, SUBTEL called for a public consultation on the refarming this GHz band.

Through its consultation document, SUBTEL explained that several countries around the world were carrying out refarming or reordering processes to make available the GHz bands and spectrum necessary for the full deployment of 5G technology. It also identified three different processes for carrying out a spectrum refarming process:

1. the establishment of technical mechanisms for the transition from the old to the new distribution processes;
2. the transfer of a service from one band to another; or
3. the regrouping of operators' concessions within the same band ('continuity' of the spectrum assigned or awarded to such operators).

SUBTEL proposed option (iii), that is, to realign the radioelectric spectrum by granting new blocks to current concessionaires in the same frequency band and with the same amount of spectrum, but in a different order. This would update the technical framework of the existing 3.4–3.6 GHz concessionaires and regroup free blocks, making them available for future public bids to provide 5G services.

Notwithstanding the potential benefits of the 3.4–3.6 GHz band refarming process, the following considerations need to be addressed for its proper implementation in Chile:

## Grounds for the termination of concessions and concessionaires' property rights

Under the Chilean legal regime, the only grounds for termination of a concession are those established in the GTL:

- ☐ expiration of the term of the concession;
- ☐ voluntary resignation of the same;

- ☐ dissolution of the concessionaire (operator);
- ☐ failure to publish the Supreme Decree granting the relevant concession in the Official Gazette within 30 days of notification to the interested party; or
- ☐ revocation of the concession due to specific sanctions imposed according to the GTL.

In addition, once the concession is granted, under Chilean law the concessionaire has ownership of its right to the concession (for the term or duration of the concession), which is guaranteed by Numbers 23 and 24 of Article 19 of the Chilean Constitution.

This article contends that the regulatory authority would need to define whether the refarming should consider the current 3.4–3.6 GHz band concessionaires' participation (eg, seek a refarming agreement among them) or not (eg, move forward with the expropriation of the concessions). In the second case, the enactment of a law authorising the expropriation for reasons of public utility or national interest, as well as payment to the concessionaire for the damage effectively caused (market value compensation), would be necessary.

## Immutable nature of the type of service in telecom concessions

Article 14 of the GTL establishes that the service type and the concession term are both essential elements of the concession and cannot be amended.

The 3.4–3.6 GHz telecom concessions granted in the early 2000s were assigned or awarded for providing public fixed wireless telephone service, such characteristics being an essential element of the concession.

This article contends that it is therefore not legally possible through an administrative act of the regulator to amend the concessions already granted for a specific service in order to provide a completely different one, such as mobile telephony/data transmission over 5G networks.

## The need to carry out new public bid procedures for granting new concessions in the 3.5 GHz band

As aforementioned, the GTL states that a public bid process must be carried out to grant concessions over the spectrum when a technical rule provides for the granting of a limited number of concessions. In addition, the 3.4–3.6 GHz technical rule, notwithstanding its amendment over the last few years, has always provided that the granting of new telecom concessions must be awarded through a public bid process.

In addition, express references to this framework have been provided by the Antitrust Court, specifically in Resolution No 62/2020:

‘the harmonic interpretation of the provision of the GTL cited in paragraph 142 leads to the conclusion that there must be a public bid to grant concessions or permits for mobile services in the referred Band 3.5, without being possible to exempt from this tender the current concessionaires of such band, since there is a

technical rule that only allows the granting of a limited number of concessions or permits in this regard, and the law does not establish any exception as to who must participate in the public bid and, therefore, no distinction can be made in this regard’.

It is also worth mentioning that, according to the GTL and Chilean jurisprudence, the establishment of preferential rights to existing concessionaires in public contests is prohibited.

## Conclusion

This article argues that SUBTEL’s decision to launch a public consultation on a potential refarming in the 3.4–3.6 GHz band is a good sign to the market and the public, to the extent that it aims to improve telecom services by strictly following the state’s legal, regulatory and judicial framework.

However, for refarming to occur, SUBTEL would need to carry out an in-depth analysis regarding how to conciliate current concessionaires’ rights and obligations, the efficient and effective management and use of the spectrum, the competitors’ and potential new entrants’ rights, and the protection of free competition in any future public bids to assign new concessions for the provision of 5G services.

Taking previous local cases related to spectrum distribution and management into consideration, the authors of this article are of the opinion that SUBTEL could resolve the aforementioned issues and avoid potential conflicts with stakeholders by initiating – in addition to the public consultation referred to above – a non-adversarial consultation procedure before the Chilean Antitrust Court, which could set the final terms and conditions under which the refarming should be performed.